Date and Time: Wednesday, October 18, 2023 3:23:00 PM CST

Job Number: 208323006

Documents (100)

1. [Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d 41]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

2. [Goldwasser v. Ameritech Corp., 1998 U.S. Dist. LEXIS 1463]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

3. [David L. Aldridge Co. v. Microsoft Corp., 995 F. Supp. 728]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

4. [Gateway Western Ry. v. Terminal R.R. Ass'n of St. Louis, 1998 U.S. Dist. LEXIS 4614]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

5. [Continental Orthopedic Appliances v. Health Ins. Plan, 994 F. Supp. 133]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

6. *Blanco v. Remington Hotel Corp., 1998 U.S. Dist. LEXIS 5605*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

7. *Classic Communs. v. Rural Tel. Serv. Co., 995 F. Supp. 1185*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

8. *Double D Spotting Serv. v. Supervalu, Inc., 136 F.3d 554*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

9. *Davies v. Genesis Med. Ctr., 994 F. Supp. 1078*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

10. *United States v. Rochester Gas & Elec. Corp., 4 F. Supp. 2d 172*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

11. *All Care Nursing Serv. v. High Tech Staffing Servs., 135 F.3d 740*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

12. *Rads, P.C. v. Mercy Mem'l Hosp., 3 F. Supp. 2d 772*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

13. *Image Tech. Serv. v. Eastman Kodak Co., 136 F.3d 1354*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

14. *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery, 1998 U.S. App. LEXIS 3736*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

15. *CDC Techs., Inc. v. IDEXX Labs., Inc., 7 F. Supp. 2d 119*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

16. [Concord Boat Corp. v. Brunswick Corp., 1998 U.S. Dist. LEXIS 14570]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

17. [International Techs. Consultants v. Pilkington PLC, 137 F.3d 1382]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

18. [Repeat-O-Type Stencil v. Hewlett-Packard Co., 1998 U.S. App. LEXIS 4396]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

19. [Cardtoons L.C. v. Major League Baseball Players Ass'n, 1998 U.S. Dist. LEXIS 22242]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

20. [L'Altrella v. Weight Watchers Internat'l, 1998 Conn. Super. LEXIS 845]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

21. [Smith v. NCAA, 139 F.3d 180]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

22. *Mitel Corp. v. A&A Connections, 1998 U.S. Dist. LEXIS 3576*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

23. *Tampa Bay Storm v. Arena Football League, 1998 U.S. Dist. LEXIS 5211*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

24. *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

25. *LABORERS v. PHILIP MORRIS, INC., 7 F. Supp. 2d 277*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

26. *Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n, 137 F.3d 1293*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

27. *Iams Co. v. L.A. Pet Foods, 1998 U.S. Dist. LEXIS 6584*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

28. *CDC Techs. v. IDEXX Lab., 7 F. Supp. 2d 119*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

29. *LITTLE CAESAR ENTERPRISES v. SMITH, 34 F. Supp. 2d 513*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

30. *Little Caesar Enters., Inc. v. Smith, 34 F. Supp. 2d 459*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

31. *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

32. *Brokerage Concepts v. United States Healthcare, 140 F.3d 494*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

33. *J. Allen Ramey, M.D., Inc. v. Pacific Found. for Med. Care, 999 F. Supp. 1355*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

34. *Kimberlin v. DOJ, 139 F.3d 944*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

35. *Southern Card & Novelty v. Lawson Mardon Label, 138 F.3d 869*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

36. *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

37. [Campos v. Ticketmaster Corp., 140 F.3d 1166]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

38. [Intergraph Corp. v. Intel Corp., 3 F. Supp. 2d 1255]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

39. [Southeast Fla. Laborers Dist. Heath & Welfare Trust Fund v. Philip Morris, 1998 U.S. Dist. LEXIS 5440]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

40. [Law v. NCAA, 5 F. Supp. 2d 921]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

41. [Earles v. State Bd. of Certified Pub. Accountants, 139 F.3d 1033]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

42. [Schimpf v. Gerald, Inc., 2 F. Supp. 2d 1150]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

43. Schlafly v. Caro-Kann Corp., 1998 U.S. App. LEXIS 8250

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

44. Omega Homes v. City of Buffalo, 4 F. Supp. 2d 187

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

45. Khan v. State Oil Co., 143 F.3d 362

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

46. Bennett Elec. Co. v. Village of Miami Shores, 11 F. Supp. 2d 1348

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

47. Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 5 F. Supp. 2d 694

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

48. *Ezekwo v. American Bd. of Internal Med., 18 F. Supp. 2d 271*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

49. *Autry v. Northwest Premium Servs., 144 F.3d 1037*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

50. *Jefferson v. Chevron U.S.A., 713 So. 2d 785*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

51. *Giampolo v. Somerset Hosp. Ctr. for Health, 1998 U.S. Dist. LEXIS 14388*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

52. *Porous Media Corp. v. Pall Corp., 1998 U.S. Dist. LEXIS 23651*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

53. *Serpa Corp. v. McWane, Inc., 14 F. Supp. 2d 147*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

54. *City of Pittsburgh v. West Penn Power Co., 147 F.3d 256*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

55. *United States v. Tucor Int'l, Inc., 35 F. Supp. 2d 1172*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

56. *Western Parcel Express v. UPS of Am., 65 F. Supp. 2d 1052*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

57. *Hickory Specialties, Inc. v. Forest Flavors Int'l, Inc., 12 F. Supp. 2d 760*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

58. [Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

59. [Evans v. State, 963 P.2d 177]

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

60. [North Star Steel Co. v. MidAmerican Energy Holdings Co., 1998 U.S. Dist. LEXIS 22332]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

61. [Rebel Oil Co. v. Atlantic Richfield Co., 146 F.3d 1088]

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

62. [United States v. Microsoft Corp., 147 F.3d 935]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

63. [George Haug Co. v. Rolls Royce Motor Cars, 148 F.3d 136]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

64. Metro Ford Truck Sales v. Ford Motor Co., 145 F.3d 320

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

65. Mellon v. Cessna Aircraft Co., 7 F. Supp. 2d 1183

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

66. Rockholt Furniture, Inc. v. Kincaid Furniture Co., 1998 U.S. Dist. LEXIS 24255

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

67. Marshall v. Planz, 13 F. Supp. 2d 1231

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

68. Seafarers Welfare Plan v. Philip Morris, 27 F. Supp. 2d 623

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

69. [Brookins v. International Motor Contest Ass'n, 1998 U.S. Dist. LEXIS 14225]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

70. [International Test & Balance, Inc. v. Associated Air & Balance Council, 14 F. Supp. 2d 1033]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

71. [Diaz v. Farley, 15 F. Supp. 2d 1138]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

72. [Caribbean Broad. Sys., v. Cable & Wireless PLC, 148 F.3d 1080]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

73. [FTC v. MTK Mktg., 149 F.3d 1036]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

74. Blue Cross & Blue Shield United v. Marshfield Clinic, 152 F.3d 588

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

75. SMS Sys. Maintenance Servs. v. Digital Equip. Corp., 11 F. Supp. 2d 166

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

76. Theme Promotions, Inc. v. News Am. FSI. Inc., 1998 U.S. Dist. LEXIS 23561

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

77. Lloyd Design Corp. v. Mercedes-Benz of N. Am., 66 Cal. App. 4th 716

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

78. National Parcel Servs. v. J.B. Hunt Logistics, 150 F.3d 970

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

79. [Sport Squeeze, Inc. v. Pro-Innovative Concepts, Inc., 1998 U.S. Dist. LEXIS 21559]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

80. [Stewart Glass & Mirror, Inc. v. U.S.A. Glas, Inc., 17 F. Supp. 2d 649]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

81. [Telecomm Tech. Servs. v. Siemens Rolm Communications., 66 F. Supp. 2d 1306]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

82. [Concord Boat Corp. v. Brunswick Corp., 21 F. Supp. 2d 923]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

83. [Automated Salvage Transp. v. Wheelabrator Envtl. Sys., 155 F.3d 59]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

84. [Eleven Line v. North Tex. State Soccer Ass'n, 1998 U.S. Dist. LEXIS 13868]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

85. *Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp. 2d 275*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

86. *PepsiCo, Inc. v. Coca-Cola Co., 1998 U.S. Dist. LEXIS 13440*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

87. *Supermarket of Marlinton v. Valley Rich Dairy, 1998 U.S. App. LEXIS 21110*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

88. *Surgical Care Ctr. v. Hospital Serv. Dist. No. 1, 153 F.3d 220*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

89. *Johnstone ex rel. National Income Realty Trust v. First Bank N.A., 1998 U.S. Dist. LEXIS 13763*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

90. *Metzler v. Bear Auto. Serv. Equip. Co., SPX, 19 F. Supp. 2d 1345*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

91. *Morrison v. Viacom, Inc., 66 Cal. App. 4th 534*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

92. *St. Louis Convention & Visitors Comm'n v. Nfl, 154 F.3d 851*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

93. *Addamax Corp. v. Open Software Found., 152 F.3d 48*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

94. *Concord Boat Corp. v. Brunswick Corp., 1998 U.S. Dist. LEXIS 14569*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

95. [Utah Foam Prods. Co. v. Upjohn Co., 154 F.3d 1212]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

96. [Alba v. Marietta Mem'l Hosp., 184 F.R.D. 280]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

97. [Rossi v. Standard Roofing, 156 F.3d 452]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

98. [American Int'l Sec. Specialists v. Roberts, 1998 U.S. App. LEXIS 22128]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

99. [Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc., 23 F. Supp. 2d 771]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

100. *VIM, Inc. v. Somerset Hotel Ass'n, 19 F. Supp. 2d 422*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Oct 01, 1991 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

Canterbury Liquors & Pantry v. Sullivan

United States District Court for the District of Massachusetts

February 3, 1998, Decided

C.A. No. 94-11701-MLW

Reporter

16 F. Supp. 2d 41 *; 1998 U.S. Dist. LEXIS 1155 **; 1998-1 Trade Cas. (CCH) P72,055

CANTERBURY LIQUORS & PANTRY, Plaintiff, and WHITEHALL CO., LTD., Plaintiff/Intervenor, v. WALTER J. SULLIVAN, JR., et al., Defendants, and MASSACHUSETTS WHOLESALERS OF MALT BEVERAGES, INC., Defendant/Intervenor.

Disposition: **[**1]** Plaintiffs' motions for summary judgment granted. Defendants' motions for summary judgment denied.

Core Terms

prices, per se violation, wholesale, regulatory scheme, immunity, Sherman Act, regulations, liquor, supervision, hybrid, alcoholic beverage, anti trust law, private party, state action, announced, retail, summary judgment, price fixing, anticompetitive, injunctive, adhere, enforces, cases, summary judgment motion, declaratory judgment, rule of reason, cross-motions, authorizes, parties

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Per Se Rule & Rule of Reason, Per Se Violations**

Some conduct constitutes a per se violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. All other conduct is subject to a rule of reason test.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

Civil Procedure > Judicial Officers > Magistrates > Trial by Consent

HN2[] **Standards of Review, De Novo Review**

As a matter of law, the court is required to decide de novo the portions of a magistrate's report placed in dispute by objections. *28 U.S.C.S. § 636(b)(1)(C)*, *Fed. R. Civ. P. 72(b)*; Local Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN3[] **Summary Judgment, Evidentiary Considerations**

On motions for summary judgment, the court is, with regard to each motion, required to look at the record in the light most favorable to the opposing party, and to decide if any material fact is genuinely placed in dispute by the admissible evidence. *Fed. R. Civ. P. 56(c)*.

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Licenses

Governments > State & Territorial Governments > Licenses

Trademark Law > Special Marks > Trade Names > General Overview

Trademark Law > Conveyances > General Overview

HN4[] **Conveyances, Licenses**

Mass. Gen. Laws ch. 138, § 25A, provides in pertinent part that: No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall-- (a) Discriminate, directly or indirectly, in price, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality. All price lists or price quotations made to a licensee by a wholesaler shall remain in effect for at least thirty days after the establishment of such price list or quotation. Any sale by a wholesaler of any alcoholic beverages at prices lower than the price reflected in such price list or quotation within such thirty day period shall constitute price discrimination under this section.

Governments > State & Territorial Governments > Licenses

HN5[] **State & Territorial Governments, Licenses**

The related, relevant regulations require each wholesaler by the fifth day of each month to post the prices that it will charge during the next following month for each item that the wholesaler sells. Mass. Regs. Code tit. 204, § 6.03(3). The regulations permit the wholesaler by the fifteenth day of the month to amend its posted prices, but only to meet a specific lower price or a specific greater discount for an individual item filed by a competitor. Mass. Regs. Code tit. 204, § 6.05(1). In other words, a wholesaler may not increase its previously posted price or decrease its price to any price other than the exact lower price for the same product that was posted by a rival wholesaler. The prices, as amended, become effective on the first day of the following month and they must remain unchanged throughout that calendar month. Mass. Regs. Code tit. 204, § 6.03(3).

Constitutional Law > Supremacy Clause > Federal Preemption

Constitutional Law > Supremacy Clause > General Overview

Constitutional Law > Supremacy Clause > Supreme Law of the Land

HN6[] **Supremacy Clause, Federal Preemption**

In the federal system of government established by our constitution, the laws of the United States are the supreme Law of the Land, U.S. Const. art. VI, and thus preempt and invalidate inconsistent state laws in certain circumstances.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Per Se Rule & Rule of Reason, Per Se Violations**

A state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1* when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Per Se Rule & Rule of Reason, Per Se Violations**

With regard to a possible per se violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, the court must in this case first decide if the restraint on trade at issue is a "unilateral restraint" or a "hybrid restraint." Second, if it is a "hybrid restraint," the court must decide if it involves a per se violation of *§ 1*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN9[] **Exemptions & Immunities, Parker State Action Doctrine**

With regard to possible antitrust immunity as state action, the court must decide, first, whether there is a clearly articulated and affirmatively expressed state policy that the restraint at issue is intended to serve. If so, second, the court must decide whether that policy is actively supervised by the state itself.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Antitrust & Trade Law, Sherman Act

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1 of the Sherman Act, 15 U.S.C.S. § 1. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. Where private actors are thus granted a degree of private regulatory power, the regulatory scheme may be attacked under § 1.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Per Se Rule & Rule of Reason, Per Se Violations

A "hybrid restraint" does not necessarily involve any violation of § 1 of the Sherman Act, 15 U.S.C.S. § 1, let alone a per se violation. It depends upon the particular facts of the case.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN12[] Antitrust & Trade Law, Sherman Act

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. These agreements or practices are deemed unlawful per se without further examination under the rule of reason generally applied in Sherman Act cases.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Per Se Rule & Rule of Reason, Per Se Violations

The mere exchange of price data is not a per se violation of § 1 of the Sherman Act, 15 U.S.C.S. § 1.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Per Se Rule & Rule of Reason, Per Se Violations

Where announced prices are coupled with a requirement that those prices be adhered to for a period of time, a per se violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1* exists.

Governments > Courts > Judicial Precedent

HN15[] Courts, Judicial Precedent

Federal appellate courts are bound by the United States Supreme Court's considered dicta almost as firmly as by the United States Supreme Court's outright holdings, particularly when a dictum is of recent vintage and not enfeebled by any subsequent statement. This principle applies equally to federal district courts.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN16[] Scope, Exemptions

Actively supervising, and thus assuring, a per se violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, is not sufficient to create state action immunity. A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN17[] Exemptions & Immunities, Parker State Action Doctrine

A state may establish a regulatory scheme to displace free competition in order to serve some other, clearly stated public policy. If it does so, however, it must provide as part of that regulatory scheme state power to assure that the resulting prices are reasonable because the free market can no longer be relied upon to do so. Ideally in a democracy, if a state has this power and responsibility, competing economic interests should operate to cause the state to assure that the prices established through its regulatory scheme are reasonable.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN18[] **Remedies, Injunctions**

At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.

Counsel: For SEA SHORE CORPORATION, Plaintiff: Alan L. Kovacs, Gerald J. Caruso, Ferriter, Scobbo, Sikora, Caruso & Rodophele, Boston, MA.

For STUART P. KRUSELL, PAMELA M. NOURSE, MASSACHUSETTS ALCOHOLIC BEVERAGES CONTROL COMMISSION, Defendants: Jane L. Willoughby, Attorney General's Office, Boston, MA.

For MASSACHUSETTS WHOLESALERS OF MALT BEVERAGES, Intervenor-Defendant: H. Glenn Alberich, Mahoney, Hawkes & Goldings, Boston, MA. Thomas Fenerty, Eileen M. Fava, Eileen M. Fava, LeBoeuf, Lamb, Greene & MacRae, L.L.P., Boston, MA.

For WHITEHALL CO., LTD., Movant: Robert M. Buchanan, Jr., Robert S. Frank, Jr., Joshua Engel, Choate, Hall & Stewart, Boston, MA.

Judges: Mark L. Wolf, UNITED STATES DISTRICT COURT

Opinion by: Mark L. Wolf

Opinion

[*42] *ORDER*

WOLF, D.J.

February 3, 1998

The following analysis is based upon the transcript of the decision rendered orally on January 27, 1998, granting plaintiffs' motions for summary judgment (Docket Nos. 158 & 166) and denying defendants' motions for summary judgment (Docket Nos. 162 & 169). This memorandum adds citations, revises and amplifies some **[**2]** of the discussion, and deletes certain non-essential matters.

The transcripts of the hearings on January 26 and 27, 1998, are being prepared and may be acquired from the court reporter.

* * * *

The present plaintiffs in this case are Sea Shore Corporation, which does business as Canterbury Liquors and Pantry, a licensed retailer of alcoholic beverages, [1] and an intervenor as plaintiff, Whitehall Company Limited, a licensed wholesaler of alcoholic **[*43]** beverages [2] **[**3]** (collectively, the "plaintiffs"). The defendants are the Chairman and Commissioners of the Massachusetts Alcoholic Beverages and Control Commission ("the Commission"), sued in their official capacities, [3] and a defendant-intervenor, Massachusetts Wholesalers of Malt

[1] The other original plaintiffs were Luke Brothers, Inc.; Cape Cod Package Store, Inc.; Andy's Market, Inc.; and Yankee Spirits, Inc. They voluntarily dismissed their claims in 1995.

[2] In February, 1996, Whitehall was granted leave to intervene as a plaintiff. Whitehall filed a complaint in intervention which mirrored the original plaintiffs' complaint.

Beverages, Inc. ("MWMBI"), a trade association whose members are engaged primarily in the wholesale sale beer [4] (collectively, the "defendants").

The plaintiffs brought this action seeking declaratory and injunctive relief. Count I seeks a declaration that *M.G.L. c. 138, § 25A* which relates to the pricing of wholesale liquor, violates *§ 1* of the Sherman Act both on its face and as applied, and that it is not shielded from invalidation by the immunity doctrine enunciated in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. Count I also seeks an order permanently enjoining the Commission from enforcing the state statute. *See* Verified Complaint at 7-9, PP 25-30.

Count II seeks the same declaratory and injunctive relief with respect to the regulations **[**4]** promulgated by the Commission to implement *§ 25A*. 204 C.M.R. §§ 6.00-6.07. *See* Verified Complaint at 9-11, PP 31-36.

The plaintiffs' fundamental contention is that the Massachusetts regulatory scheme concerning the pricing of wholesale liquor violates *§ 1* of the Sherman Act. *Section 1* states, in pertinent part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is illegal." *15 U.S.C. § 1*.

The Supreme Court has explained that:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress … The policy unequivocally laid down by the Act is competition.

Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958).

The Supreme Court has held that ***HN1***[] some conduct constitutes a *per se* violation of *§ 1*. *Id. at **[**5]** 5*. All other conduct is subject to a rule of reason test. *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*.

With regard to the procedural history of this matter, which began in 1994, the parties engaged in the limited discovery relevant to the alleged *per se* violation of *§ 1*. The parties filed cross-motions for summary judgment on this issue. The parties agreed at the hearing on January 26, 1998, that this issue can be decided on the cross-motions or summary judgment.

More specifically, the defendants assert that there are no material facts in dispute.

The plaintiffs contend that the question of whether the state actually monitors its regulatory scheme is not undisputed, but that this factual question is not material. As I will describe later, I agree that this issue is not material. Thus, the issues relating to the alleged *per se* violation can and should be decided on the cross-motions for summary judgement.

At the inception of this case I referred it to the Magistrate Judge. The Magistrate Judge heard argument on the cross-motions for summary judgment in December, 1996. He issued a Report and Recommendation **[**6]** on June 27, 1997 (the "Report"). He recommended that summary judgment be entered for the defendants. The plaintiffs filed objections to the Report. The defendants responded. I held a hearing on January 26, **[*44]** 1998, on the issues relating to the alleged *per se* violation of *§ 1*. If the plaintiffs do not prevail on their claims of a *per se* violation, discovery and further litigation will be necessary with regard to their rule of reason claim.

---

[3] At the time suit was brought, the Chairman was Stuart P. Krusell and the sole Commissioner was Pamela M. Nourse. The present Chairman is Walter J. Sullivan, Jr., and the other two members of the Commission are Suzanne Iannella, who replaced Nourse, and Frederick W. Riley. By operation of *Fed. R. Civ. P. 25(d)(1)*, they are, in their official capacities, the defendants.

[4] In September, 1994, MWMBI was granted leave to intervene as defendant-intervenor.

The Magistrate Judge's Report and Recommendation is instructive. However, **HN2**[] as a matter of law, this court is required to decide *de novo* the portions of the Report placed in dispute by the objections. 28 U.S.C. § 636(b)(1)(C). *See also* Fed. R. Civ. P. 72(b); Local Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts.

HN3[] As these are motions for summary judgment, I am, with regard to each motion, required to look at the record in the light most favorable to the opposing party, *Woods v. Friction Materials, Inc., 30 F.3d 255, 259 (1st Cir. 1994)*, and to decide if any material fact is genuinely placed in dispute by the admissible evidence. *Fed. R. Civ. P. 56(c)*; **[**7]** *Anderson v. Liberty Lobby, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. I agree with the parties that the evidence does not place any material fact genuinely in dispute. Thus, as I said, it is necessary and appropriate to decide now who is entitled to prevail as a matter of law.

I have decided that the plaintiffs are entitled to prevail on their motion for summary judgment. I reach this conclusion essentially for the reasons stated by the Ninth Circuit in addressing a similar regulatory scheme in *Miller v. Hedlund 813 F.2d 1344 (9th Cir. 1987)*, *cert. denied, 484 U.S. 1061, 98 L. Ed. 2d 983, 108 S. Ct. 1018 (1988)*. Comparable analysis was done by Judge Ralph Winter in his dissent concerning the virtually identical regulatory scheme involved in *Battipaglia v. New York State Liquor Auth., 745 F.2d 166, 179 (2d Cir. 1984)* (Winter, J., dissenting), *cert. denied, 470 U.S. 1027, 84 L. Ed. 2d 782, 105 S. Ct. 1393 (1985)*. The Ninth Circuit and Judge Winter essentially implement the analysis previously done by Professor Phillip Areeda and his colleagues in their treatise on ***antitrust law***; the reasoning of the Ninth Circuit and Judge Winter has been endorsed **[**8]** in the most recent edition of that treatise. 1 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 217, at 310-12 (1997). [5]

[9]** The statute now at issue, **HN4**[] *M.G.L. c. 138, § 25A*, provides in pertinent part that:

> No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall--
> (a) Discriminate, directly or indirectly, in price, . . . between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality.

And then, in a further paragraph, it states:

> All price lists or price quotations made to a licensee by a wholesaler shall remain in effect for at least thirty days after the establishment of such price list or quotation. Any sale by a wholesaler of any alcoholic beverages at prices lower than the price reflected in such price list or quotation within such thirty day period shall constitute price discrimination under this section.

The plaintiffs do not challenge the broad prohibition against price discrimination contained in the first quoted paragraph, subsection (a). Rather, they challenge only the provisions of the second quoted paragraph.

HN5[] The related, relevant regulations require each wholesaler by the fifth day **[**10]** of each month to post the prices that it will charge during the next following month for each item that the wholesaler sells. 204 C.M.R. § 6.03(3). The regulations permit the wholesaler **[*45]** by the fifteenth day of the month to amend its posted prices, but only to meet a specific lower price or a specific greater discount for an individual item filed by a competitor. 204 C.M.R. § 6.05(1). In other words, a wholesaler may not increase its previously posted price or decrease its price to any price other than the exact lower price for the same product that was posted by a rival wholesaler. The prices, as amended, become effective on the first day of the following month and they must remain unchanged throughout that calendar month. 204 C.M.R. § 6.03(3). Plaintiffs challenge the validity of these regulations.

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[5] The majority in *Battipaglia* expressly recognized that its suggestion, but not holding, that the regulatory scheme at issue might enjoy state action immunity if it otherwise constituted a *per se* violation of *§ 1* was contrary to the conclusion reached by "the most influential treatise on the subject, Areeda & Turner, 1 ***Antitrust Law*** P 213d, at 75 (1978)." *745 F.2d at 176*. Professor Areeda and his colleagues subsequently considered the observations made by the majority in *Battipaglia* and were unpersuaded, both on the issue of whether the New York regulatory scheme involved a *per se* violation of *§ 1* and whether there was state action immunity. *See* Areeda & Hovenkamp, *supra,* P 217, at 311. Professors Areeda and Hovenkamp also found the Ninth Circuit's decision in *Miller, supra,* to apply properly the approach employed by the Supreme Court in *Midcal. Id.* at 311-12.

HN6[] In the federal system of government established by our Constitution, the laws of the United States are the "supreme Law of the Land," U.S. Const. Art. VI, and thus preempt and invalidate inconsistent state laws in certain circumstances. *See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11, 6 L. Ed. 23 (1824)*. The standard for determining whether the statute and regulations **[**11]** now at issue are preempted by *§ 1* of the Sherman Act is set forth in the Supreme Court's decision in *Rice v. Norman Williams Co., 458 U.S. 654, 73 L. Ed. 2d 1042, 102 S. Ct. 3294 (1982)*. The Supreme Court in *Rice* said:

> HN7[] [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under *§ 1* of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

458 U.S. at 661. As I said earlier, at this point **[**12]** the motions for summary judgment address only the plaintiffs' claim of a *per se* violation of *§ 1* and, therefore, the Supreme Court's formulation of the issue in the *Rice* case applies here.

The analysis involved in deciding the cross-motions for summary judgment requires two steps. First, I must determine whether the Massachusetts regulatory scheme violates *§ 1* under the *Rice* test. If so, second, I must determine whether the state has and exercises sufficient power to prevent anticompetitive conduct to provide that regulatory scheme antitrust immunity as state action pursuant to the Supreme Court's decision in *Parker, supra.*

Each of these two steps also has two parts to the analysis. HN8[] With regard to a possible *per se* violation of *§ 1*, I must in this case first decide if the restraint on trade at issue is what the Supreme Court has called a "unilateral restraint" or a "hybrid restraint." *Fisher v. City of Berkeley, 475 U.S. 260, 267-68, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986)*. Second, if it is a "hybrid restraint," I must decide if it involves a *per se* violation of *§ 1*.

HN9[] With regard to possible immunity, I must decide, first, whether there is a clearly **[**13]** articulated and affirmatively expressed state policy that the restraint at issue is intended to serve. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)* (citing *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978))*. If so, second, I must decide whether that policy is actively supervised by the state itself *Id.*

As I will soon describe, I find that this case involves a "hybrid restraint." Furthermore, I find that the requirements that prices be announced, not be changed except to meet a competitor's lower announced price, and be maintained for a month effect a *per se* violation of *§ 1*.

In addition, I find that there is no state action immunity for this regulatory scheme because, while Massachusetts has a clearly articulated policy concerning what the restraint on trade is intended to serve, the **[*46]** state does not have the power to attempt to assure that the resulting prices are reasonable. Rather, the Commission merely enforces a *per se* violation of *§ 1*, and this conduct is insufficient to generate state action immunity. The reasons for **[**14]** these conclusions are as follows.

First, as I said, the Massachusetts regulatory scheme creates a "hybrid restraint" as defined by the Supreme Court in its 1986 decision in *Fisher.* In *Fisher,* the Supreme Court found a city rent control ordinance was not preempted by *§ 1* because the city unilaterally established the maximum rents that could be charged in Berkeley, California. 475 U.S. at 267. The Supreme Court went on to say, however:

> HN10[] Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. *See* Rice v. Norman Williams Co., 458 U.S. at 665 (Stevens, J., concurring in judgment). Where private actors are thus granted "a degree of private regulatory power," id. at 666 n.1, the regulatory scheme may be attacked under § 1.

475 U.S. at 267-68.

The Supreme Court has characterized its decisions in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 95 L. Ed. 1035, 71 S. Ct. 745 (1951), Midcal, supra, and *324* Liquor Corp. v. Duffy, **[**15]** 479 U.S. 335, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1986), as involving "hybrid restraints." Each of those cases involved the liquor industry and some form of retail price maintenance. *Schwegmann;* 341 U.S. at 386; Midcal, 445 U.S. at 103; Duffy, 479 U.S. at 341. All involved the state authorizing price setting and enforcing the price established by private parties. Schwegmann, 341 U.S. at 387; Midcal, 445 U.S. at 105; Duffy 479 U.S. at 341.

In its 1987 decision in *Miller,* after examining *Schwegmann* and *Midcal,* the Ninth Circuit characterized a regulatory scheme relating to wholesale liquor prices that was comparable to the scheme at issue in the instant case as a "hybrid restraint" because it allowed private parties to set prices and the state did not review the reasonableness of them; rather, the regulatory scheme merely enforced private pricing decisions. 813 F.2d at 1350-51. Implicit in the *Miller* decision is the understanding that there may be a "hybrid restraint" concerning wholesale liquor prices as well as concerning retail liquor prices. I agree and, essentially for the reasons stated by the Ninth Circuit, find that this case involves a **[**16]** "hybrid restraint." Id. at 1351. [6]

In addition, I find that the Massachusetts regulatory scheme effects a *per se* violation of § 1. It Is important to recognize, however, that HN11[] a "hybrid restraint" does not necessarily involve any violation of § 1, let alone a *per se* violation. It depends upon the particular facts of the case. Hertz Corp. v. City of New York, 1 F.3d 121, 129 (2d Cir. 1993), cert. denied, *510 U.S. 1111, 127 L. Ed. 2d 375, 114 S. Ct. 1054, 114 S. Ct. 1055 (1994)*.

The Supreme Court has defined a *per se* violation most notably in Northern Pacific Ry. Co., 365 U.S. 1, 5, 81 S. Ct. 435, 5 L. Ed. 2d 377, stating that HN12[] "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed **[**17]** to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." These agreements or practices are deemed unlawful *per se* "without further examination under the rule of reason generally applied in Sherman Act cases." Broadcast Music, Inc., 441 U.S. at 8.

The Ninth Circuit in *Miller* and Judge Winter in his dissent in *Battipaglia* deemed the regulatory schemes at issue in each of **[*47]** those cases to be a *per se* violation of § 1. They relied on statements of the Supreme Court in reaching their respective conclusions. I am persuaded by the reasoning and statements of the Supreme Court to concur with the Ninth Circuit and Judge Winter in this case.

Contrary to plaintiffs' contention, however, I do not find that merely exchanging price information, as the Massachusetts regulatory scheme in effect requires, is a *per se* violation, despite certain language in United States v. Container Corp., 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969). There, the Supreme Court ruled that the result of a "reciprocal exchange of prices was to stabilize prices though at a downward level." 393 U.S. **[**18]** at 336. The Court held that "the limitation or reduction of price competition" resulting in this stabilization in prices "brings the case within the ban [of the Sherman Act], for … interference with the setting of price by free market forces is unlawful *per se*." 393 U.S. at 337 (citation omitted). Justice Fortas, however, wrote in a concurrence to *Container Corp.* that, "I do not understand the Court's opinion to hold that the exchange of specific information

[6] The Second Circuit decided *Battipaglia* in 1984, two years before the Supreme Court's decision in *Fisher.* Thus, the Second Circuit did not analyze whether the New York regulatory scheme at issue created a "hybrid restraint."

among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a *per se* violation of the Sherman Act." *Id. at 338-39* (Fortas, J., concurring). The Supreme Court has at least twice cited with approval this concurrence in stating that ***HN13***[] the mere exchange of price data is not a *per se* violation of *§ 1*. *United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*; *United States v. Citizens and Southern Nat'l Bank, 422 U.S. 86, 113, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975)*.

However, the Supreme Court has also stated that ***HN14***[] where, as here, announced prices are coupled with a requirement that those prices be adhered to for a period **[**19]** of time, a *per se* violation of *§ 1* exists. More specifically, in *Catalano, Inc. v. Target Sales, Inc.,446 U.S. 643, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)* (*per curiam),* the Supreme Court held an agreement among competing wholesalers not to sell on credit to be a form of price fixing that constituted a *per se* violation of *§ 1*.

In doing so, the Supreme Court said:

> We have held agreements to be unlawful *per se* that had substantially less direct impact on price than the agreements alleged in this case. For example, in *Sugar Institute v. United States, 297 U.S. 553, 601-02, 80 L. Ed. 859, 56 S. Ct. 629 (1936)*, the Court held unlawful an agreement to adhere to previously announced prices and terms of sale, even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement.

446 U.S. at 647.

I recognize, as the Magistrate Judge pointed out, that the *Sugar Institute* case was decided after a non-jury trial and was based on detailed findings of fact, *297 U.S. at 571*; the Supreme Court's decision in 1936 did not characterize the violation being found **[**20]** as a *per se* violation; and the statement in *Catalano* is dictum. Report at 42. However, as the First Circuit said in *McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991)*, *cert. denied, 504 U.S. 910, 118 L. Ed. 2d 545, 112 S. Ct. 1939 (1992)*, ***HN15***[] "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when ... a dictum is of recent vintage and not enfeebled by any subsequent statement." *See also United States v. Santana, 6 F.3d 1, 9 (1st Cir. 1993)*. This principle applies equally to federal district courts.

In the instant case, the Supreme Court's characterization in *Catalano* of an agreement to adhere to a previously announced price as a *per se* violation of *§ 1* is relatively recent. It appears to have been considered. Indeed, it was highly relevant to the Supreme Court's analysis in *Catalano.* Moreover, it has not been qualified by any subsequent statements by the Supreme Court to this court's knowledge.

In addition, the Supreme Court's characterization of an agreement to adhere to previously announced prices as a *per se* violation of *§ 1* makes **[**21]** sense when the purposes of the Sherman Act are considered. As indicated **[*48]** earlier, the "Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. Thus, as the Supreme Court noted in *Catalano, 446 U.S. at 647*, an agreement among competing firms of professional engineers to refuse to discuss prices with potential customers until an engineer had been initially selected, while "not price fixing as such," constituted a *per se* violation of *§ 1* because no elaborate industry analysis was required to demonstrate that a ban on competitive bidding was anticompetitive. *National Soc'y of Prof'l Eng'rs, 435 U.S. at 692*. Similarly, in the instant case, no elaborate inquiry is needed to demonstrate that the Massachusetts regulatory scheme for pricing wholesale liquor is anticompetitive because it plainly precludes individual retailers from seeking to negotiate more favorable prices from competing wholesalers.

Thus, like the Ninth Circuit and Judge Winter in *Battipaglia,* I am guided if not governed by the Supreme Court's **[**22]** statements and reasoning in *Catalano,* and find that this case too involves a *per se* violation of *§ 1*.

See also Areeda & Hovenkamp, *supra,* P 217, at 311 ("Given the great danger that agreements to post and adhere will facilitate horizontal collusion, the dissent's position [in *Battipaglia]* is more consistent with Midcal."). [7]

[23]** The fact that a *per se* violation of *§ 1* has been demonstrated is not the end of the inquiry, however. As indicated earlier, a state may immunize an otherwise impermissible violation of *§ 1* if its regulatory scheme meets certain standards. However, as also indicated earlier, in this case those standards are not met.

To reiterate, the Supreme Court's decision in *Midcal* establishes the two-part test for determining whether immunity exists. *445 U.S. at 105*. The Magistrate Judge found with regard to the first prong that the challenged restraint was clearly articulated and affirmatively expressed as state policy. Report at 33. No objection has been taken to this finding. The parties do not dispute that this prong of the test is satisfied. I agree that the statute and regulations meet this requirement.

Midcal also requires, however, that the policy at issue be actively supervised by the state itself. U.S. 445 at 105. The defendants claim that the Commission monitors to assure that the regulatory scheme it administers is being followed by wholesalers and that enforcement action is sometimes taken in appropriate circumstances to prevent wholesale price discrimination. They **[**24]** assert, in part, that this is all that is required.

In *Battipaglia,* the majority, in dictum, stated that it felt there was "some force" to this argument. *745 F.2d at 176*. The majority also recognized, however, that Professors Areeda and Turner in their treatise rejected this contention. *Id.* (citing Areeda & Turner, ***Antitrust Law*** P 213d, at 75 (1978)). The Second Circuit did not decide this issue in *Battipaglia* because it was unnecessary in that case to do so. *Id.*

As indicated earlier, the plaintiffs state that, if it were material, they would seek more discovery and a trial to determine whether the state even actively enforces the regulatory scheme now being challenged. **[*49]** They assert, however, that this issue is immaterial because ***HN16***[] actively supervising, and thus assuring, a *per se* violation of *§ 1* of the Sherman Act is not sufficient to create state action immunity. I agree. As the Supreme Court has written, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker, 317 U.S. at 351*. *See also* Areeda & Hovenkamp, *supra,* P 226, at 470 ("The state itself **[**25]** might wish simply to yield discretion to private firms to break the antitrust laws when and how they please, but this is the place where federal antitrust policy draws the line.").

In essence, I find this case to be in material respects analogous to the Supreme Court's decisions in *Midcal* and *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)*, and closely comparable to the Ninth Circuit's decision in *Miller.*

Midcal involved a regulatory scheme that had the effect of permitting private parties to set retail prices of wine in *California. 445 U.S. at 103*. The Supreme Court held that the California program was not actively supervised, and therefore was not protected by state action immunity, because:

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.

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[7] The fact that the regulatory scheme at issue effects a *per se* violation of *§ 1* renders immaterial any dispute that may be created by competing affidavits in this case concerning whether the ability to amend a posted price downward in certain circumstances is anticompetitive or procompetitive. *Compare* Statement of Phoebe Morse, Director of the Boston Regional Office of the Federal Trade Commission, Appendix to Whitehall's Motion for Summary Judgment, Exh. C, *and* Statement and Affidavits of Daniel S. Levy, Memorandum in Support of MWMBI's Motion for Summary Judgment, Exh. C, D; Opposition of MWMBI to Plaintiff's Motions for Summary Judgment, Exh. B. It is this type of complicated economic analysis that a *per se* rule moots. *Northern Pacific Ry. Co., 356 U.S. at 5* ("This principle of *per se* unreasonableness … avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken.").

445 U.S. at 105-06. *See also* Duffy, 479 U.S. at 344-45. In *Midcal,* the **[**26]** Supreme Court held that: "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S. at 106. The fatal flaw in *Midcal* was not the private price fixing, but the failure of state officials to set or regulate the prices resulting from California's regulatory scheme. *See* Areeda & Hovenkamp, *supra,* P 217, at 308.

In *Miller,* the Ninth Circuit held that the Oregon law at issue also did not involve sufficiently active supervision to generate immunity because:

> "Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the Commission 'may reject any price posting which is in violation of any of its rules,' the effect of that rule is simply to effectuate the price posting. . . . It does not provide for government establishment or review of the prices themselves. . . . Oregon merely authorizes and enforces the disputed pricing practices."

813 F.2d at 1351 (quoting Miller v. Oregon Liquor Control Comm'n, 688 F.2d 1222, 1226-27 (9th Cir. 1982)). **[**27]**

Miller was decided in 1987. The Supreme Court's 1992 decision in *Ticor* reenforces the validity of the view expressed by the Ninth Circuit in that case. In *Ticor* the Supreme Court held that state regulators had not sufficiently supervised the uniform prices established by title insurers through rate bureaus to provide state action immunity under *Parker. Ticor,* 504 U.S. at 639-40. In doing so, the Supreme Court made several statements that I find particularly meaningful here.

First, it said that:

> *Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. *Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.*

Id. at 633 (emphasis added). The Supreme Court explained this point further, stating that the purpose of the active supervision inquiry:

> is to determine whether the State has exercised sufficient independent judgment and control **[**28]** so that the details of the rates or prices have been established as a product **[*50]** of deliberate state intervention, not simply by agreement among private parties. . . . The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

Id. at 634-35.

In addition, the Supreme Court explained that for this standard to be met, the state must both have and exercise the power to review and revise the pricing decisions made by private parties.

More specifically, it stated:

> "The active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. . . . The mere presence of some state involvement or monitoring does not suffice. . . . The active supervision prong of the *Midcal* test requires that state officials *have and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."

Id. at 634 (quoting Patrick v. Burget, 486 U.S. 94, 101, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)) (emphasis added). *See also* New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d 1064, 1070 (1st **[**29]** Cir. 1990).

This means, in part, that:

> For States which … choose to displace the free market with regulation, [the Supreme Court's] insistence on real compliance with both parts of the *Midcal* test [authorization and supervision] will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

504 U.S. at 636. Thus, to generate immunity, it is not sufficient for a state, like Massachusetts, to articulate clearly a public policy reason -- in this case the goal of preventing price discrimination in the wholesale sale of liquor -- for authorizing a form of price fixing. It must also have and exercise the power to assure that the resulting prices are reasonable.

The reason for this requirement emerges from *Ticor.* There, the Supreme Court indicated that it had been, and would be, "adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws." *Id. at 636*. As described previously, the Sherman Act is aimed at preserving free competition in order to, among other things, assure the lowest prices for the highest quality of goods. **[**30]** *National Soc'y of Prof'l Eng'rs, 435 U.S. at 695*; *Northern Pacific Ry Co., 365 U.S. at 4*. ***HN17***[] A state may establish a regulatory scheme to displace free competition in order to serve some other, clearly stated public policy. If it does so, however, it must provide as part of that regulatory scheme state power to assure that the resulting prices are reasonable because the free market can no longer be relied upon to do so. Ideally in a democracy, if a state has this power and responsibility, competing economic interests should operate to cause the state to assure that the prices established through its regulatory scheme are reasonable. In *Ticor,* however, the Supreme Court expressed its unwillingness to rely on the functioning of the democratic process alone. Rather, it instructed courts to determine whether states which in effect authorize a form of price fixing both have the power to prevent abuses and also exercise that power. *504 U.S. at 637-38*.

These principles as applied in the present case demonstrate that the *per se* violation of *§ 1* of the Sherman Act generated by *M.G.L. c. 138, § 25A* and the related regulations is not protected by state action immunity. As described **[**31]** earlier, the system of announced prices coupled with a requirement that those prices be adhered to for a period of time constitutes a form of price fixing that ordinarily constitutes an impermissible *per se* violation of *§ 1*. *Catalano, 446 U.S. at 643*; *Miller, 813 F.2d at 1349*. State action immunity for such anticompetitive conduct exists only if Massachusetts both has and exercises the power to assure that the prices privately set for wholesale liquor are reasonable.

Under Massachusetts law, however, the Commission does not have the statutory authority to review or revise wholesale liquor prices. More specifically, neither *M.G.L. c.* ***[*51]*** *138, § 25A*, the related regulations, nor any other statute or regulation gives the Commission this power. This contrasts, for example, with *M.G.L. c. 138, § 25C*, which requires the filing of minimum consumer prices for alcoholic beverages, and Commission approval as "not being excessive, inadequate or unfairly discriminatory" before those consumer prices can go into effect.

If the state in this case had the power to assure that its regulatory system generated reasonable wholesale liquor prices, it would also be necessary to decide whether **[**32]** it actually exercises that power. As the Commission lacks such power, this issue is not material. [8]

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[8] However, since the parties have agreed that the record is complete concerning this issue and that it can be resolved on summary judgment, in the interest of completeness I note that there is little evidence that the Commission exercises any conceivable power it might have to try to assure the reasonableness of prices for wholesale liquor.

Mr. Krusell, a former Commissioner, gave some testimony with regard to his activities in considering the reasonableness of prices. Memorandum in Support of MWMBI's Motion for Summary Judgment, Exh. F (Stuart Krusell Deposition Transcript), at 2:84, 3:58-59. There is considerably more evidence indicating that the Commission does not actively seek to evaluate or assure the reasonableness of prices. For example, there is no document in the record showing that the Commission ever reviewed, let alone approved, the reasonableness of a wholesale liquor price. The depositions of Commission employees Robert Temple and Peter Connelly are consistent with the conclusion that the Commission did not do this. Appendix to Whitehall's Opposition, Exh. 5 (Robert Temple Deposition Transcript), at 34, 90-91; Appendix to Whitehall's Opposition, Exh. 4 (Peter Connelly Deposition Transcript), at 41-44, 48-50.

[33]** In view of the foregoing, the plaintiffs are entitled to summary judgment of their request for a judgment declaring that the pertinent portion of *M.G.L. c. 138, § 25A* and the implementing regulations are preempted by *§ 1* of the Sherman Act and, therefore, are invalid. It is not clear, however, whether it will be necessary or appropriate to issue the injunctive relief plaintiffs seek. ***HN18***[] "At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Doran v. Salem Inn, Inc., 422 U.S. 922 931, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975)*. Thus, unless the Commonwealth of Massachusetts states that it does not intend to comply with the declaratory judgment which will be issued, the court perceives no imminent threat of irreparable harm and, therefore, no need to issue an injunction. *See South Boston Allied War Veterans Council v. City of Boston, 875 F. Supp. 891, 920 (D. Mass. 1995)* (entering declaratory judgment, but not injunction, concerning decision that City could not **[**34]** condition issuance of a permit for St. Patrick's Day Parade on the inclusion of a gay and lesbian group because City intended to comply with the declaratory judgment).

If either the Commonwealth or the defendant-intervenor Massachusetts Wholesalers of Malt Beverages, Inc. wishes to appeal this decision and requests a stay pending appeal, I will decide whether a stay is justified. *See, e.g., Exxon Corp. v. Esso Worker's Union, Inc., 963 F. Supp. 58 (D. Mass. 1997)*.

Accordingly, it is hereby ORDERED that:

1. The Attorney General shall by February 17, 1998, inform the court:

(a) Whether the Chairman and Commissioners of the Alcoholic Beverages and Control Commission intend to comply voluntarily with the declaratory judgment to be entered or whether it will be necessary for the court to enter the requested injunction;

(b) Whether the Chairman and Commissioners of the Alcoholic Beverages and Control Commission intend to appeal; and, if so

(c) Whether they seek a stay of this court's Order pending appeal.

2. Defendant-Intervenor Massachusetts Wholesalers of Malt Beverages, Inc. shall, by February 17, 1998, inform the court whether it intends to appeal and, if so, whether it seeks **[**35]** a stay of this court's Order pending appeal.

3. If either defendant moves for a stay pending appeal, it shall, by February 24, 1998, file a supporting memorandum and affidavit(s).

[*52] 4. If plaintiffs wish to oppose any requested stay, they shall, by March 2, 1998, file their memorandum and affidavit(s).

5. If necessary, a further hearing will be held on March 10, 1998, at 3:00 p.m.

Mark L. Wolf

UNITED STATES DISTRICT COURT

Goldwasser v. Ameritech Corp.

United States District Court for the Northern District of Illinois, Eastern Division

February 3, 1998, Decided ; February 4, 1998, Docketed

97 C 6788

Reporter
1998 U.S. Dist. LEXIS 1463 *; 1998 WL 60878

RICHARD GOLDWASSER, MICHAEL J. COHN, ERIC S. CARTER and RICHARD C. LOZON, individually and on behalf of all others similarly situated, Plaintiffs, v. AMERITECH CORPORATION, a Delaware corporation, Defendant.

Disposition: **[*1]** Ameritech's motion to dismiss Plaintiffs' complaint granted with prejudice.

Core Terms

filed rate doctrine, consumers, rates, competitors, local telephone, anticompetitive, telephone, carriers, antitrust, damages, telecommunications, prices, claim for damages, asserts, motion to dismiss, long-distance, allegations, railroads, argues, Lake, injunctive relief, telephone service, rate-setting, overcharge, transport, Sections, contends, monopoly, courts, standing to bring

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

In ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. The allegations of a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN2[] Motions to Dismiss, Failure to State Claim

In reviewing a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim, the court is limited to the allegations contained in the pleadings themselves. Documents incorporated by reference into the pleadings and documents attached to the pleadings as exhibits are considered part of the pleadings for all purposes. *Fed. R. Civ. P. 10(c)*. In addition, documents that a defendant attaches to a motion to dismiss are considered a part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > False Charges & Rebates

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN3[] Filed Rate Doctrine, Public Utilities & Telecommunications Carriers

The filed rate doctrine prohibits claims against a regulated utility based on allegations that the utility's "filed rate" -- in other words, one approved by the governing regulatory agency -- is too high and the product of anticompetitive activity. Courts have frequently invoked the doctrine to dismiss overcharge claims by ratepayer plaintiffs.

Administrative Law > Judicial Review > Standards of Review > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN4[] Judicial Review, Standards of Review

As long as the agency has the power to review and challenge a filed rate, it is unnecessary to consider the fastidiousness with which that power is exercised.

Communications Law > Federal Acts > Federal Communications Act > Remedies

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN5[] Federal Communications Act, Remedies

See *47 U.S.C.S. § 206*.

Communications Law > Federal Acts > Federal Communications Act > Remedies

Transportation Law > Carrier Duties & Liabilities > Damages

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN6[] Federal Communications Act, Remedies

Section 207 of the Communications Act of 1934, codified at 47 U.S.C.S. § 207, permits any person claiming to be damaged by the actions of any common carrier to bring suit for the recovery of these damages.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Communications Law > ... > Telephone Services > Long Distance Telephone Services > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > Jurisdiction

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN7[] Alternative Dispute Resolution, Arbitration

Sections 271 and 272 of Telecommunications Act of 1996 (Act), codified at 47 U.S.C.S. §§ 271, 272, merely set forth a checklist of conditions that local exchange carriers must meet before they will be permitted to compete in the long-distance service market. If there are problems with carriers failing to satisfy these duties to their competitors, the Act establishes the sole remedy: state public utility commission arbitration and enforcement proceedings, with review by federal courts.

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Judges: Charles P. Kocoras, United States District Judge.

Opinion by: Charles P. Kocoras

Opinion

MEMORANDUM* [*2] *OPINION AND ORDER

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on Defendant Ameritech's motion to dismiss Plaintiffs' complaint pursuant to *Fed.R.Civ.P. 12(b)(6)*. For the following reasons, Ameritech's motion is granted.

BACKGROUND

The following facts are taken from Plaintiffs' complaint, the allegations of which must be taken as true for the purposes of this lawsuit.

A brief summary of the evolution of the telecommunications industry is first appropriate. During the early part of this century, American Telephone and Telegraph Company (AT&T) and the Bell Operating Companies, which were wholly-owned subsidiaries of AT&T, controlled much of the local and long-distance telephone markets. In 1974, the United States filed a lawsuit against AT&T alleging violations of the Sherman Act. Ultimately, in 1984, AT&T was divested of control over the seven Regional Bell Operating Companies (RBOCs) and thus exited the local telephone business. The RBOCs, including Ameritech, were barred from providing long distance services, and were required to provide long-distance carriers with exchange access that was equal in type, quality and price to the access provided **[*3]** to AT&T.

Local telephone companies, such as the RBOCs, are commonly referred to as local exchange carriers ("LECs"). Local exchange carriers generally provide business and residential customers with local exchange services, such as local telephone calls, operator services, and advanced features such as call waiting, call forwarding, and voice mail. They also provide exchange access services, which allow long distance carriers to use the local exchange facilities to originate and terminate long distance calls to end users. In addition to the RBOCs, there are now hundreds of other LECs operating in the United States.

The Telecommunications Act of 1996 ("the 1996 Act") became law on February 8, 1996. The Act sought to adopt a "pro-competitive, de-regulatory policy framework" by creating competition in both the local telephone and long-distance service markets. The intent of the Act was to create competition without delay so that consumers could reap the benefits of such competition as soon as possible. The Act defined the seven original RBOCs and GTE as "incumbent local exchange companies" ("ILECs"), imposing specific requirements on these corporations.

Recognizing that the ILECs (including **[*4]** Ameritech) had previously existed as natural monopolies in their respective local markets, the Act requires the ILECS to provide potential competitors access and connections to their lines and equipment on just, reasonable and non-discriminatory rates and charges. In addition, the ILECs are also required to provide competitors the same quality service to competitors' customers that the ILECs provide to themselves.

With respect to long-distance service, the 1996 Act establishes a detailed mechanism for the RBOCs to compete in the long-distance market (with incumbents AT&T, MCI, Sprint and GTE). Before the RBOCS can offer long-distance telephone service, however, the Act requires them to, *inter alia*, satisfy a 14-point checklist of requirements and demonstrate that there is competition in their respective local markets. *See 47 U.S.C. § 271(b)(1)*. The Act vests the FCC with the power to decide, upon the request of an RBOC, if and when the RBOC has met the requirements to enter the long-distance market.

As for local service, the Act preempts the states from adopting or enforcing any barriers to entry, such as exclusive local telephone franchises. Section 251 of the 1996 Act **[*5]** also imposes certain obligations on the ILECs which are designed to permit new entrants to use some or all of the ILECs' established networks to offer competitive local exchange services. ILECs are specifically required to: (1) allow competitors to interconnect with its network so that the competitor can provide calls to and from that network; (2) sell to competitors access to components of its network ("network elements") on an unbundled or individual basis; and (3) sell its retail telephone services to competitors at wholesale prices. All of these requirements are to be provided by the ILEC "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."

Plaintiffs Richard Goldwasser, Michael Cohn, Eric Carter and Richard Lozon (collectively "Plaintiffs") are citizens of the states of Illinois, Wisconsin, Indiana and Michigan, respectively, and all are local telephone service subscribers in their respective states. Plaintiffs seek to certify a class action on behalf of "all subscribers for local telephone services from the defendant or its competitors, who reside or resided in the states of Illinois, Indiana, Michigan, Ohio and Wisconsin, and are or were subscribers **[*6]** for the period of February 8, 1996 [until present]." Defendant Ameritech provides local telephone service to subscribers and customers in Illinois, Indiana, Michigan, Ohio and Wisconsin. Plaintiffs allege that Ameritech controls in excess of 90 percent of the markets for local telephone service in its geographic areas.

Plaintiffs allege that Ameritech has committed monopolistic acts in furtherance of an anticompetitive objective of maintaining a monopoly for local phone service in the five-state region. Ameritech is accused of a litany of activities which violate its duties under Sections 251 and 252 of the Telecommunications Act of 1996. Primarily, Plaintiffs assert that Ameritech has denied its competitors many of the elements which are required by the Act and are necessary for competition. For example, Ameritech is alleged to have violated Section 251(c)(3) of the Act by delaying the provision to its competitors of unbundled elements, loops, and access to local transport interoffice transmission facilities. All told, the Plaintiffs' complaint lists 20 separate anticompetitive activities that Ameritech is alleged to be engaged in.

Plaintiffs essentially accuse Ameritech of engaging **[*7]** in anticompetitive activity to prevent competition in the local telephone service market. Count I of Plaintiffs' complaint, asserting a claim under § 2 of the Sherman Act, alleges that Ameritech's anticompetitive acts have harmed Plaintiffs' ability to select among a competitive group of local telephone providers, thus causing Plaintiffs to have to pay supracompetitive prices for telephone prices. In other words, Plaintiffs claim that Ameritech's actions have caused them to be damaged by having to pay telephone bills that were and are higher than they would be with the competition that would be generated but for Ameritech's unlawful acts. In Count II, Plaintiffs allege a cause of action under *§§ 206* and *207* of the Communications Act of 1934 (as amended by the Telecommunications Act of 1996), asserting that Ameritech's anticompetitive acts violate the provisions of the statute.

Ameritech has now filed a motion to dismiss Plaintiffs' complaint, asserting several bases as to why it fails as a matter of law. Before addressing the substance of this motion, however, it is necessary to set forth the appropriate standard of review at this stage of the case.

STANDARD OF REVIEW

The **[*8]** purpose of a motion to dismiss pursuant to *Rule 12(b)(6)* is to test the sufficiency of the complaint, not to decide the merits of the case. Defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. ***HN1***[] In ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *Bontkowski v. First National Bank of Cicero, 998 F.2d 459, 461* (7th Cir.), *cert. denied*, *510 U.S. 1012, 126 L. Ed. 2d 567, 114 S. Ct. 602 (1993)*. The allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. *See also* *Hartford Fire Insurance Co. v. California, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)*; *Sherwin Manor Nursing Center, Inc. v. McAuliffe, 37 F.3d 1216, 1219 (7th Cir. 1994)*, *cert. denied*, *516 U.S. 862,* ***[*9]*** *116 S. Ct. 172, 133 L. Ed. 2d 113 (1995)*. Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. *Lucien v. Preiner, 967 F.2d 1166, 1168* (7th Cir.), *cert. denied*, *506 U.S. 893, 121 L. Ed. 2d 196, 113 S. Ct. 267(1992)*.

HN2[] In reviewing a *Rule 12(b)(6)* motion to dismiss for failure to state a claim, the court is limited to the allegations contained in the pleadings themselves. Documents incorporated by reference into the pleadings and documents attached to the pleadings as exhibits are considered part of the pleadings for all purposes. *Fed.R.Civ.P.*

10(c). In addition, "documents that a defendant attaches to a motion to dismiss are considered a part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." Venture Associates Corp. v. Zenith Data Systems Corp., 987 F.2d 429, 431 (7th Cir. 1993). It is with these principles in mind that we turn to the motion before us.

DISCUSSION

Ameritech asserts three basic arguments as to why Plaintiffs' complaint must be dismissed. Ameritech first contends that the filed rate doctrine **[*10]** bars the claims for damages of both counts of Plaintiffs' complaint. Furthermore, Ameritech asserts that Plaintiffs have no standing to assert either count in this case. Finally, Ameritech also argues that Count II is legally without merit because the 1996 Act does not establish free-standing duties for which consumers can bring private actions for violations thereof.

I. Filed Rate Doctrine

Ameritech's first argument is that the damage claims of Plaintiffs' complaint, which basically seek recompense for Plaintiffs' overpayment for telephone services, are barred by the filed rate doctrine. ***HN3***[] This doctrine prohibits claims against a regulated utility based on allegations that the utility's "filed rate" -- in other words, one approved by the governing regulatory agency -- is too high and the product of anticompetitive activity. *See* Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994) (a filed rate is "per se reasonable and unassailable in judicial proceedings brought by ratepayers"). In fact, courts have frequently invoked the doctrine to dismiss overcharge claims by ratepayer plaintiffs. *See, e.g.*, In re Wheat Rail Freight Rate Antitrust Litig., 759 F.2d 1305, 1311-13 **[*11]** (7th Cir. 1984) (affirming dismissal of antitrust claim under Fed.R.Civ.P. 12(b)(6)), *cert. denied 476 U.S. 1158 (1986)*; County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858 (9th Cir. 1997) (same), *cert. denied 139 L. Ed. 2d 754, 1998 U.S. LEXIS 494, 1998 WL 15468, 118 S. Ct. 854 (1998)*. Thus, Ameritech argues that since Plaintiffs' claims are merely disputing the reasonableness of Ameritech's filed rates, these claims must be dismissed under the filed rate doctrine.

Plaintiffs first point out, and Ameritech concedes, that the filed rate doctrine does not bar the claims in this case insofar as they seek injunctive relief. *See* Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-59, 89 L. Ed. 1051, 65 S. Ct. 716 (1945) (suit that seeks to enjoin anticompetitive conduct rather than revoke tariff is not barred by doctrine); *see also Gelb v. AT&T Co., 813 F. Supp. 1022, 1033 (S.D.N.Y. 1993)* ("the filed rate doctrine does not affect plaintiff's claim for declaratory or injunctive relief"). In addition, Plaintiffs argue that, because the conduct complained of does not directly involve the rate-setting process, this case falls outside the parameters of the filed rate doctrine and therefore is not barred. Finally, **[*12]** Plaintiffs contend that the filed rate doctrine is only applicable when the regulatory agency conducts a meaningful review of a rate to ensure that it is reasonable. Asserting that the five states' Public Utility Commissions (PUCs) do not review telephone tariffs with sufficient scrutiny, Plaintiffs argue that the filed rate doctrine does not apply in this case.

It is first appropriate to discuss the origins of the filed rate doctrine and the limits of its scope. The doctrine was first recognized by the Supreme Court in Keogh v. Chicago & N.W. R. Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922). In *Keogh*, the Court held that a shipper could not recover damages based upon a claim that, but for the alleged conspiracy among carriers, the shipper would have been entitled to transportation rates lower those which had been filed and approved by the Interstate Commerce Commission (ICC). Id. at 160. The Court based its decision on three policy considerations: (1) plaintiffs should not be allowed an antitrust remedy for rates found reasonable by the ICC; (2) awarding an antitrust remedy would result in unjust discrimination in favor of the litigious plaintiffs; and (3) it **[*13]** would be near impossible for the Court to determine that a particular hypothetical lower rate would have existed absent the antitrust violation and that this rate would have been approved by the ICC. Id. at 164-65. Simply put, "the filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." H. J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 488 (8th Cir.) (*citing* Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578-79, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981)), *cert. denied 504 U.S. 957, 112 S. Ct. 2306, 119 L. Ed. 2d 228 (1992)*. The Supreme Court has affirmed the continuing vitality of the filed rate doctrine, *see* Square D Co. v. Niagara Frontier

Tariff Bureau, 476 U.S. 409, 90 L. Ed. 2d 413, 106 S. Ct. 1922 (1986), and the Seventh Circuit has also recently recognized the doctrine in the telecommunications context. *See* *Cahnmann v. Sprint Corp., 133 F.3d 484, 1998 U.S. App. LEXIS 118, 1998 WL 3357 (7th Cir. 1998)*.

Ameritech asserts that this case presents exactly the kinds of claims that the filed rate doctrine is intended to bar. Ameritech contends that Plaintiffs, no matter what **[*14]** the underlying conduct that they complain of, are merely seeking recovery for Ameritech's overcharge for local telephone services. To bolster this contention, Ameritech points to Plaintiffs' complaint, which claims damage for "having to pay telephone bills that were and are higher than they would be with the competition that would be generated but for the defendant's unlawful acts and conduct." Since Plaintiffs' damage claims implicate the reasonableness of a filed rate, therefore, Ameritech argues that the filed rate doctrine bars these claims.

Plaintiffs vehemently disagree with Ameritech's characterization of their claims in this case. They argue that the filed rate doctrine only shields unlawful conduct which is integral to the rate-making process, something which is not at issue in this case. *Cf.* *Wegoland, 27 F.3d 17* (ratepayers barred from challenging telephone company's misrepresentation of costs to justify higher rates); *Taffet v. Southern Co., 967 F.2d 1483* (11th Cir.) (filed rate doctrine applies to utility's fraudulent misrepresentations to state rate-setting commission), *cert. denied 506 U.S. 1021, 121 L. Ed. 2d 583, 113 S. Ct. 657 (1992)*; *Keogh, 260 U.S.* **[*15]** *156, 67 L. Ed. 183, 43 S. Ct. 47* (doctrine bars suit alleging conspiracy to fix railroad rates). In this case, in contrast, Plaintiffs allege that Ameritech has effectively fenced-out competitors from the local telephone service market, thus preserving Ameritech's monopoly power and its ability to extract supracompetitive prices from consumers. The gist of Plaintiffs' claims is that Ameritech has failed to comply with its duties under the 1996 Act, which was intended to open the local telephone markets to free and fair competition. Though such conduct may indirectly impact telephone rates, Plaintiffs contend that it is not integral to the rate-setting process. Thus, Plaintiffs assert that the filed rate doctrine should not bar its claims in this case.

The principal case upon which Plaintiffs rely in drawing this distinction between rate and non-rate anticompetitive activity is *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144 (3d Cir. 1993)*. In *Lower Lake Erie*, steel companies, dock companies and trucking companies asserted antitrust claims against railroad companies, alleging that the railroads "conspired ... to preclude competitors from entering the market of **[*16]** lake transport, dock handling, storage and land transport of iron ore." *Id. at 1151*. A central issue in the case was whether the steel companies, as consumers in the iron ore market, were barred from asserting their claims by the filed rate doctrine. Relying on this doctrine, the district court had previously dismissed the steel companies' claims that were "based on the allegation that, absent the conspiracy, these plaintiffs would have paid lower rates for costs associated with the transportation of ore." *Id. at 1154*. However, the steel companies were allowed to proceed with their damage claims insofar as they alleged "non-rate anticompetitive activity" -- specifically, "that the railroads conspired to protect their stronghold in the ore transport market by blocking entry by low-cost competitors, not that the railroads charged an unlawful rate." *Id. at 1159*. Plaintiffs contend that such market exclusion is exactly what they are accusing Ameritech of in this case, and that therefore the filed rate doctrine does not apply.

Assuming that the *Lower Lake Erie* court properly applied the filed rate doctrine (which is subject to debate), this Court is convinced that *Lower* **[*17]** *Lake Erie* is nevertheless distinguishable from the facts of this case. In *Lower Lake Erie*, the alleged anticompetitive activity sought to exclude an entirely new alternative means of competition -- shipping by truck instead of rail -- which would have otherwise been available to the consumer steel company plaintiffs. The court explained that "the question of hypothetical lower rates [was] ancillary" since the excluded trucking competitors would not have been subjected to the same rate-setting regulatory review. *Id. at 1160*. Thus, the filed rates of the railroads were only relevant to the extent that consumers were constrained to pay them for lack of any other options.

In stark contrast, the competitors allegedly excluded in this case are telephone companies, just like Ameritech, that are governed by the same rate-filing requirements in that industry. Unlike the steel companies in *Lower Lake Erie*, consumers in the local telephone market are captive to rates approved by the state PUCs. Any measure of damages in this case would necessarily involve the Court's determination of a hypothetical lower rate that would have been approved by the various state PUCs -- exactly **[*18]** the messy task which the filed rate doctrine seeks to avert. Thus, since filed rates are necessarily implicated by Plaintiffs' claims, the distinction drawn by *Lower Lake Erie* is not relevant to the case at bar. *See* *County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858, 865 (9th Cir. 1997)* (similarly finding *Lower Lake Erie*'s distinction irrelevant where filed rates are unavoidable).

In the Court's opinion, the filed rate doctrine properly governs the anticompetitive conduct alleged in this case. Though Plaintiffs' complaint specifically attacks Ameritech's actions with respect to suppressing competition in the local telephone service market, rather than activity directly involved in the rate-setting process, their claims necessarily seek damages for the result these anticompetitive activities have allegedly had on the telephone rates which they, as consumers, must pay. The damages sought by Plaintiffs -- indeed, their only possible basis for standing to assert these claims -- stem from these filed rates allegedly inflated by the lack of fair competition. Ameritech's alleged actions to exclude competition, without making the link that these actions have on telephone **[*19]** rates, do not of themselves harm consumers. Thus, when reduced to its essence, Plaintiffs' complaint simply seeks damages for Ameritech's overcharging for telephone services. In this Court's opinion, such claims clearly fall under the filed rate doctrine.

Plaintiffs alternatively argue that, even if the filed rate doctrine applies to Ameritech's conduct in this case, the doctrine is still inapplicable because Ameritech's local telephone rates are not subjected to sufficient regulatory review. Some courts have held that, where filed rates are the product of anticompetitive activity, but are not afforded meaningful review by the state agency, the filed rate doctrine does not apply. *See* *Brown v. Ticor Title Ins. Co., 982 F.2d 386, 394 (9th Cir. 1992)*; *Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332 (9th Cir. 1990)*. To that end, Plaintiffs accuse the state regulatory agencies in this case as possessing little more than a rubber stamp in the rate-setting process. Though the state statutes require varying notice prior to imposition of a new rate, Plaintiffs point out that in certain instances Ameritech's rates can become effective without consideration by the respective **[*20]** PUCs. *See, e.g.*, *Ohio Rev. Code § 4909.42* (rate increases become effective 245 days after filing absent action by commission); *220 ILCS 5/9-201(a)* (45-day notice to amend tariff, takes effect absent suspension by commission). Such review, requiring only "non-disapproval", has been held inadequate to justify application of the filed rate doctrine. *See* *Brown, 982 F.2d at 393-94*; *Wileman, 909 F.2d at 337-38*. Thus, because there is some question as to the level of review through which Ameritech's rates must pass, Plaintiffs argue that the filed rate doctrine cannot be held to apply as a matter of law.

In contrast to the Ninth Circuit's view, however, the Seventh Circuit has opined that it is unnecessary for a rate to undergo rigorous review for it to fall within the protection of the filed rate doctrine. *In re Wheat Rail Freight Rate Antitrust Litig., 759 F.2d 1305 (7th Cir. 1985)*. In *Wheat Rail*, recent legislation had limited the regulatory agency's review of the reasonableness of a railroad's rates unless it first found the railroad at issue had market dominance. *Id. at 1311*. Given this limited review, the plaintiffs argued that the filed rates should not be **[*21]** afforded protection under the filed rate doctrine. Since the agency retained the power to ensure that rates did not discriminate among consumers, however, the court held that the filed rate doctrine barred the antitrust damage claims in that case. *Id.* Thus, ***HN4***[] as long as the agency has the power to review and challenge a filed rate, it is unnecessary to consider the fastidiousness with which that power is exercised. *Id.; see also* *Square D, 476 U.S. at 417* (noting that the lower court properly concluded that the filed rate doctrine applied, not only where rates have been investigated and approved by the governing agency, but whenever tariffs have been filed). Since Ameritech's rates are filed with, and subject to the review of, the state PUCs, this is enough to trigger the applicability of the filed rate doctrine.

The Court is therefore of the opinion that both counts of Plaintiffs complaint, insofar as they seek damages, are barred by the filed rate doctrine. Thus, the claims for damages must be dismissed.

II. Standing

Ameritech additionally argues that Plaintiffs do not have standing to bring either of the counts in their complaint. They assert that Plaintiffs lack standing **[*22]** to bring their Sherman Act claim in Count I because the causal link between the alleged conduct and harm is too indirect, the injury asserted by Plaintiffs is too speculative, and there is a risk of duplicative recovery because of the complex damage estimates which would be required. Ameritech further asserts that Plaintiffs, as consumers in the local telephone market, do not have standing to bring a claim under the 1996 Act. Finally, Ameritech argues that standing should be denied because this case will interfere with the scheme of the 1996 Act. Of course, in light of our conclusion that the filed rate doctrine bars Plaintiffs' damage claims, these arguments only remain potentially dispositive for the injunctive relief sought by Plaintiffs.

In arguing that Count I should fail for Plaintiffs lack of standing to bring such an antitrust claim, Ameritech relies on the factors for denying antitrust standing set forth in the Supreme Court's decision in *American General Contractors v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* ("*AGC*"): (1) "the tenuous and speculative character of the relationship between the alleged antitrust violation **[*23]** and the [] alleged injury"; (2) "the potential for duplicative recovery or complex apportionment of damages"; and (3) "the existence of more direct victims of the alleged conspiracy." *Id. at 545*. Ameritech contends that Plaintiffs' antitrust claims must fail for all of these reasons. The Court, however, is not so convinced. Since Plaintiffs' lawsuit essentially involves consumers suing for overcharges by a monopolist, the Court believes that Plaintiffs do have antitrust standing under the analysis of *AGC*.

Unlike the plaintiffs in *AGC*, who were unions suing an association of building contractors, Plaintiffs are consumers in the market in which Ameritech has allegedly sought to suppress competition. *See Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)* (finding standing where plaintiff was a consumer of psychotherapeutic services and had alleged she was injured by defendants' conspiracy to restrain competition in the market for such services). The *AGC* Court specifically noted that the "Union was neither a consumer nor a competitor in the market in which trade was restrained." *AGC*, 459 U.S. at 539. Thus, as consumers **[*24]** in the market of which they complain, Plaintiffs would seem to have standing in this case.

Furthermore, Ameritech's citation to *Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975)*, a case in which a consumer of telephone services was denied standing, is also unpersuasive. In *Jeffrey*, the "residential subscribers eschewed any direct attack on the rates themselves," instead only attacking the predatory (below-cost) pricing tactics of the defendants in another market, the losses from which defendants allegedly sought to recoup by charging residential customers more. *Id. at 1130*. In contrast, Plaintiffs in this case seek redress for "the payment of supracompetitive prices for telephone services" in the market in which Plaintiffs are consumers. Thus, the Court believes that where a consumer seeks recovery of overcharge damages, alleging that a monopolist (or cartel) excluded competition in the consumer's market, a direct injury has been alleged.

Plaintiff's claims are also not too speculative. Though Ameritech raises legitimate concerns about proving the link between Plaintiffs harm and the alleged misconduct, the Court is cognizant that the determination that market **[*25]** conditions would be different "but for" the defendant's conduct is always a difficult issue in antitrust cases. *See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566-67, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)* ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation."). The Court is persuaded that telephone rates will be lower once the telecommunications industry becomes competitive; thus, if Ameritech is at fault for this industry not yet being competitive, Ameritech's actions have harmed Plaintiffs. Furthermore, Ameritech's worries as to the complexity of any damage calculations, and the potential for duplicative recoveries, are assuaged by the fact that the Court has found that Plaintiffs' damages claims are barred by the filed rate doctrine.

Ameritech's arguments against Plaintiffs' standing under *AGC* are most concisely refuted by the Seventh Circuit's dicta in *Serfecz v. Jewel Food Stores, 67 F.3d 591 (1995)*, *cert. denied 516 U.S. 1159, 116 S. Ct. 1042, 134 L. Ed. 2d 189 (1996)*. Though a shopping mall owner was held not to have standing to bring a Sherman Act claim with regard **[*26]** to the grocery retail market, the court explained that "grocery consumers could maintain an action if defendants' actions stifled competition allowing defendants to engage in monopoly pricing in the retail grocery market." *67 F.3d at 598*. Furthermore, the court cited with approval the following treatise language: "'Because protecting consumers from monopoly pricing is the central concern of antitrust,[…] consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted.'" *Id. at 598, fn. 6* (*quoting* II Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, P 370 at p. 253 (Rev. ed. 1995). Similarly, Plaintiffs in the instant case are consumers seeking relief from the telephone rates which they allege to be the product of anticompetitive activity by a monopolist. Especially considering that the only remaining claims are those seeking injunctive relief, the Court finds that Plaintiffs have standing to assert their Sherman Act claim under the analysis of *AGC. See [Bubar v. Ampco Foods, Inc., 752 F.2d 445](#)* (9th Cir.), *cert. denied*, *472 U.S. 1018, 87 L. Ed. 2d 616, 105 S. Ct. 3481 (1985)* (standing in claims for injunctive relief **[*27]** "are less stringent" than those for damages claims).

As for Count II, Plaintiffs allege that the same anticompetitive acts which comprise the basis for Count I also constitute violations of the Telecommunications Act of 1996. Ameritech seizes on this fact, and thus argues that all of the reasons for denying antitrust standing in Count I equally require dismissal of Count II. As the Court has already explained, however, Plaintiffs have standing to bring an antitrust claim in this case. Therefore, Ameritech's argument that *AGC* should bar Count II is also unpersuasive.

Ameritech lastly contends that the Supreme Court's decision in *Block v. Community Nutrition Institute 467 U.S. 340, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984)*, dictates that Plaintiffs must be denied standing to avoid "severely disrupting the complex and delicate ... scheme" of the *1996 Act. Id. at 348*. Ameritech argues that, like the Agricultural Agreement Act that was at issue in *Block*, the statutory scheme established by the Telecommunications Act of 1996 would be severely undermined if Plaintiffs' lawsuit is allowed to proceed. Thus, Ameritech contends that Plaintiffs should be denied standing on this **[*28]** basis.

In *Block*, consumers of milk products sued to set aside "milk orders" issued by the Secretary of Agriculture setting minimum prices that processors of milk (handlers) must pay to dairy farmers (producers). *Id. at 343-44*. The consumer plaintiffs in *Block* sought lower prices between producers and handlers so that retail prices paid by consumers would also be lower. *Id. at 352 n.3*. Despite the fact that the general purpose of the Act was to promote consumer interests, the Court found the "structure of the Act indicates that Congress intended only producers and handlers, not consumers, to ensure that the statutory objectives would be realized." *Id. at 347*. The Court thus denied the consumer plaintiffs standing, explaining that "consumer suits would undermine the congressional preference for administrative remedies and provide a mechanism for disrupting administration of the congressional scheme." *Id. at 352*.

Ameritech asserts that *Block* is directly on point in this case. Permitting consumer lawsuits to enforce the 1996 Act, Ameritech warns, would upset the scheme fashioned by Congress to implement the de-regulation of the telecommunications industry. **[*29]** Indeed, Plaintiffs' allegations of anticompetitive conduct all involve Ameritech's purported failure to comply with its obligations to competing carriers under the 1996 Act. In order to resolve Plaintiffs' claims, the Court would be required to examine Ameritech's dealings with their competitors and determine what the Act specifically requires and whether Ameritech has complied. In fact, these are precisely the same issues which are currently being addressed by regulatory agencies and federal courts. *See, e.g., AT&T v. Illinois Bell Tel. Co.*, No. 97 C 0886 (N.D. Ill., Coar, J.); *Illinois Bell Tel. Co. v Miller*, No. 97 C 8285 (N.D. Ill., Grady, J.); *AT&T Corp. v. Iowa Utilities Bd., cert. granted U.S. , 139 L. Ed. 2d 867, 118 S. Ct. 879, 1998 U.S. LEXIS 661, 1998 WL 23494 (1998)*.

Plaintiffs respond by citing statutory provisions which seemingly afford them a right to sue. ***HN5***[] *Section 206* of the Communications Act provides that "any common carrier" found to have violated the Act shall "be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation." *47 U.S.C. § 206*. ***HN6***[] *Section 207* further permits "any person claiming to be damaged" by the **[*30]** actions of any common carrier to bring suit for the recovery of these damages. *47 U.S.C. § 207*. Despite these provisions, however, Plaintiffs fail to cite a single case in which consumer plaintiffs have sued to enforce provisions of the 1996 Act. Furthermore, Ameritech notes that the principles of antitrust standing (which limit the class of plaintiffs to those best positioned to seek redress for anticompetitive conduct) must be applied to ensure that Plaintiffs are entitled to bring these claims. Thus, a consideration of the ramifications of allowing Plaintiffs' suit to proceed is appropriate.

The 1996 Act envisions that the opening of the local telephone markets is primarily a matter between the local carriers, carriers seeking entry into the local markets, and the state regulatory commissions. The 1996 Act has established a detailed regime of negotiation, mediation, arbitration, regulatory evaluation and federal court review -- all of which are directed at incumbent local carriers and their prospective competitors. To grant Plaintiffs the injunctive relief they seek (which is all that survives the filed rate doctrine), the Court would have to stick its nose into this complicated **[*31]** morass of regulatory review. This is not something the Court is prepared to do, nor is something that Congress intended. *See* 141 Cong. Rec. S7942, S7958 (June 8, 1995) (statement of Sen. Stevens) ("the intention of the [Act] is to take the regulations of the telecommunications service away from the courts"). Hence, as Ameritech so eloquently states, this suit would merely be a "monkey wrench jammed into the workings of state utility commissions, the FCC and the federal courts."

The Court is thus of the opinion that, because of the potential for frustrating the goals of the 1996 Act, Plaintiffs should not be permitted standing to continue with its claims in this case. In the Court's mind, these claims could severely threaten the delicate balance that Congress has struck in attempting to ease the transition of the telecommunications industry into a competitive marketplace. This is not to say, however, that consumers have no role to play in ensuring compliance with the antitrust laws, as these laws will become increasingly important in preserving the marketplace as it moves toward competition. The Court simply holds that Plaintiffs have no standing to bring claims seeking to require **[*32]** Ameritech to comply with its duties to prospective competitors under the 1996 Act. Thus, Plaintiffs claims must be dismissed in their entirety.

III. Duties Under the 1996 Act

Ameritech finally argues that the 1996 Act imposes no free-standing duties on local exchange carriers, and that therefore Count II does not allege a cognizable cause of action. Count II alleges that Ameritech's anticompetitive acts violate Sections 251, 252, 271 and 272 of the Act. Ameritech contends that these sections merely establish duties that Ameritech owes to prospective competitors, and that these duties are only triggered upon the request of a competitor who is seeking to enter Ameritech's local markets. As their sole response to Ameritech's argument, Plaintiffs again point to *Sections 206* and *207* as providing a right to sue under the Act.

The Court is persuaded that Plaintiffs are not entitled to sue Ameritech for its failure to comply with these sections of the Act. Sections 251 and 252 require Ameritech to provide certain access to its facilities, but only when "any requesting telecommunications carrier" seeks to enter their local market. These duties exist, therefore, only within the framework **[*33]** of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition. ***HN7***[] Likewise, *Sections 271* and *272* merely set forth a checklist of conditions that RBOCs must meet before they will be permitted to compete in the long-distance service market. If there are problems with carriers (such as Ameritech) failing to satisfy these duties to their competitors, the Act establishes the sole remedy: state PUC arbitration and enforcement proceedings, with review by federal courts.

Since these sections do not establish duties that Ameritech owes to consumers, Plaintiffs cannot sue Ameritech for its alleged breach of these duties. Therefore, Count II of Plaintiffs' complaint must also be dismissed on this basis.

CONCLUSION

For the foregoing reasons, Ameritech's motion to dismiss Plaintiffs' complaint is granted with prejudice.

Charles P. Kocoras

United States District Judge

Dated: February 3, 1998

End of Document

David L. Aldridge Co. v. Microsoft Corp.

United States District Court for the Southern District of Texas, Houston Division

February 5, 1998, Decided ; February 5, 1998, Filed; February 5, 1998, Entered

CIVIL ACTION NO. H-96-0198

Reporter

995 F. Supp. 728 *; 1998 U.S. Dist. LEXIS 2226 **

THE DAVID L. ALDRIDGE COMPANY, et al., Plaintiffs, v. MICROSOFT CORPORATION, Defendant.

Disposition: [1]** Microsoft's Motion for Summary Judgment (Docket Entry No. 26) GRANTED IN PART and DENIED IN PART.

Core Terms

Message, operating system, cache, programs, disk, user, tests, disparagement, Interrupt, software, hooking, compatibility, decrease, argues, read-write, functions, box, hard disk, falsity, summary judgment, driver, antitrust, issue of fact, detects, display, court concludes, manufacturer, defamation, facilities, monopoly

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

A motion for summary judgment should be granted if the record, taken as a whole, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] **Summary Judgment, Burdens of Proof**

Fed. R. Civ. P. 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] **Entitlement as Matter of Law, Genuine Disputes**

A party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. The movant accomplishes this by informing the court of the basis for its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If this burden is met, *Fed. R. Civ. P. 56* requires the nonmovant to go beyond the pleadings and to show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a mere scintilla of evidence.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN4[] **Case & Controversy Requirements, Actual Controversy**

Factual controversies surrounding a motion under *Fed. R. Civ. P. 56* are to be resolved in favor of the nonmovant, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. A court will not, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts. Unless there is sufficient evidence for a reasonable jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial.

Torts > Business Torts > Trade Libel > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Trade Libel > General Overview

Torts > Business Torts > Trade Libel > Remedies

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Intentional Torts > Defamation > Procedural Matters

HN5[] **Trade Libel, Elements**

To recover damages for the tort of business disparagement under Texas law, a plaintiff must prove (1) publication by the defendant of disparaging words, (2) that were false, (3) that were published with malice, (4) the absence of any privilege, and (5) that plaintiff suffered special damages. Because falsity is an element of a business disparagement claim, truth is a negative defense.

Torts > Intentional Torts > Defamation > Libel

Torts > Intentional Torts > Defamation > General Overview

HN6[] **Defamation, Libel**

In Texas libel is defined by *Tex. Civ. Prac. & Rem. Code Ann. § 73.001* as a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Torts > ... > Defamation > Elements > General Overview

Torts > Intentional Torts > Defamation > General Overview

HN7[] **Defamation, Elements**

A plaintiff is required to prove falsity as an element of a cause of action for defamation.

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN8[] **Sales (Article 2), Form, Formation & Readjustment**

To recover on a claim of tortious interference with contract a plaintiff must prove (1) the existence of a contract, (2) a willful and intentional act by the defendant that interfered with the contract, (3) the willful and intentional act proximately caused damage to the plaintiff, and (4) actual damages.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN9[] **Intentional Interference, Elements**

To recover for tortious interference with business relations a plaintiff must prove (1) a reasonable probability that the plaintiff would have entered a contract, (2) willful and intentional acts by the defendant effectively interfered with the prospective business relationship, and (3) the plaintiff suffered actual harm.

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN10[] **Intentional Interference, Defenses**

Legal justification is an affirmative defense to tortious interference with business relations and tortious interference with a contract. The affirmative defense of legal justification protects a defendant who provides truthful information about a plaintiff to third parties. One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person truthful information.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Antitrust & Trade Law > Clayton Act > General Overview

HN11[] **Clayton Act, Claims**

The Clayton Act, *15 U.S.C.S. § 15(a)*, limits the class of private persons who may sue on antitrust violations to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. To demonstrate antitrust standing a plaintiff must show (1) injury-in-fact, (2) antitrust injury, and (3) status as a proper plaintiff.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN12[] **Private Actions, Standing**

To establish the first element of standing in an antitrust action, injury-in-fact, a plaintiff must show an injury to its business or property proximately caused by the conduct of the defendant.

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > Doctors & Physicians

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN13[] **Actions Against Healthcare Workers, Doctors & Physicians**

To demonstrate the antitrust injury element of standing a plaintiff must show anticompetitive effects of the defendant's actions; in other words, antitrust injury should be the type of loss that the claimed violations of the antitrust laws would be likely to cause.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN14[] **Private Actions, Standing**

To establish the third element of antitrust standing a plaintiff must show that it is a proper plaintiff. In evaluating this element a court must examine (1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing the plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment.

Torts > Business Torts > Trade Libel > Elements

Torts > Business Torts > Trade Libel > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN15[] **Trade Libel, Elements**

Even if a plaintiff shows falsity in a product disparagement action, it must overcome a presumption that the disparagement had only a de minimis effect on competition. A de minimis effect is presumed for three reasons: (1) it is generally difficult to distinguish mere puffery from patently false statements relied upon by a consumer; (2) the effects of disparagement are speculative at best, especially when the disparagement is not systematic; and (3) most consumers view statements about a competitor cynically, recognizing the inherent bias and lack of objectivity. To satisfy the test for rebutting the de minimis presumption, a plaintiff must prove that the allegedly disparaging statements were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to consumers having little understanding of the subject matter, (5) continued for extended time periods, and (6) not readily susceptible to counter statement, explanation, or other neutralizing effort or offset by the plaintiff.

Evidence > Relevance > Relevant Evidence

HN16[] **Relevance, Relevant Evidence**

A material fact is one that is of consequence to the determination of the action. *Fed. R. Evid. 401*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN17[] **Monopolies & Monopolization, Actual Monopolization**

To prevent a potential expansion of monopoly power under the essential facilities doctrine, the Sherman Antitrust Act imposes a duty on the owner of an essential facility to open it to competitors on a nondiscriminatory basis. To prevail on an essential facilities claim a plaintiff must establish that (1) the defendant is a monopolist, (2) the facility is essential, (3) the defendant has the type of control over the facility that is forbidden by the Sherman Act, (4) duplication of the facility is unreasonable or impractical, (5) the defendant denied the plaintiff use of the facility, and (6) providing access to the plaintiff was feasible.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN18[] **Monopolies & Monopolization, Actual Monopolization**

To establish a monopolist, a plaintiff must show that the company possesses monopoly power in the relevant geographic and product markets. In an essential facilities case a court must define several markets: (1) the relevant product market for the alleged essential facility (the "primary product market"), (2) the relevant product market for the potentially monopolized product (the "secondary product market"), and (3) the relevant geographic markets.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN19[] **Monopolies & Monopolization, Actual Monopolization**

The essential facilities doctrine applies to four situations: (1) natural monopolies; (2) facilities whose duplication is forbidden by law; (3) publicly subsidized facilities that cannot practically be built privately; and (4) the sole facility in the relevant geographic market, i.e., the only facility in town.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN20[] **Monopolies & Monopolization, Actual Monopolization**

Natural monopolies occur in industries having large initial fixed costs but declining marginal production costs.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN21[] **Monopolies & Monopolization, Actual Monopolization**

To establish denial of access a plaintiff must have at the very least sought access to the facility.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN22[] **Monopolies & Monopolization, Actual Monopolization**

A manufacturer is under no obligation to pre-disclose or disclose its knowledge about its products so that competition may arise in the related peripheral hardware, software, and repair service markets.

Counsel: For THE DAVID L ALDRIDGE COMPANY INC dba The Aldridge Company, TECHNICAL PARTNERS, DAVID L ALDRIDGE, plaintiffs: Julius Glickman, Glickman Herlong and Hughes, Houston, TX.

For MICROSOFT CORPORATION, defendant: Ronald D Secrest, Beck Redden and Secrest, Houston, TX.

Judges: SIM LAKE, UNITED STATES DISTRICT JUDGE.

Opinion by: SIM LAKE

Opinion

[*732] ***OPINION AND ORDER***

At issue in this action is the liability of Microsoft Corporation under Texas tort law and federal ***antitrust law*** for the demise in sales of the Cache86 disk cache program. Pending before the court is Microsoft's Motion for Summary Judgment. For reasons explained below the motion will be granted in part and denied in part.

I. *BACKGROUND*

An appreciation of the legal issues in this case requires a basic understanding of computer operating systems in general and Microsoft's Windows95 operating system in particular.

A. Computer Operating Systems

Modern personal computers consist of a microprocessor and several components ("peripheral devices"), including volatile and nonvolatile memory chips; [1] **[**3]** data input devices, **[**2]** such as keyboards and mouses; data storage devices, such as hard and floppy disk drives; [2] output devices, such as printers and monitors; and communication interfaces, such as fax/modems and ethernet connections. Computers only perform operations when told to do so. An operating system is a program that coordinates activities among the various components of the computer and controls the flow of data among them. [3] It is a computer's operating system, for example, that instructs the computer to download data from memory to a disk or to execute the necessary procedures to open a program when requested to do so by the user. While personal computer users could conceivably write their own customized operating system programs, commercially available operating systems are far more desirable to most users.

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[1] Volatile memory is more commonly referred to as "random-access memory" (RAM); while nonvolatile memory is known as "read-only memory" (ROM). Generally speaking, both RAM and ROM are computer chips that store data electronically. The technical details of how this is done are not relevant to this case. Because a computer can only store, read, and delete data in RAM while the computer has power, it is called volatile memory. The data held in RAM disappears when the computer is turned off. The data stored in ROM does not disappear when the computer is off. Because of the way the ROM chip stores the data, however, the computer cannot store fresh data or otherwise alter data stored in ROM. ROM is thus called nonvolatile memory.

[2] Unlike RAM and ROM chips, disk drives store data magnetically on hard or floppy computer disks.

[3] Affidavit of Ralph Lipe (Microsoft senior software development designer) P 2. The affidavits and depositions cited in this Opinion and Order are contained in appendices to Microsoft's Motion for Summary Judgment (Docket Entry Nos. 26-29) and Plaintiffs' Response (Docket Entry No. 31).

[*733] Microsoft Corporation is a software manufacturer that sells numerous computer programs, including the MS-DOS operating system. [4] As personal computers proliferated, MS-DOS became the operating system of choice among users of computers modeled on IBM's personal computer design. [5] Software manufacturers began tailoring their programs to run in conjunction with MS-DOS. [6] Many software companies also wrote programs, known as utilities, to improve the performance of operating systems in general, and MS-DOS in particular. [7] Plaintiffs developed a utility program called Cache86 that accelerated the disk-writing functions of MS-DOS. David L. Aldridge, the owner of The David L. Aldridge Company, originally wrote **[**4]** the computer code for this program. Technical Partners owns the program, and The David L. Aldridge Company markets and sells it. (For simplicity, the court will refer to the three plaintiffs collectively as Aldridge.)

B. Disk Cache Programs

Cache86 is a disk cache program. Disk cache programs are designed to improve the speed at which computers function. [8] An application program such as a word processor will **[**5]** often direct the operating system to download ("write") or upload ("read") data from the computer's hard or floppy disk. Because of the great speed of modern microprocessors the computer cannot physically perform these read-write operations as fast as the microprocessor can process the data. Read-write operations occur more slowly because disk drives are mechanical devices that can only move so quickly, while the rest of a computer's operations occur electrically and are theoretically only limited by the speed of light. The microprocessor must thus often wait idle while the read-write operations are completed.

Disk caches solve this problem by intercepting information that the operating system is reading from or writing to the computer's hard disk and temporarily using vacant portions of the computer's RAM as a pseudo-disk. This allows the operating system to perform the read-write operations electrically **[**6]** instead of using the hard disk. The disk cache program sets aside a portion of RAM to temporarily store data; this set-aside area of memory is called a "cache." When an application program reads data from a disk, the disk cache program copies the data into the set-aside portion of RAM. The next time the application program needs that same data it can read that data electrically from the cache in RAM rather than having to read mechanically from the hard disk. When the application program writes data onto the disk, the disk cache program directs the data to the set-aside cache in RAM. Because reading from and writing to RAM is an electrical operation, the computer can perform these operations much faster than it can with a mechanical disk drive. [9]

The way the Cache86 disk cache utility program functions is important to this case. Aldridge designed Cache86 to improve the performance of MS-DOS. [10] MS-DOS (and versions of Windows that run in conjunction with **[**7]** MS-DOS) performs read-write operations to the hard disk by "calling" a "device driver" [11] -- a program used by operating systems to control peripheral devices such as a hard disk drive. [12] The hard disk drive driver then sends

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[4] DOS stands for "disk operating system." (Lipe Deposition at 47) Operating systems that are capable of controlling disk drives are called disk operating systems. MS-DOS is a version of DOS designed and marketed by Microsoft. (Lipe Deposition at 47) Other disk operating systems include OS/2, Windows NT, Linux, SCO Unix, and Solaris. (Lipe Deposition at 205-07)

[5] Affidavit of Herbert Lyon (plaintiffs' market share expert) P 3 (stating that Microsoft's three operating systems comprised 81% of the operating system market in 1995).

[6] Lipe Affidavit P 8.

[7] Aldridge Deposition at 57.

[8] Lipe Affidavit PP 10, 12; Aldridge Deposition at 15. The version of Cache86 at issue in this case is 5.03.

[9] Aldridge Deposition at 15; Lipe Affidavit PP 10-12.

[10] Aldridge Affidavit P 3.

[11] Lipe Affidavit P 13.

commands to an interface **[*734]** on the microprocessor known as "Interrupt 13." [13] Cache86 monitors Interrupt 13 and intercepts the information and instructions that pass through that interrupt (a process referred to as "hooking"). [14] Cache86 thus reroutes read-write operations to the cache in RAM by hooking Interrupt 13. [15]

C. Windows95

For years Microsoft developed gradually more sophisticated versions of its MS-DOS operating system. Eventually, Microsoft introduced **[**8]** a supplemental operating system, Windows, to run in conjunction with MS-DOS. Windows allowed users to perform tasks by "pointing and clicking" on small pictures ("icons"') displayed on the computer's video screen. This "graphical user interface" enabled users to operate their computers without having to enter typewritten commands into the computer. [16] The evolution of operating systems and extensive advances in computer technology ultimately caused Microsoft to replace MS-DOS and Windows with a new, fundamentally different operating system called Windows95. [17] This new system combined the graphical user interface made popular by Windows with more advanced programming techniques. [18]

Windows95 can operate in three different modes: DOS-compatibility mode, real-mode DOS, and protect mode. When Windows95 operates in DOS-compatibility mode it emulates MS-DOS by calling the hard disk drive in the same manner as MS-DOS. [19] **[**9]** Microsoft included this mode so that Windows95 could run most MS-DOS programs as if they had been designed for use with Windows95. When operating in DOS-compatibility mode, however, Windows95 cannot use several of the new features designed to improve the operating system over its predecessors. [20] Real-mode DOS is a hybrid between DOS-compatibility mode and protect mode. When operating in real-mode DOS the computer remains in protect mode but runs DOS as an application program. In other words, the user has opened DOS as an application program to run under the guidance of protect mode.

When in protect mode the Windows95 operating system functions in a new, fundamentally different way. [21] Among numerous changes and improvements, protect mode uses a different file system [22] and does not use device drivers; instead, in protect mode Windows95 interacts directly with peripheral devices. While the file system in MS-DOS cannot function while **[**10]** MS-DOS performs other tasks, the file system in protect mode can operate simultaneously while the operating system performs other tasks, a property known as "multitasking." Moreover, while MS-DOS only allows data to flow in one direction at a time between the operating system and the hard drive, protect mode permits data to flow in both directions at the same time, a property known as "asynchronous input-output." [23]

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[12] Deposition of Russ Arun (Microsoft program manager during Windows95 development) at 30.

[13] Lipe Affidavit P 13; Lipe Deposition at 43.

[14] Aldridge Deposition at 16; Lipe Affidavit P 13.

[15] Aldridge Affidavit P 4; Lipe Affidavit P 13.

[16] Lipe Affidavit P 5.

[17] Lipe Affidavit PP 5-7.

[18] Lipe Affidavit PP 3, 5-7.

[19] Lipe Affidavit P 4; Lipe Deposition at 47-48.

[20] Lipe Affidavit P 8.

[21] Lipe Deposition at 46-49.

[22] Computers store programs as files. "File system" refers to the manner in which an operating system indexes, stores, searches for, and retrieves programs on the hard and floppy disks.

[23] Lipe Affidavit P 7.

How protect mode accomplishes these features is not relevant to this action except for one important point: Protect mode does not perform read-write operations only through Interrupt 13. [24] Protect mode also uses other interrupts. Because Cache86, like many other disk cache programs, operates under the assumption that the computer will transfer all **[**11]** read-write data through Interrupt 13, Cache86 only monitors and hooks the data passing through Interrupt 13. [25] Since computers running under Windows95 protect mode do not exclusively use Interrupt 13, a disk cache program like Cache86 will not **[*735]** reroute all of the data sent between the microprocessor and the hard disk. [26] Programs such as Cache86 that hook Interrupt 13 thus posed a serious concern for the designers of Windows95. [27]

For example, while a disk cache program performs read-write operations of the data passing through Interrupt 13 to the cache in RAM, Windows95 protect mode could be sending data to the hard disk directly or through other data pathways. If that occurred, the data stored in RAM might no longer be synchronized with the corresponding information on the hard disk. [28] This would create the danger of a problem known **[**12]** as "data corruption" that could cause the computer to lose all of the information stored on the hard disk. [29] **[**13]** Microsoft wanted to avoid this problem [30] while ensuring that computer owners could continue to use their existing MS-DOS and Windows-compatible programs. [31]

Because of the popularity of MS-DOS and Windows, over the years software developers sold thousands of programs specifically designed to function with the MS-DOS and Windows operating systems. [32] When Microsoft designed its new operating system it wanted to ensure that computer users could still use their MS-DOS-and Windows-compatible programs with the new system; in other words, Microsoft intended to make Windows95 "backwardly compatible." [33] The problem Microsoft faced was to design Windows95 with the capability of running MS-DOS- and Windows-compatible programs, while preventing programs that hook Interrupt 13 (or certain other interrupts) from corrupting hard disk data. The way that Microsoft solved this problem ultimately led to this lawsuit.

First, Microsoft designed **[**14]** Windows95 to detect programs that hooked certain interrupts, including Interrupt 13. [34] Some programs that hook Interrupt 13, such as data encryption or antivirus programs, remain valuable on

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[24] Lipe Affidavit P 14; Lipe Deposition at 48-49.

[25] Aldridge Deposition at 16; Lipe Affidavit P 15.

[26] Lipe Affidavit PP 14-15.

[27] Lipe Affidavit P 14.

[28] Lipe Affidavit P 15.

[29] In his affidavit Microsoft senior software development designer Ralph Lipe gave a specific example of what could happen:

> One of the most frequently accessed portions of a hard disk is the index of its contents, called the File Allocation Table (or FAT). Because the FAT is being read from and written to constantly, it is almost always present in the disk cache's memory space [the cache in RAM]. If the copy of the FAT being maintained in the disk cache gets out of synchronization with the original FAT on the hard disk, the entire hard disk can be rendered useless when the FAT on the hard disk is overwritten by the copy of the FAT in the disk cache's memory space. Once the index to the contents of a hard disk has been corrupted, the operating system will be unable to find particular information on the hard disk, which typically is not stored sequentially. That includes, for example, not only documents created using a word processing program like Microsoft Word but also the word processing program -- and perhaps the operating system itself.

Lipe Affidavit P 17.

[30] Lipe Deposition at 47.

[31] Lipe Affidavit P 8; Lipe Deposition at 47.

[32] Arun Deposition at 105; Lipe Affidavit P 8.

[33] Lipe Affidavit P 8.

[34] Lipe Affidavit P 18.

computers using Windows95. [35] Others, such as some older computer games, will not function in protect mode; to use them, Windows95 must operate in an alternative mode. [36] In addition, disk cache utility programs remain useful when Windows95 is running in DOS-compatibility mode or real-mode DOS. [37] In these modes Windows95 performs read-write operations in the same manner as MS-DOS and Windows, and a disk cache program operating in conjunction with either mode offers the same advantages it provides to a computer that uses MS-DOS. Microsoft therefore designed Windows95 not to delete programs it detected hooking interrupt 13. [38]

Instead, Microsoft **[**15]** created a list of all known hooking programs that could potentially corrupt the hard disk in a file named **[*736]** SETUPC.INF. [39] When Windows95 begins "booting up" on a computer (the process by which an operating system loads itself into the computer when it is turned on) it refers to this file and looks for any of the listed programs. If Windows95 finds a program listed in SETUPC.INF, it disables the program. [40]

Because it was impossible to identify all existing hooking programs, [41] and because it was likely that new hooking programs would be marketed after the release of Windows95, [42] Microsoft also added a second program to protect against data corruption from unrecognized hooking programs. [43] When Windows95 detects a program hooking Interrupt 13 that is not listed in SETUPC.INF., it refers to this second file, IOS.INI. This file contains a list of known hooking programs that will *not* cause **[**16]** data corruption while Windows95 runs in protect mode. [44] If the detected hooking program appears on this "safe" list Windows95 continues operating in protect mode; if not, Windows95 automatically shifts from protect mode to DOS-compatibility mode. [45] In DOS-compatibility mode the operating system performs read-write operations in the same way as MS-DOS and Windows, and read-write data and commands pass only through Interrupt 13. Because DOS-compatibility mode functions the same way that a disk cache program like Cache86 assumes the operating system will function, there is no risk that the disk cache program will corrupt data. [46] Succinctly stated, Windows95 protects against data corruption from unrecognized programs that hook Interrupt 13 by shifting into DOS-compatibility mode. [47]

[17]** A computer operating in DOS-compatibility mode loses the efficiencies and advancements provided by Windows95's preferred mode of operation, protect mode, and is no more efficient than one using MS-DOS. [48] To alert users of the shift to DOS-compatibility mode Microsoft programmed Windows95 to display a series of messages when Windows95 detects that an unfamiliar program has triggered the shift in modes. [49] These messages are the basis of all of Aldridge's claims against Microsoft.

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[35] Lipe Affidavit P 21.

[36] Lipe Deposition at 27-28.

[37] Aldridge Affidavit P 19; Lipe Deposition at 28.

[38] Lipe Deposition at 44.

[39] Arun Deposition at 147-49; Lipe Affidavit P 18 & Exhibit A.

[40] Lipe Affidavit P 18; Lipe Deposition at 230-31.

[41] Arun Deposition at 153; Lipe Affidavit P 19.

[42] Arun Deposition at 153.

[43] Lipe Affidavit P 19.

[44] Arun Deposition at 31-32, 34-37; Lipe Deposition at 40-42.

[45] Arun Deposition at 31-32; Lipe Deposition at 41.

[46] Lipe Deposition at 170.

[47] Arun Deposition at 53; Lipe Affidavit P 19.

[48] Lipe Affidavit P 8.

[49] Lipe Affidavit P 23.

D. Windows95's Treatment of Cache86

Microsoft did not list Cache86 in either the disabling file (SETUPC.INF) [50] **[**18]** or the safe list (IOS.INI). [51] Thus, upon detecting Cache86, Windows95 will not disable it because it is not listed in SETUPC.INF. Because Cache86 does not appear on the safe list in IOS.INI, however, Windows95 will shift into DOS-compatibility mode. [52]

Microsoft programmed Windows95 to display a generic warning to the user the first time an unknown program causes a shift to DOS-compatibility mode. [53] The warning appears **[*737]** in a box on the video screen captioned "Performance Warning." The box contains a triangle with an exclamation point. Next to the triangle is a statement to the user. (The statement is the same for any program that causes such a shift, but Windows95 inserts the filename of the particular triggering program into the statement. [54]) The statement that Windows95 displays when it detects Cache86 and shifts to MS-DOS compatibility mode says

> A new MS-DOS resident program named **[**19]** 'C86EXTEN' [55] may decrease your system's performance. Would you like to see more information about this problem?

Below this statement are a "yes" box and a "no" box. [56] (The court will refer to this message box as Message One.)

[20]** If a user clicks on the yes button, a new message box appears on screen, captioned "System Properties" and subcaptioned "Performance." This box includes a statement that

> C86EXTEN in AUTOEXEC.BAT [57] **[**21]** forces MS-DOS compatibility mode. Compatibility mode paging [58] reduces overall system performance. [59]

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[50] Lipe Affidavit P 18 & Exhibit A.

[51] Arun Deposition at 138, 150; Lipe Deposition at 59-60, 74. The parties dispute whether Microsoft knew of Cache86 when it designed Windows95. Compare Lipe Affidavit P 4 (stating that the architect of Windows95 did not know Cache86 existed until the filing of this action), with Aldridge Affidavit PP 12-14 (explaining the several conversations he had over the years with various Microsoft personnel concerning Cache86).

[52] Lipe Affidavit PP 18-22.

[53] Aldridge Deposition at 83; Arun Deposition at 89-90; Deposition of Terrence Lee Canup (former vice-president for marketing for the David L. Aldridge Co.) at 105-06; Lipe Deposition at 156-57. Windows95 will display these messages in only two circumstances -- when a user installs Windows95 on a computer that already has Cache86 stored on its hard disk, or when a user attempts to install Cache86 on a computer that already operates under Windows95. (Aldridge Deposition at 83; Lipe Deposition at 157-59) In either case, Windows95 only displays the initial warning message the first time it detects Cache86.

[54] Lipe Affidavit P 25.

[55] C86EXTEN is the name of the file in Cache86 that hooks Interrupt 13. (Aldridge Affidavit P 17; Lipe Affidavit P 25) Windows95 identifies programs that hook Interrupt 13 by their filename, not their brand name.

[56] Lipe Affidavit Exhibit B.

[57] A computer's AUTOEXEC.BAT file contains the master task list that MS-DOS and Windows95 initially use to set up the computer when it is first turned on. AUTOEXEC stands for "automatic execution." BAT tells the operating system that this is a batch file. Batch files contain a series of commands for the computer to execute.

When a user starts MS-DOS or Windows95 the operating system searches the hard disk for AUTOEXEC.BAT and executes each command contained in that file. AUTOEXEC.BAT is thus an essential file opened by the operating system every time a user turns on the computer.

When a user installs Cache86 on a computer Cache86 edits the AUTOEXEC.BAT file to include a command to open and begin running Cache86. The computer recognizes Cache86 by its filename, C86EXTEN. Thus, when the message says "C86EXTEN in AUTOEXEC.BAT," it is telling the user that it found Cache86 in the list of programs to run in AUTOEXEC.BAT.

[58] "Paging" is the process by which an operating system transfers ("swaps") data out of RAM and onto the hard disk. (Lipe Deposition at 32) "Compatibility mode paging" refers to the manner in which DOS-compatibility mode swaps data.

(Message Two)

Users can obtain additional information by highlighting either sentence in Message Two and clicking on the "details" box. A new message box, captioned "Windows Help," then appears on the screen with Message Two. If the user highlights the first sentence of Message Two and clicks on the details box the following explanation of the first sentence appears in the Windows Help box:

> **[Filename] in AUTOEXEC.BAT forces MS-DOS compatibility mode.**
> Windows was unable to identify the specified memory-resident program which was loaded in your Autoexec.bat file.
> If you no longer need this program, remove it from your Autoexec.bat file. Otherwise, contact the manufacturer of this program to see if an updated version is available. Windows will not perform optimally while this program is loaded. [60]

(Message Three) **[**22]**

If a user highlights the second sentence in Message Two and clicks on the "details" box the following explanation of the second sentence appears in the Windows Help box:

> **Compatibility mode paging reduces overall system performance.**
>
> Windows was unable to identify a real-mode driver or memory-resident program loaded in your Config.sys [61] **[**23]** or Autoexec.bat file. You will see another message that lists the name of the driver or program causing the problem.
>
> **[*738]** Because Windows could not identify the driver or program, it has switched to MS-DOS compatibility mode to ensure the program will run. However, this slows down overall performance. To improve performance, remove the program or driver causing the problem, or contact its manufacturer for an updated version. [62]

(Message Four)

Windows95 only displays Message One once for each program that causes Windows95 to shift into DOS-compatibility mode. [63] If the user takes no action, either by removing the program or by installing an updated version compatible with Windows95, the computer shifts into DOS-compatibility mode, but does not warn the user each time it again detects the previously discovered hooking program. [64] Windows95 will not display Messages Two, Three, or Four again without directions to do so from the user. [65]

[24]** Microsoft included two of its own disk cache programs with Windows95: VCACHE and SMARTDRV. VACHE is a disk cache designed by Microsoft to operate safely while Windows95 functions in protect mode. [66] Like

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[59] Lipe Affidavit Exhibit C.

[60] Lipe Affidavit Exhibit D (emphasis in original).

[61] CONFIG.SYS is a special file that allows a user to modify some of the features and functions of the operating system. The operating system opens this file and configures the operating system to the file's specifications before it executes the commands in AUTOEXEC.BAT.

[62] Lipe Affidavit Exhibit E (emphasis in original).

[63] Aldridge Deposition at 83; Arun Deposition at 89-90; Canup Deposition at 105-06; Lipe Deposition at 156-57.

[64] If Windows95 detects another, previously undiscovered, program that hooks Interrupt 13 but which does not appear on the safe list, it will display Message One again, referencing the new program this time. (Lipe Deposition at 159)

[65] Deposition of Terrence Canup (vice-president for marketing of The Aldridge Company) at 106-07; Deposition of Peggy Foerch (Microsoft's technical writer responsible for drafting the warning messages) at 48-49; Lipe Deposition at 194.

[66] Lipe Deposition at 117, 137.

Windows95, it functions according to principles and assumptions fundamentally different from those of Cache86 and SMARTDRV. For purposes of this action it is not relevant how VCACHE functions, except to note that rather than assuming that all read-write operations will pass through Interrupt 13, VCACHE takes advantage of Windows95's asynchronous input-output system. [67] Aldridge does not allege that Cache86 competes with VCACHE.

Like Cache86, SMARTDRV caches read-write data by hooking Interrupt 13. [68] Windows95's treatment of SMARTDRV is different, however, from its treatment of Cache86. When Windows95 detects SMARTDRV it does not shift into DOS-compatibility mode. [69] Microsoft developed a way to allow Windows95 to remain in protect mode **[**25]** despite the presence of its SMARTDRV disk cache program on the system without risking data corruption. [70] Microsoft reprogrammed SMARTDRV so that it can determine if Windows95 is running in protect mode. [71] If it is, SMARTDRV disables itself by reducing the size of the reserved cache in RAM to zero. [72] Because the cache size is zero it does not save any data, and the read-write data passes directly to the hard disk. [73] The data hooked by SMARTDRV therefore remains synchronized with the hard disk. By eliminating the danger of asynchronization Microsoft avoided the possibility of data corruption and placed SMARTDRV on the safe list in IOS.INI. [74] Aldridge alleges that Cache86 competes with SMARTDRV.

[**26] E. Events Leading to this Action

Although Microsoft did not release Windows95 for sale to the public until August of 1995, [75] it distributed trial versions of the operating system as part of a series of design tests, called "beta tests," before the public **[*739]** release. Some 400,000 computer users received test versions of Windows95 as part of this program. [76] These "beta testers" could run Windows95 on their computers and report any problems to Microsoft. [77] Microsoft then examined the reports generated by the beta testers in an effort to correct any problems with Windows95. Once Microsoft was satisfied that it had identified and corrected the problems, it began publicly selling Windows95.

Although Aldridge had previously beta tested earlier versions of Windows, [78] Microsoft did not send him a beta-test version of Windows95, [79] nor did Aldridge ask for one. [80] During one of the last rounds of beta testing **[**27]** Aldridge obtained a beta-test version of Windows95 from a third party. [81] In April of 1995, four months before the

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[67] Lipe Deposition at 138-39.

[68] Lipe Deposition at 114.

[69] Lipe Affidavit P 11; Lipe Deposition at 109-10.

[70] Lipe Deposition at 110, 112, 115.

[71] Lipe Deposition at 122-24.

[72] Lipe Deposition at 65, 110, 119.

[73] Lipe Deposition at 69.

[74] When SMARTDRV detects a shift into real-mode DOS (a mode where there is no danger of losing synchronicity) it enlarges the size of the cache in RAM so that the program can operate as intended. (Lipe Deposition at 65, 116)

[75] Arun Deposition at 134.

[76] Lipe Deposition at 200-01.

[77] Lipe Deposition at 26.

[78] Aldridge Affidavit P 12.

[79] Aldridge Affidavit P 9.

[80] Aldridge Deposition at 24, 31, 33.

[81] Aldridge Affidavit P 7; Aldridge Deposition at 109.

general release of Windows95, Aldridge discovered that Windows95 would display messages when it detected Cache86 and would shift into DOS-compatibility mode. [82]

Sales of Cache86 began to decline even before the general release of Windows95. [83] Aldridge later developed an upgraded version of Cache86 (version 6.0) that functioned like SMARTDRV and was compatible with Windows95. [84] The release of version 6.0 had little impact on the plummeting sales of Cache86, however. In addition to the decline in sales of individually packaged units of Cache86, Aldridge claims to have lost at least one contract with a major software designer, Quarterdeck, to include Cache86 in a software program designed to improve **[**28]** performance of computer games. [85]

Aldridge blames Microsoft for the lost sales of Cache86. [86] Aldridge alleges that Microsoft is liable under Texas law for

(1) business disparagement,
(2) defamation,
(3) tortious interference with contract, and
(4) tortious interference with business relations.

Aldridge also alleges that Microsoft is guilty of actual and attempted monopolization in violation of section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. In support of the antitrust claims Aldridge relies on the doctrines of product disparagement and essential facilities.

F. Microsoft's Motion for Summary Judgment

Microsoft has **[**29]** moved for summary judgment, asserting truth as a defense to all claims. With respect to Aldridge's antitrust claims Microsoft also argues that any damages from product disparagement were *de minimis*, that Windows95 is not an essential facility, and that Microsoft did not deny access to Windows95.

HN1[] A motion for summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *New York Life Ins. Co. v. Travelers Ins. Co., 92 F.3d 336, 338 (5th Cir. 1996)*; *Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 758 (5th Cir. 1996)*. The Supreme Court has interpreted the plain language of ***HN2***[] *Rule 56* as mandating "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)*.

[*740] ***HN3***[] As the party **[**30]** moving for summary judgment Microsoft "must 'demonstrate the absence of a genuine issue of material fact,' but need not *negate* the elements of the nonmovant's case." *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)* (*en banc*) (emphasis in original) (quoting *Celotex, 106 S. Ct. at 2553*). "The movant accomplishes this by informing the court of the basis for its motion, and by identifying portions of the record which highlight the absence of genuine factual issues." *Rizzo v. Children's World Learning Ctrs., Inc., 84 F.3d 758, 762 (5th Cir. 1996)* (citing *Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992))*. If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little, 37 F.3d at 1075*.

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[82] Aldridge Deposition at 108.

[83] Aldridge Affidavit P 31; Aldridge Deposition at 109-10, 153-54.

[84] Aldridge Affidavit P 10.

[85] Aldridge Affidavit P 31.

[86] Plaintiffs' Original Complaint P 32.

If Microsoft meets this burden *Rule 56* requires Aldridge, as the nonmovant, to go beyond the pleadings and to show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1180 (5th Cir. 1996)*; *Wallace v. Texas Tech Univ.,* ***[**31]*** *80 F.3d 1042, 1046-47 (5th Cir. 1996)*. The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a mere scintilla of evidence. *Wallace, 80 F.3d at 1047*; *Little, 37 F.3d at 1075*.

HN4[] Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Wallace, 80 F.3d at 1047*; *accord, S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996)*. The court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Washington Capital DUS, Inc., 66 F.3d 89, 92* (5th Cir.), *as modified*, *70 F.3d 26 (5th Cir. 1995)*. Unless there is sufficient evidence for a reasonable jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)*; *Texas Instruments, 100 F.3d at 1179*.

II. *STATE LAW CLAIMS*

A. Burden of Proof

Microsoft argues that none **[**32]** of Aldridge's state law claims have merit because all of the Windows95 messages are true. Whether falsity is an element of Aldridge's state law claims, or an affirmative defense to these claims, is an important issue because this distinction governs which party has the burden of proof. If truth is an affirmative defense Microsoft has the burden of proof at trial, and to prevail on its summary judgment motion Microsoft must prove that the messages are true. *See Exxon Corp. v. Oxxford Clothes, Inc., 109 F.3d 1070, 1074* (5th Cir.), *cert. denied*, *139 L. Ed. 2d 231, 118 S. Ct. 299 (1997)*. On the other hand, if falsity is an element of Aldridge's causes of action, Aldridge must produce summary judgment evidence that would support a jury finding of falsity to *avoid* summary judgment for Microsoft. *See EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1180 (5th Cir. 1996)*. In this context truth is a negative defense. *See Emmons v. Southern Pac. Transp. Co., 701 F.2d 1112, 1118 (5th Cir. 1983)* (explaining that negative defenses are those tending to disprove at least one element of a plaintiff's cause of action).

1. *Business Disparagement*

HN5[] To recover damages for the tort **[**33]** of business disparagement under Texas law a plaintiff must prove

(1) publication by the defendant of disparaging words,

(2) that were false,

(3) that were published with malice,

(4) the absence of any privilege, and

(5) that plaintiff suffered special damages.

See Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 766 (Tex. 1987). Because falsity is an element of a business disparagement claim, truth is a negative defense. Aldridge must raise a fact issue as to the falsity of the Windows95 messages to avoid summary judgment on this claim.

2. *Defamation*

There are two forms of defamation; libel and slander. ***HN6***[] In Texas libel is defined by statute:

> **[*741]** A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Tex. Civ. Prac. & Rem. Code Ann. § 73.001 **[**34]** (Vernon 1986). Although Texas has no parallel statutory provision for slander, Texas courts recognize a common-law cause of action for slander. *See* *Cain v. Hearst Corp., 878 S.W.2d 577, 580 (Tex. 1994)*. Because Microsoft's messages appear in graphic form they are governed by the law of libel.

The Texas libel statute does not list falsity as an element, and in a later section of the statute truth is identified as a defense. *See* *Tex. Civ. Prac. & Rem. Code Ann. § 73.005* (Vernon 1986). Because falsity is not a statutorily required element of a libel claim, but an independent ground for denying recovery, the statutory scheme implies that truth is an affirmative defense on which a defendant has the burden of proof at trial.

Texas appellate courts are divided on whether truth is an affirmative defense to a libel claim. *Compare* *Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 623* (Tex. App. -- Houston [14th Dist.] 1984, writ ref'd n.r.e.) ("For many years the courts of Texas have held in libel and slander actions that truth of the defamatory statements is an affirmative defense, and the burden of proving truth by a preponderance of the evidence is on the defendant."), *with* **[**35]** *A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71, 79-80* (Tex. App. -- Fort Worth 1982, writ ref'd n.r.e.) (holding that the *First Amendment* requires the plaintiff to prove falsity when claiming defamation).

The Texas Supreme Court has not squarely addressed the issue. In *Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994)*, the court was asked to decide if Texas recognized the tort of false-light invasion of privacy. One of the reasons the court held that Texas does not recognize that tort was because false-light invasion of privacy duplicates the existing cause of action for defamation. In particular, the court observed that both torts require proof of falsity. *Cain, 878 S.W.2d at 580*.

In *Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995)*, however, the court characterized truth as an affirmative defense to a slander action. Johnson worked as a store manager for Randall's. One day she bought several items from the store but failed to pay for a large wreath she held in her hands at the checkout station. The checkout clerk charged Johnson for the other items and asked her if there was anything else to ring up; Johnson said no. Randall's investigated the incident **[**36]** and eventually suspended Johnson, who then sued on a variety of theories, including slander. Johnson alleged that statements made by employees during the investigation were slanderous. Because the statements were true and protected by the employer's qualified investigative privilege, the Texas Supreme Court affirmed summary judgment in favor of Randall's. The court made no reference to the statement in *Cain* that "defamatory statements must be false in order to be actionable." *Cain, 878 S.W.2d at 580*. Instead, the court stated that "in suits brought by private individuals, truth is an affirmative defense to slander." *Randall's, 891 S.W.2d at 646* (footnote omitted). [87]

[37]** The Fifth Circuit has interpreted Texas law as requiring the ***HN7***[] plaintiff to prove falsity as an element of a cause of action for defamation. *See* *Brown v. Petrolite Corp., 965 F.2d 38, 43 (5th Cir. 1992)* ("A defamation plaintiff must prove that the allegedly defamatory **[*742]** language is false."). Because this court is bound to follow

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[87] The parties' briefs shed little light on the confusing status of Texas law. Aldridge does not even address the defamation claim in his response to Microsoft's motion for summary judgment, except for a one-sentence footnote arguing for denial on the same grounds as for business disparagement. (Plaintiffs' Response at 17 n.10) Microsoft argues both that falsity is an element of Aldridge's defamation claim and that the truth of the messages is a complete defense to the defamation claim, without ever attempting to harmonize this inconsistency. (Microsoft's Motion for Summary Judgment at 18)

Fifth Circuit precedent on the interpretation of Texas substantive law, [88] the court will require Aldridge to prove that the messages were false to establish his defamation claim.

3. *Tortious Interference with Contract and with Business Relations*

HN8[] To recover on a claim of tortious interference with contract a plaintiff must prove

(1) the existence of a contract,

(2) a willful and intentional act by the defendant that interfered with the contract,

(3) the willful and intentional act proximately caused damage to the plaintiff, and

(4) **[**38]** actual damages.

See Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 210 (Tex. 1996); *Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 926 (Tex. 1993)*; *Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991)*; *see also Thrift v. Hubbard, 44 F.3d 348, 356 (5th Cir. 1995)*.

HN9[] To recover for tortious interference with business relations a plaintiff must prove

(1) a reasonable probability that the plaintiff would have entered a contract,

(2) willful and intentional acts by the defendant effectively interfered with the prospective business relationship, and

(3) the plaintiff suffered actual harm.

See Kiepfer v. Beller, 944 F.2d 1213, 1220 (5th Cir. 1991).

HN10[] Legal justification is an affirmative defense to both causes of action. *Id.* (tortious interference with business relations); *Texas Beef Cattle Co., 921 S.W.2d at 210* (tortious interference with contract); *Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989)* (tortious interference with contract). The affirmative defense of legal justification protects a defendant who provides truthful information about a plaintiff to third parties. *Tarleton State Univ. v.* ***[**39]*** *Rosiere, 867 S.W.2d 948* (Tex. App. -- Eastland 1993, writ dism'd by agr.). As the Restatement of Torts explains, "one who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person . . . truthful information." *Restatement (Second) of Torts § 772* (1979); *accord id. § 772 cmt. b* ("There is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another.").

Because the falsity of Microsoft's messages is an element of Aldridge's business disparagement and defamation claims, to avoid summary judgment on these claims Aldridge must present evidence that the messages are false. Conversely, because truth is an affirmative defense to Aldridge's tortious interference claims, Microsoft must prove that the messages are true to prevail on its motion for summary judgment on these claims.

B. The Evidence

Aldridge generally alleges that the four messages falsely state that Cache86 reduces overall system performance. **[**40]** [89] He also alleges that the following specific statements are false:

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[88] *See Satcher v. Honda Motor Co., 984 F.2d 135, 137* (5th Cir.), *vacated on other grounds*, *993 F.2d 56 (5th Cir. 1993)*.

[89] Aldridge Affidavit PP 15, 25; Plaintiffs' Responses to Interrogatory Nos. 3-6.

(1) Cache86 is a new program (as to Message One), [90]

(2) Cache86 *may* decrease overall system performance (as to Message One), [91]
(3) Cache86 is a problem (as to Messages One and Four), [92]

[*743] (4) Cache86 forces MS-DOS compatibility mode (as to Messages Two and Four), [93]
(5) MS-DOS compatibility mode reduces overall system performance (as to Messages Two and Four), [94]
(6) Cache86 is unknown to Windows95 (as to Messages Three and Four), [95]
(7) Windows95 will not perform optimally while Cache86 is on the system (as to Message Three), [96]
(8) Windows95 switched to MS-DOS compatibility mode to ensure that Cache86 will run (as to Message Four), [97] and
(9) performance will improve if Cache86 is removed (as to Messages Three and Four). [98]

Because many of Aldridge's allegations represent only minor semantic differences, and because neither Aldridge nor Microsoft discusses all of the allegations separately in their motion papers, the court will group them into three general categories:

(1) Was Cache86 new and unknown to Windows95,

(2) does Cache86 **[**41]** decrease system performance, and
(3) does Windows95 call Cache86 a problem, and if so, is this statement true?

[42]** 1. *Was Cache86 new or unknown to Windows95*

Aldridge argues that Message One calls Cache86 a new program, despite the fact that Cache86 has been on the market since 1989. [99] Windows95 considers "new" any program installed after Windows95 had last been run on the computer. [100] Aldridge admits that Windows95 only labels Cache86 as new when a user has "newly introduced" the program on a computer running Windows95. [101] **[**43]** The evidence also establishes that Cache86 was unknown to Microsoft. The software engineer responsible for including the warning messages testified that he had never heard of Cache86 before this lawsuit. [102] Windows95 will generate the warning messages only if a program that hooks Interrupt 13 is not on the safe list. Because Cache86 is not on the safe list it is accurate for Windows95 to characterize Cache86 as unknown. Because it is accurate for Windows95 to call Cache86 new and unknown, these statements cannot support any of Aldridge's state law claims.

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[90] Aldridge Affidavit P 20; Plaintiffs' Responses to Interrogatory No. 3.

[91] Aldridge Affidavit PP 18, 25; Plaintiffs' Responses to Interrogatory No. 3 (emphasis added). The conditional language of this statement requires that it be considered separately from the alleged general statement that Cache86 reduces overall system performance.

[92] Aldridge Affidavit PP 22, 28; Plaintiffs' Responses to Interrogatory Nos. 3, 6.

[93] Aldridge Affidavit P 24; Plaintiffs' Responses to Interrogatory No. 4.

[94] Plaintiffs' Responses to Interrogatory No. 4.

[95] Aldridge Affidavit P 27; Plaintiffs' Responses to Interrogatory No. 5.

[96] Aldridge Affidavit P 26; Plaintiffs' Responses to Interrogatory No. 5.

[97] Plaintiffs' Responses to Interrogatory Nos. 5-6.

[98] Aldridge Affidavit P 29; Plaintiffs' Responses to Interrogatory Nos. 5-6.

[99] Aldridge Deposition at 85; Plaintiffs' Responses to Interrogatory Nos. 3, 5.

[100] Foerch Deposition at 34.

[101] Aldridge Deposition at 83.

[102] Lipe Deposition at 63, 87, 89-90.

2. *Does Cache86 decrease system performance*

Microsoft argues that results of tests conducted both by Microsoft and Aldridge confirm that Cache86 decreases performance of the Windows95 operating system. First, Microsoft offers the results of tests conducted by one of its employees, Steve Goan, and repeated by its expert, Jeffrey Brumfield. Goan used a pair of computer programs, Winstone 96 and Winbench 96, commonly employed to evaluate computer performance. Microsoft argues that these tests show that computers using Windows95 do not perform as well with Cache86.

Aldridge's expert, Gavin Clarkson, questions the reliability of these test results. Goan ran the tests on computers having only eight megabytes of RAM. [103] Clarkson states that users of disk cache programs usually have more than eight megabytes of RAM on their computers. Because a computer's performance **[*744]** is directly related to the amount of RAM, Clarkson states that the amount of memory in the computer influenced the performance scores on Microsoft's tests. [104] Although Microsoft protests **[**44]** that Aldridge presents no evidence that a typical computer user had more than eight megabytes of RAM when Windows95 was first marketed, Clarkson, who was himself a disk cache program user, had at least sixteen megabytes of RAM on his computers at that time. [105] This testimony raises a fact issue whether Cache86, or the amount of memory on the computers, caused the low Winstone and Winbench test scores.

Clarkson also states that Winstone and Winbench were designed to test hardware performance and are not appropriate for evaluating the performance of software. [106] Microsoft counters that Clarkson once worked for a company that used the programs to test **[**45]** software, that Microsoft used Winstone and Winbench during the development of Windows95, and that Aldridge also used these test programs to evaluate software performance. Although Microsoft's evidence undercuts Clarkson's opinion, he has nevertheless raised a fact issue whether Winstone and Winbench are proper testing tools.

Clarkson also criticizes Goan for not properly controlling the testing environment. Clarkson states that "running the same Winstone test on the same machine twice should net the same result." [107] Yet, two separate Winstone tests yielded somewhat different scores. One test produced a score of 12.70 on an undefined rating scale, while another test produced a score of 12.47. Without an explanation of how Winstone calculates its results, however, the court cannot determine whether the 0.23 difference in test scores has any statistical significance or is within the expected scientific error. The court therefore concludes that Aldridge has not shown that this difference **[**46]** undermines the integrity of the Winstone test results. [108]

Microsoft also argues that tests run by Aldridge confirm that Cache86 decreases the performance of the Windows95 operating system. David Aldridge and his staff set up a series of tests to measure the time for a computer to perform twenty-eight common functions run two times on two different hard-disk drives (a total of 112 tests). [109] **[**48]** **[*745]** With Cache86, Windows95 performed each series of tests faster (by 13, 4, 23, and 15

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[103] Goan Deposition at 11. Computers use the binary number system to store and compute data. Each bit of data is stored as a 1 or 0. Eight bits make a byte of data. One megabyte consists of one million bytes. A computer that has eight megabytes of RAM can thus store a maximum of sixty-four million bits in RAM.

[104] Clarkson Affidavit P 9.

[105] *Id*.

[106] Clarkson Affidavit P 6.

[107] Clarkson Affidavit P 10.

[108] Aldridge's argument that Winstone and Winbench are biased because some components of the programs were provided by Microsoft fails to raise a fact issue. Even if Microsoft provided components for the programs there is no evidence that this caused any bias in results of the tests run with the programs.

[109] The 28 functions were:

(1) Start Win95 GUI (Graphical User Interface) using Microsoft Scandisk to verify all disks error free

seconds, respectively) than Windows95 alone. [110] Although at first blush these results appear to contradict its argument, Microsoft asks the court to disregard the first, or "boot-up," function in each **[**47]** series of Aldridge's tests. Since users boot-up a computer only once a day, Microsoft argues that booting up is not a normal operation, and that test times that include boot-up time do not accurately reflect overall system performance. If the test times are recalculated to exclude boot-up, Windows95 with Cache86 performed slower in the first, second, and fourth series of tests. [111] The court is not persuaded by this argument because the senior Microsoft software designer

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(2) Open the CD-CABIN PRO database with 2 million plus entries (stored with internal compression off)

(3) Search the CD-CABIN PRO database for BMP entries in the Clipart group finding 5,000 plus results

(4) Open test image JPG format using CD-CABIN PRO viewer

(5) Open test image TIF format using CD-CABIN PRO viewer

(6) Open test image JPG format using Image-In

(7) Open test image TIF format using Image-In

(8) Open test image JPG format using Picture Publisher

(9) Open test image TIF format using Picture Publisher

(10) Start Arts & Letters Express

(11) Open test file in Arts & Letters

(12) Create a new document in WordPro

(13) Create a new document in MS Word 7.0

(14) Create a new Document in WordPerfect

(15) Open new spreadsheet in 123

(16) Open new spreadsheet in Excel

(17) Open new spreadsheet in Quatro Pro

(18) Use CD-CABIN PRO to "log" the current Windows drive

(19) Use CD-CABIN PRO to create thumbnails from 1014 test BMP images

(20) Save the thumbnail library created by the previous test

(21) Xcopy 1015 files from current drive to C:

(22) Copy 1015 files to different directory on the current Windows drive

(23) Xcopy 1015 files with the system set with 32 bit hard drive drivers manually disabled

(24) Copy 1015 files to new directory on current Windows drive with 32 bit drivers manually disabled

(25) Delete 1015 files

(26) Delete 1015 files with 32 bit drivers manually disabled

(27) Open Approach database file

(28) Start Microsoft Access.

(Aldridge Affidavit Exhibit B, at DLA-04849) Aldridge and his staff also conducted four series of tests on systems operating Windows95 and disk compression software to see if Cache86 enhanced or dampened performance. (Aldridge Affidavit P 18) Because these tests did not isolate the effect of Cache86 on overall performance, they are not relevant.

[110] With Cache86, Windows95 performed each series of tests in 464, 449, 430, and 433 seconds, respectively. Without Cache86, Windows95 performed each series in 477, 453, 453, and 448 seconds, respectively. Aldridge Affidavit Exhibit B, at DLA-04851.

admitted that boot-up time is relevant to system performance. [112] At the very least, Aldridge has raised a fact issue on this point.

However, Microsoft does raise a salient point about Aldridge's tests. Aldridge focuses on the aggregate time for each series of functions and ignores the fact that many individual functions were slower with Cache86. Cache86 caused slower performance in nine of the first series of tests, seventeen of **[**49]** the second series of tests, eight of the third series of tests, and thirteen of the fourth series of tests, for a total of 47 out of 112 slower functions. [113]

To summarize the relevance of the parties' test results on the truthfulness of the Windows95 messages about Cache86's performance, Aldridge has raised a fact issue as to the reliability of Microsoft's Winstone and Winbench tests. The tests performed by Aldridge show that Cache86 does slow the performance of Windows95 in some circumstances.

As an alternative to arguing that tests prove that Cache86 *always* improves performance, Aldridge argues that Cache86 improves performance when programs other than Cache86 cause Windows95 **[**50]** to shift into DOS-compatibility mode. Aldridge claims that since DOS-compatibility mode performs read-write operations the way MS-DOS and Windows do, Cache86 necessarily provides the same performance advantages to that mode as it does for DOS and Windows. Aldridge also claims that Cache86 always improves performance in real-mode DOS.

Because Aldridge's argument only focuses on whether Cache86 improves performance of the two subordinate modes, the court concludes that it is not relevant to the broader question whether Cache86 decreases *overall* Windows95 system performance. Aldridge's argument would be relevant only to the extent that any of the four Microsoft messages can be read as stating that Cache86 *always decreases* Windows95 performance. Having examined the parties' summary judgment evidence of the effect of Cache86 on Windows95's performance, the court turns to the actual text of each message to determine if the statements about performance are false.

(a) Message One

Message One states:

> A new MS-DOS resident program named C86EXTEN *may* decrease your *system's performance*. Would you like to see more information about *this problem*? [114]

[51] [*746]** The parties agree that Microsoft defines system performance as "the overall speed at which a computer performs a wide variety of functions." [115] Message One states that Cache86 *may* decrease performance; it does not affirmatively declare that Cache86 *will* do so. Clarkson performed three different tests designed to simulate typical uses of a personal computer. These tests measured the speed at which the computer operated a spreadsheet, a word processor, and web graphics program. Windows95 ran faster with Cache86 than without it in the spreadsheet and word processing tests. However, Windows95 ran 2.4859 seconds slower with Cache86 on the web graphics test. [116] Cache86 thus improved performance for two "typical" uses, but decreased performance in

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[111] Subtracting boot-up time (column 1 in the table of results included in Exhibit B of Aldridge's Affidavit) from the Windows95-only tests produces total times of 392, 364, 388, and 359 seconds, respectively. Subtracting boot-up time from the Windows95-with-Cache86 tests produces total times of 407, 390, 387, and 376 seconds, respectively. The Windows95-only results for the first, second, and fourth series are 15, 26, and 17 seconds faster. Windows95 with Cache86 was faster in the third series by one second.

[112] Lipe Deposition at 77-79.

[113] See Aldridge Affidavit Exhibit B, at DLA-04851; Affidavit of Microsoft Attorney Eric J.R. Nichols, Exhibit A (offering a demonstrative exhibit illustrating relative performances of each test in each series). Cache86 caused faster performance in 19 of the 112 total tests. Results were identical in the remaining 46 tests. *Id*.

[114] Lipe Affidavit Exhibit B (emphasis added).

[115] Plaintiffs' Response at 2; Microsoft's Motion for Summary Judgment at 13.

the third. The tests run by David Aldridge's employees also showed that Cache86 decreases performance in many circumstances. While Cache86 yielded faster aggregate times for each of the four series of tests, Cache86 caused slower performance in many of the individual functions. Because both David Aldridge's and Clarkson's tests show that Cache86 sometimes decreased performance, the court concludes that Aldridge has not shown that Message **[**52]** One falsely states that Cache86 decreases performance.

(b) Message Two

Message Two states:

> C86EXTEN in AUTOEXEC.BAT forces MS-DOS compatibility mode. Compatibility mode paging reduces overall system performance. [117]

Windows95 shifts into MS-DOS compatibility mode when it detects an unfamiliar program, such as Cache86, hooking Interrupt 13. The very manner in which Cache86 functions compels Windows95 to shift modes to avoid the danger of data corruption. Message Two does not state that *Cache86* reduces overall system performance; it states that "*compatibility mode paging* reduces overall system performance." Aldridge argues that the court should assume that most users **[**53]** will not understand the term "compatibility mode paging." This argument may support a claim that the message is confusing, but not that it is false. The court concludes that Aldridge has failed to present evidence that Message Two is false.

(c) Message Three

Message Three states:

> Windows was unable to identify the specified memory-resident program which was loaded in your Autoexec.bat file.
>
> If you no longer need this program, remove it from your Autoexec.bat file. Otherwise, contact the manufacturer of this program to see if an updated version is available. *Windows will not perform optimally while this program is loaded*. [118]

This message tells users that Windows95 will not perform optimally because of Cache86. Neither party has explained what "optimal" performance is. The Oxford English Dictionary defines optimal as "best or most favourable, most satisfactory." 10 Oxford English Dictionary 876 (2d ed. 1989). [119] A fair reading of Message **[**54]** Three tells users that Windows95 will not perform at its best as long as Cache86 remains on the system. Unlike the conditional language of Message One, this is a more universal statement. Aldridge's tests and those conducted by his expert raise a fact issue whether this statement is always true.

(d) Message Four

Message Four states:

> Windows was unable to identify a real-mode driver or memory-resident program loaded in your Config.sys or Autoexec.bat file. You will see another message that lists the name of the driver or program causing the problem.
>
> Because Windows could not identify the driver or program, it has switched to MS-DOS compatibility mode to ensure the program will run. However, *this slows down overall performance*. To improve performance, **[*747]**

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[116] Clarkson Affidavit PP 3 and 4.

[117] Lipe Affidavit Exhibit C.

[118] Lipe Affidavit Exhibit D (emphasis added).

[119] *Accord*, Random House College Dictionary 933 (rev. ed. 1980) ("best; most desirable"); Webster's Third New International Dictionary (Unabridged) 1584 (Philip Babcock Gove ed. 1961) ("most desirable or satisfactory").

> remove the program or **[**55]** driver causing the problem, or contact its manufacturer for an updated version. [120]

Message Four notifies users that Windows95 has switched modes and explains why. Thus far, the message is true. It then says that this switch in modes slows down overall performance. However, Aldridge's tests and those of his expert demonstrate that in some instances performance does not decline. For example, in the four series of twenty-eight tests run by Aldridge's employees, performance time did not change in 46 of the 112 tests. In 19 of the tests performance time improved when Cache86 ran in DOS-compatibility mode. Aldridge has thus produced some evidence that Message Four is false when it unequivocally states that overall performance slows down.

3. *Does Windows95 call Cache86 a problem, and if so, is this statement true*

Aldridge argues that Messages One and Four falsely characterize Cache86 as the problem that causes decreased performance. "This problem" as used **[**56]** in Message One clearly refers to the problem of decreased system performance, not to Cache86. The Microsoft software designers responsible for drafting the message confirmed that they intended the phrase "this problem" to refer to decreased system performance, not to Cache86 or any other program. [121] Furthermore, even if the message could be read as calling Cache86 a problem, it only characterizes Cache86 as a potential problem. The message states that Cache86 "*may* decrease" performance; it does not say that Cache86 *will* decrease performance. As explained above, such a statement is true.

Message Four makes two references to a problem. The first paragraph states "Windows was *unable to identify* a real-mode driver or memory-resident program loaded in your Config.sys or Autoexec.bat file. You will see another message that lists the *name of the driver or program causing the problem*" (emphasis added). The "problem" here is the inability to **[**57]** identify the triggering program. Cache86 is not on the disabling list in SETUPC.INF or on the safe list in IOS.INI. Thus, the statements in this paragraph are true.

The second paragraph of Message Four states:

> Because *Windows could not identify* the driver or program, it has switched to MS-DOS compatibility mode to ensure the program will run. However, *this slows down overall performance*. To improve performance, remove *the program or driver causing the problem*, or contact its manufacturer for an updated version. (Emphasis added.)

It is unclear whether the problem referred to in this paragraph is the inability of Windows95 to identify Cache86 or slow overall performance. Which meaning Microsoft intended is an issue of fact for the jury. While a statement that the inability to identify Cache86 was a problem would be true, a statement that Cache86 causes the problem of slow overall performance would raise an issue of fact as to its truthfulness. The court concludes that Aldridge has raised an issue of fact as to Message Four.

C. Conclusion

There is no issue of material fact as to Messages One and Two. Aldridge has failed to support the business **[**58]** disparagement and defamation claims by producing evidence of the falsity of Messages One and Two, and Microsoft has met its affirmative burden on the tortious interference claims by establishing the truth of these two messages. The court will therefore grant Microsoft's motion for summary judgment on all of Aldridge's state law claims as to Messages One and Two. Because issues of material fact preclude summary judgment as to Messages Three and Four, and because Microsoft relies solely on its defenses of truth in its motion for summary judgment on all of the state-law claims, the court will deny summary judgment as to Messages Three and Four.

III. *ANTITRUST CLAIMS*

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[120] Lipe Affidavit Exhibit E (emphasis added).

[121] Lipe Deposition at 161-62; Foerch Deposition at 35-37.

Aldridge alleges that Microsoft violated section two of the Sherman Act, *15 U.S.C. [*748] § 2*, under the theories of product disparagement and essential facilities. As a preliminary matter Microsoft challenges Aldridge's standing to assert an antitrust claim.

A. Antitrust Standing

HN11[] The Clayton Act, *15 U.S.C. § 15(a)*, limits the class of private persons who may sue on antitrust violations to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." **[**59]** To demonstrate antitrust standing Aldridge must show

(1) injury-in-fact,

(2) antitrust injury, and

(3) status as a proper plaintiff.

Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997) (citing *McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1341 (5th Cir. 1988))*. In analyzing Aldridge's standing under this test the court should assume that Microsoft has committed the antitrust violations alleged and then determine whether Aldridge has shown the three elements of standing. *123 F.3d at 306*.

HN12[] To establish the first element, injury-in-fact, Aldridge must show an injury to its business or property proximately caused by the conduct of Microsoft. *See Doctor's Hospital, 123 F.3d at 305*; *United Indus., Inc. v. Eimco Process Equip. Co., 61 F.3d 445, 448 (5th Cir. 1995)*; *Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992)*. Aldridge's evidence shows a significant decline in sales of Cache86 after November of 1994 when Microsoft began releasing early versions of Windows95 for beta testing [122] and establishes the necessary causal link between the claimed injury (lost sales) and **[**60]** the alleged antitrust violations (denial of access to Windows95 and disparagement of Cache86).

Aldridge must next show antitrust injury. This is different from the requirement that a plaintiff show market-wide injury to competition, which is often a component of substantive antitrust liability. *Doctor's Hosp., 123 F.3d at 305*. ***HN13***[] To demonstrate the antitrust injury element of standing a plaintiff must show anticompetitive effects of the defendant's actions; in other words, antitrust injury should be the "type of loss that the claimed violations of the antitrust laws would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 1577, 23 L. Ed. 2d 129 (1969)*; *see Bell v. Dow Chem. Co., 847 F.2d 1179, 1182 n.4 (5th Cir. 1988)*. Lost sales and declining market share, as alleged by Aldridge and supported by Aldridge's summary judgment evidence, [123] are the types of losses that would likely result from an anticompetitive campaign **[**61]** of product disparagement or denial of access to an essential facility.

HN14[] To establish the third element of antitrust standing Aldridge must show that it is a proper plaintiff. In evaluating this element the court must examine

(1) whether Aldridge's injuries or their causal link to Microsoft are speculative,

(2) whether other parties have been more directly harmed, and

(3) whether allowing Aldridge to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment.

See McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1341 (5th Cir. 1988). Aldridge's evidence of lost sales of Cache86 demonstrates that neither Aldridge's injuries nor their causal link to Microsoft's alleged

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[122] Aldridge Affidavit P 31 & Exhibit C.

[123] Aldridge Affidavit PP 31 and 32 & Exhibit C; Lyon Affidavit P 5 & Exhibit A.

product disparagement and denial of access to Windows95 are speculative. Nothing submitted by the parties indicates that any other party has suffered harm more directly; and allowing Aldridge's **[**62]** antitrust claims to proceed will not risk multiple lawsuits, duplicative recoveries, or complex damage apportionment. The court concludes that Aldridge has standing under the Clayton Act to pursue antitrust claims against Microsoft.

B. Product Disparagement

Microsoft argues that Aldridge cannot succeed on the product disparagement claim because the allegedly disparaging information is true and because the anticompetitive **[*749]** effect of any disparaging remarks is *de minimis*. An evaluation of whether Aldridge's damages were *de minimis* encompasses the question of whether the statements were false. The court will therefore consider Microsoft's truth defense as part of its evaluation of Microsoft's *de minimis* defense.

HN15[] Even if a plaintiff shows falsity it must overcome a presumption that the disparagement had only a *de minimis* effect on competition. *American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 108 F.3d 1147, 1151, 1152 (9th Cir. 1997)*; *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 288 n.41 (2d Cir. 1979)*; *see* IIIA Areeda & Turner, *supra*, § 782b, at 260-61 (rev. ed. 1996). Courts and commentators **[**63]** presume a *de minimis* effect for three reasons:

(1) it is generally quite difficult to distinguish mere puffery from patently false statements relied upon by a consumer;

(2) the effects of disparagement are speculative at best, especially when the disparagement is not systematic; and

(3) most consumers view statements about a competitor cynically, recognizing the inherent bias and lack of objectivity of such statements.

See American Prof'l Testing Serv., 108 F.3d at 1152; IIIA Areeda & Hovenkamp, *supra*, § 782d, at 263 (rev. ed. 1996).

At the suggestion of Professors Areeda and Hovenkamp, courts have adopted a strenuous test for rebutting the *de minimis* presumption. To satisfy this test a plaintiff must prove that the allegedly disparaging statements were

(1) clearly false,

(2) clearly material,

(3) clearly likely to induce reasonable reliance,

(4) made to consumers having little understanding of the subject matter,

(5) continued for extended time periods, and

(6) not readily susceptible to counter statement, explanation, or other neutralizing effort or offset by the plaintiff.

National Ass'n of Pharm. **[**64]** *Mfrs., Inc. v. Ayerst Lab., 850 F.2d 904, 916 (2d Cir. 1988)*; IIIA Areeda & Hovenkamp, *supra*, § 782b, at 261 (rev. ed. 1996).

Aldridge concedes that falsity is an essential element of its product disparagement claim. The alleged false statement or misrepresentation must amount to more than mere puffery by the defendant. *General Communications Eng'g, Inc. v. Motorola Communications & Elecs., Inc., 421 F. Supp. 274, 289-90 (N.D. Cal. 1976)*; *see* IIIA Areeda & Hovenkamp, *supra*, § 782d, at 263 (rev. ed. 1996). Because Aldridge has failed to show that Message One and

Two are false, proof of Aldridge's product disparagement claim must rely on Messages Three and Four. [124] The court is persuaded that a fact issue exists as to the clear falsity of these two messages.

In addition to showing clear **[**65]** falsity, Aldridge must show that the challenged messages are clearly material. ***HN16***[] A material fact is one "that is of consequence to the determination of the action." *Fed. R. Evid. 401*; *see* 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5164, at 40 (1978). Aldridge argues that the messages meet this factor because they bring into question the marketability of Cache86 by telling users that it may or does decrease performance. The court agrees that Aldridge has raised a fact issue as to the clear materiality of the four messages.

Aldridge must next show that the challenged messages were clearly likely to induce reliance. Message One is captioned as a "Performance Warning," and the message box includes an exclamation point, which implies urgency. The message invites the user to view further information, suggesting that the operating system has anticipated these circumstances and can explain what is happening. [125] Message Two appears in a message box captioned as "System Properties." **[*750]** In addition to the message about Cache86, the box contains diagnostic information about the computer, such as the amount of available memory, the current mode in which **[**66]** Windows95 is operating, and whether certain auxiliary hardware devices (PCMCIA cards, for example) are running. [126] Messages Three and Four appear in boxes captioned "Windows Help," implying that the information contained in the messages will assist the user. [127] Microsoft acknowledges that it sought to make all four messages understandable to assist the user in knowing what to do. [128] The court concludes that Aldridge has raised a fact issue as to the reliance factor.

Aldridge also has established the fourth factor -- that Microsoft published the messages to consumers who had little understanding of the subject matter. Microsoft admits that it assumed users would not understand terms like DOS-compatibility mode. [129]

[67]** To satisfy the fifth factor Aldridge must show that the messages were displayed for long periods of time. Aldridge argues that "the warnings are continued for a prolonged period because Windows95 generates them every time it detects CACHE86 on the computer." [130] The court does not agree. Message One appears only once. When the user acknowledges Message One it disappears from the video screen and will not reappear unless the user takes Cache86 off the computer and later reinstalls it. [131] None of the three other messages automatically appear on the screen; the user must seek them out. [132] None of the other messages remain on display after the computer is turned off. Because the messages do not appear for extended periods of time, the court concludes that Aldridge has failed to raise a fact issue as to the fifth rebuttal factor.

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[124] Although the court has found that Messages One and Two are true, in the interest of thoroughness the court will also evaluate Messages One and Two under the remaining *de minimus* rebuttal factors.

[125] Lipe Affidavit Exhibit B.

[126] Lipe Affidavit Exhibit C.

[127] Lipe Affidavit Exhibits D and E.

[128] Foerch Deposition at 22.

[129] Foerch Deposition at 64-66.

[130] Plaintiffs' Response at 24.

[131] *See supra* note 63 and accompanying text; Lipe Deposition at 159.

[132] Users may view Messages Two through Four by accessing the "control panel" window of Windows95. The control panel will then display Message Two. (Lipe Deposition at 160-61) By highlighting either of the two sentences in Message Two, a user may then bring up Messages Three and Four. None of the messages remain on the screen after the control panel window is closed or the computer is turned off.

[68]** The sixth factor requires Aldridge to show that the messages were not readily susceptible to explanation or neutralization. Aldridge argues it had no way of neutralizing these warnings until it was too late, and that it did not receive a copy of Windows95 until April of 1995, four months before the general release of Windows95. Aldridge also argues that Microsoft should have informed it about the new read-write system and told it how to avoid triggering the switch to DOS-compatibility mode.

The court is not persuaded by these arguments. Microsoft did not have an affirmative duty to predisclose the messages or the new design of Windows95 to Aldridge. As the Second Circuit has observed:

> [A] firm may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is introduced. . . . It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances **[**69]** to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated.

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 (2d Cir. 1979) (citation omitted).

Messages Three and Four encourage users to contact the manufacturer of Cache86 for an updated version of Cache86 as an alternative to removing the program. Aldridge could have countered these messages by giving information to users who called. Even if no users responded, Aldridge could have designed **[*751]** an updated version of Cache86 that would operate under Windows95 protect mode without triggering the messages. (In fact, Aldridge eventually did market such a product, known as Cache86 version 6.0.) The fact that Aldridge took no action, despite knowing that Windows95 was being developed and despite learning from beta-testers at least a year before Windows95 was introduced that it would display warning messages about Cache86, severely undercuts Aldridge's argument that the messages were not susceptible to explanation or neutralization. [133] The court concludes that Aldridge has failed to raise a fact issue as to the sixth factor.

[70]** Because Aldridge has failed to show that Messages One and Two are clearly false and has failed to show that any of the four messages continued for extended periods or that they were not readily susceptible to explanation or neutralization, the court concludes that Aldridge has failed to rebut the strong presumption that any damage caused by Microsoft's allegedly disparaging messages was *de minimis*. Aldridge's claim of anticompetitive product disparagement therefore fails.

C. Essential Facilities

Aldridge alleges that Windows95 is an essential facility because all software must operate under an operating system, Windows95 is the most prevalent system, [134] and if software cannot function under Windows95 it is not usable to most computer users. Aldridge argues that by disabling or disparaging all competing disk cache programs Microsoft denied Aldridge access to Windows95. Aldridge also contends that Microsoft prevented disk cache developers from updating their programs to operate under Windows95, and thereby continuing to compete in the disk cache market, by not disclosing design details about Windows95 to disk cache developers. Microsoft responds

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[133] Terrence Canup, who was then vice-president for marketing of the Aldridge Company, testified that the issuance of the new Windows95 operating system was general knowledge in the computer industry two or three years before it was commercially released in August of 1995. Six to eight months before Aldridge obtained an advance copy of Windows95 in April of 1995, half a dozen beta-testers had reported the Windows95 messages about Cache86 to Canup. Canup reported this to David Aldridge, who did nothing other than express interest. Aldridge did not attempt to replicate the messages the beta-testers had seen, ask Microsoft about the messages, or upgrade Cache86 to make it compatible with Windows95. (Canup Deposition at 24-27, 70-73)

[134] Plaintiffs' Response at 18.

that Windows95 is not **[**71]** an essential facility, and even if it were, Microsoft did not deny Aldridge access to it. [135]

Often criticized, [136] the essential facilities doctrine nevertheless remains a viable part of the federal antitrust laws. The doctrine protects a competitor from having to enter an additional market with large capital requirements in order to compete. *Fishman v. Estate of Wirtz, 807 F.2d 520, 540 (7th Cir. 1986)*. "The core concern of the doctrine is that a monopolist possesses a resource that is 'essential' in some sense for the business of someone else, but that the monopolist refuses to share." IIIA Areeda & Hovenkamp, *supra*, P 772a, at 177 (rev. ed. 1996). By controlling the "essential" facility, a monopolist can potentially extend its monopoly power "from one stage **[**72]** of production to another, and from one market into another." *MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983)*; *accord* *Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9, 12 (1st Cir. 1987)*; IIIA Areeda & Hovenkamp, *supra*, P 771a, at 172 (rev. ed. 1996). ***HN17***[] To prevent this potential expansion of monopoly power the Sherman Act imposes a duty on the owner of an essential facility to open it to competitors on a nondiscriminatory basis. *Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976, 983 (9th Cir. 1988)*; *Hendricks Music Co. v. Steinway, Inc., 689 F. Supp. 1501, 1509 (N.D. Ill. 1988)*; IIIA Areeda & Hovenkamp, *supra*, P 771a, at 172 (rev. ed. 1996). [137]

[73]** **[*752]** To prevail on an essential facilities claim a plaintiff must establish that

> (1) the defendant is a monopolist,
>
> (2) the facility is essential,
>
> (3) the defendant has the type of control over the facility that is forbidden by the Sherman Act, [138]
>
> (4) duplication of the facility is unreasonable or impractical,
>
> (5) the defendant denied the plaintiff use of the facility, and
>
> (6) providing access to the plaintiff was feasible.

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[135] Microsoft also asserts truth as a defense to Aldridge's essential facilities claim. Microsoft presents no authority, however, that falsity is an element of this claim or that truth is a defense to it.

[136] *See, e.g.*, IIIA Areeda & Hovenkamp, *supra*, P 771c, at 176 (rev. ed. 1996).

[137] As Professors Areeda and Hovenkamp explain:

> The essential facility doctrine concerns vertical integration -- in particular, the duty of a vertically integrated monopolist to share some input in a vertically related market, which we call market # 1, with someone operating in an upstream or downstream market, which we shall call market # 2. If the facility is truly "essential," then the # 1 monopoly facility also establishes a # 2 monopoly.

IIIA Areeda & Hovenkamp, *supra*, P 771a, at 172 (rev. ed. 1996).

[138] Most cases articulate four elements for showing a violation of the essential facilities doctrine. The first of these elements is commonly stated as "control of the essential facility by a monopolist." *MCI Communications Corp., 708 F.2d at 1132*; *accord* *Ferguson, 848 F.2d at 983*; *City of College Station v. City of Bryan, 932 F. Supp. 877, 887 (S.D. Tex. 1996)*; *TCA Bldg. Co. v. Northwestern Resources Co., 873 F. Supp. 29, 39 (S.D. Tex. 1995)*. However, this element requires proof that

> (1) the defendant is a monopolist,
>
> (2) the facility is essential, and
>
> (3) the defendant has the type of control over the essential facility forbidden by the Sherman Act.

Because the customary first element consists of three "subelements" a plaintiff must prove as part of its case, for clarity's sake the court lists these subelements as separate elements.

See Twin Lab., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569, 570 (2d Cir. 1990); Ferguson, 848 F.2d at 983; MCI Communications Corp., 708 F.2d at 1132; City of College Station v. City of Bryan, 932 F. Supp. 877, 887 (S.D. Tex. 1996); TCA Bldg. Co. v. Northwestern Resources Co., 873 F. Supp. 29, 39 (S.D. Tex. 1995); International Audiotext Network, Inc. v. AT&T Co., 893 F. Supp. 1207, 1220-21 (S.D.N.Y. 1994), *aff'd*, 62 F.3d 69 (2d Cir. 1995); IIIA Areeda & Hovenkamp, *supra*, P 773c, at 208 (rev. ed. 1996).

[74]** 1. *Is Microsoft a monopolist*

HN18[] To establish that Microsoft is a monopolist Aldridge must show that Microsoft possesses monopoly power in the relevant geographic and product markets. In an essential facilities case the court must define several markets:

(1) the relevant product market for the alleged essential facility (the "primary product market"),

(2) the relevant product market for the potentially monopolized product (the "secondary product market"), and

(3) the relevant geographic markets.

Herbert Lyon, Aldridge's market share expert, concludes (and Microsoft does not dispute) that the relevant primary market is the worldwide market for personal computer operating systems, and the relevant secondary market is the United States market for disk cache programs. [139] **[**75]** Aldridge must also show that Microsoft possessed the power to control prices or exclude competition in the market for personal computer operating systems. Lyon's report and affidavit conclude that Microsoft has such monopoly power, and Microsoft's summary judgment papers do not dispute this conclusion. [140]

2. *Is Windows95 essential*

The purpose of the antitrust laws is to promote competition. State Oil Co. v. Khan, 522 U.S. 3, 139 L. Ed. 2d 199, 118 S. Ct. 275, 282 (1997); Doctor's Hosp., Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 306 (5th Cir. 1997). To show that a monopolist's facility is essential a plaintiff must first demonstrate that the facility is critical to the plaintiff's own competitive viability. *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 539 (7th Cir. 1986); TCA Bldg. Co. v. Northwestern Resources Co., 873 F. Supp. 29, 39 (S.D. Tex. 1995); IIIA Areeda & Hovenkamp, *supra*, PP 773a, 773b, at 199, 202 (rev. ed. 1996). The plaintiff must then demonstrate that sharing the facility is vital **[*753]** to enhancing competition in general. IIIA Areeda & Hovenkamp, *supra*, P 773b3, at 206 (rev. ed. 1996). A facility is essential under the antitrust laws only when it is vital to both the plaintiff's individual competitive **[**76]** viability and the viability of the market in general.

Aldridge only addresses the first requirement, arguing that without access to Windows95, "Cache86 cannot run, cannot be sold, and therefore cannot compete in the software market." [141] The court agrees that Cache86, like any commercial software program, must be compatible with an operating system in order to function on a computer. However, Aldridge has not produced any evidence that Cache86 cannot run on other operating systems in the primary market, such as IBM's OS/2 system. In fact, Cache86 does run, as it was designed to do, on at least two other operating systems, MS-DOS and Windows. [142] Lyon estimated that MS-DOS and Windows had a 21.5% share of the operating-system market in 1996, the year after Microsoft allegedly denied Aldridge access to Windows95. Aldridge offers no evidence that a 21.5% market share made those operating systems inadequate "facilities." Furthermore, although Lyon also predicts that the market share for MS-DOS and Windows will decline to 0.4% by 2000, Lyon presented no opinion or evidence about the present or projected market share of operating systems produced by firms other than Microsoft. Aldridge **[**77]** has failed to show that it cannot compete viably in the secondary market of disk cache programs by using operating systems other than Windows95.

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[139] June 1, 1997, report of Lyon, attached as Exhibit A to his affidavit.

[140] The court emphasizes that it has made no independent finding or holding that Microsoft is a monopolist. The issue has simply not been joined by Microsoft.

[141] Plaintiffs' Reply Brief [Docket Entry No. 35] at 10.

[142] Aldridge Affidavit P 3.

Nor has Aldridge presented any evidence of the effect of Windows95 on competition in general in the secondary market for disk cache programs. While demand for *Windows95-compatible* disk cache programs may have declined sharply or even disappeared, Aldridge presents no evidence that the entire relevant secondary product market for disk cache programs has disappeared.

Lyon opines that by including its own disk cache software (SMARTDRV) with Windows95 and by disabling non-Microsoft disk cache programs, or displaying warnings about them, "Microsoft effectively owns 100% of the relevant market for disk cache utilities operating within the domain of the Windows95 operating system." [143] But the relevant secondary market is disk cache programs in general, not disk cache programs **[**78]** operating within the domain of the Windows95 operating system. Although Lyon may be correct that there is effectively no competition in the "submarket" of Windows95-specific disk cache programs, that fact does not establish that Windows95 is vital to competitors in the disk cache program market.

Even had Aldridge brought evidence to support both requirements of this element, the court concludes as a matter of law that in this case Windows95 is not essential to the disk cache program market under the Sherman Act. Cache86 relies upon an imperfection in the design of MS-DOS and Windows -- the practice of passing all read-write information between the hard disk and microprocessor through Interrupt 13. This imperfection caused slow performance, and Aldridge developed the Cache86 program to overcome it and to improve the speed of MS-DOS and Windows. Microsoft, the maker of those two operating systems, chose an alternative method for improving performance; it designed the new Windows95 operating **[**79]** system to avoid this imperfection in its primary mode. In essence, Microsoft's operating systems are essential to Aldridge only to the extent that the systems operate less efficiently.

Acceptance of Aldridge's arguments would mean that Microsoft could be punished under the antitrust laws for improving its own product. Such a result would inhibit, not promote, competition in the market. The antitrust laws do not require a competitor to maintain archaic or outdated technology; even monopolists may improve their products. *See* *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 (2d Cir. 1979)* ("It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which **[*754]** the proper functioning of our competitive economy rests.").

The essentialness issue in this case presents a crucial distinction from previous cases applying the essential facilities doctrine. The plaintiffs here marketed a product, Cache86, whose sole purpose was to improve the operation of the allegedly monopolized product. In the usual essential facilities case the alleged facility is a conduit for the distribution of another product. Sports stadiums facilitate **[**80]** the display of indoor sports. *See* *Fishman v. Estate of Wirtz, 807 F.2d 520, 532 (7th Cir. 1986)*; *Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 989 (D.C. Cir. 1977)*. Railroad bridges permit continuation of rail service and delivery of freight. *See* *United States v. Terminal R.R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 509, 56 L. Ed. 810 (1912)*. Telecommunications networks distribute information. *See* *MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1093 (7th Cir. 1983)*. Ski mountains provide access to recreational skiing. *See* *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1521 (10th Cir. 1984)*, *aff'd on other grounds*, *472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*.

While Windows95 does facilitate the use of application software, Cache86 is not such a product; it is a utility program designed to improve the distributing product. Windows95 is analogous to a long-distance telephone network. It is very doubtful that a long-distance carrier like AT&T could be liable to a copper wire manufacturer under the essential facilities doctrine for switching from copper wire to faster fiber-optic lines. While it could be argued that **[**81]** access to AT&T's long-distance network may be essential to competitors in the market for delivery of long-distance telephone service, the network would not be essential to the market for copper wire. Similarly, even were the court to assume for purposes of argument that Windows95 could be an essential facility for application software, such as a word processing program, it is not essential to a market whose sole purpose is to improve on imperfections in the facility at issue.

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[143] Lyon Affidavit P 6.

3. *Does Microsoft have the type of control over the facility that is forbidden by the Sherman Act*

Courts have only applied the ***HN19***[] essential facilities doctrine to four situations:

(1) natural monopolies;

(2) facilities whose duplication is forbidden by law;

(3) publicly subsidized facilities that cannot practically be built privately; and

(4) the sole facility in the relevant geographic market, i.e., "the only facility in town."

See Twin Lab., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990); *International Audiotext Network, Inc. v. AT&T Co., 893 F. Supp. 1207, 1220-21 (S.D.N.Y. 1994)*; IIIA Areeda & Hovenkamp, *supra*, PP 771c, 773b2, at 176, 205 (rev. **[**82]** ed. 1996).

Microsoft does not hold a natural monopoly over operating systems. ***HN20***[] Natural monopolies occur in industries having large initial fixed costs but declining marginal production costs. *Greenwood Utils. Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1502 (5th Cir. 1985)*. In such circumstances a single firm can produce more efficiently than multiple firms because the single firm can constantly expand its capacity at a much lower cost than the fixed costs required to enter the market. *Fuchs v. Rural Elec. Convenience Coop. Inc., 858 F.2d 1210, 1212 n.5 (7th Cir. 1988)*; *Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 990 n.26 (D.C. Cir. 1977)*. While Microsoft may hold a natural monopoly over the distribution of its own products, that kind of monopoly does not offend the Sherman Act. *See Sports Ctr., Inc. v. Riddell, Inc., 673 F.2d 786, 791 (5th Cir. 1982)*. To argue, as Aldridge appears to, [144] that Microsoft holds a natural monopoly over Windows95 is therefore irrelevant. Aldridge has not shown that Microsoft holds a natural monopoly over the worldwide market for personal computer operating systems.

[83]** Nor has Aldridge shown that creation of a personal computer operating system is forbidden by law, that personal computer operating **[*755]** systems are publicly subsidized facilities, or that Windows95 is the only operating system in the relevant geographic market. Instead, Aldridge argues that "antitrust violations based on essential facility claims are recognized whenever monopolists such as Microsoft deny equal access to a product that is essential for competition." [145] The essential facilities doctrine is not that broad, however. The cases Aldridge relies on as authority for his argument confirm the narrowness of the doctrine because each falls within one of the four categories mentioned above. [146] The court concludes that Aldridge has not established that Microsoft's control of Windows95 is the type of control that is forbidden by the Sherman Act.

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[144] Plaintiffs' Reply Brief at 10.

[145] Plaintiffs' Reply Brief at 11.

[146] Aldridge cites *Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)*; *Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982 (D.C. Cir. 1977)*; *Zschaler v. Claneil Enters., Inc., 958 F. Supp. 929 (D. Vt. 1997)*; *Blue Cross & Blue Shield United v. Marshfield Clinic, 881 F. Supp. 1309 (W.D. Wis. 1994)*; *Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 719 F. Supp. 1551 (S.D. Fla. 1988)*, *rev'd*, *999 F.2d 1436 (11th Cir. 1993)*; and *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984)*, *aff'd on other grounds*, *472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*.

The Supreme Court explicitly declined to address the essential facilities arguments in its review of the Tenth Circuit's decision in *Aspen Highlands Skiing*. *See Aspen Skiing Co.*, 105 S. Ct. at 2862 n.44. However, to the extent that the Tenth Circuit's application of the essential facilities doctrine is relevant, the facility there would fall under the first category, natural monopoly, because the fixed cost in acquiring possession of a skiable mountain is much greater than the marginal cost of expanding facilities on existing slopes. *See Twin Lab., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990)* (categorizing *Aspen Skiing*). *Cf.* IIIA Areeda & Hovenkamp, *supra*, PP 772c1-c2 (rev. ed. 1996) (criticizing the Tenth Circuit's essential facilities analysis in *Aspen Skiing* and contending that it should not have been analyzed as an essential facilities case).

[84]** 4. *Is duplication of an operating system unreasonable or impractical*

Because Microsoft does not address this factor, the court will assume that it is unreasonable or impractical for a disk cache program manufacturer to produce its own operating system in order to gain market access for its programs.

5. *Has Microsoft denied Aldridge access to the Windows95 operating system*

Aldridge argues that Microsoft denied access to Windows95 by encrypting the Windows95 program code, by not disclosing functional details about the program to Aldridge before releasing Windows95, and by designing the operating system "to disable or disparage all competing disk caches." [147] Microsoft responds that Aldridge never asked for any information about the design or operation of Windows95 and never asked to be a beta tester for the operating system.

HN21[] To establish denial of access a plaintiff must have at the very least sought access to the facility. *City of Vernon v. Southern Cal. Edison **[**85]** Co., 955 F.2d 1361, 1367 (9th Cir. 1992)*. David Aldridge admitted that he did not ask for any information that would have allowed him to upgrade Cache86 for Windows95. Nor did he ask for a beta version of Windows95. Instead, he expected Microsoft to invite him into the beta-testing program, as it had with respect to previous software products. [148] ***HN22***[] "[A] manufacturer is under no obligation to pre-disclose or disclose its knowledge about its products so that competition may arise in the related peripheral hardware, software, and repair service markets." *Data Gen. Corp. v. Grumman Sys. Support Corp., 761 F. Supp. 185, 192 (D. Mass. 1991)*, *aff'd*, *36 F.3d 1147 (1st Cir. 1994)*; *accord* *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 (2d Cir. 1979)* ("Withholding from others advance knowledge of one's new products, therefore, ordinarily constitutes valid competitive conduct."). Because Microsoft could lawfully decline to reveal **[*756]** advances in technology, it did not offend the antitrust laws by failing to distribute design information about Windows95 to Aldridge or by encrypting the computer code for the operating system.

[86]** Aldridge fairs no better on his argument that "Microsoft denied access to Windows95 by designing it to disable or disparage all competing disk caches." [149] Aldridge offers no evidence to show that Windows95 disables Cache86, [150] and nothing in the messages prevents a user from employing Cache86 in DOS-compatibility mode or from contacting Aldridge for an updated version of the program. Aldridge has thus failed to show that Microsoft denied Aldridge access to the Windows95 operating system.

6. *Was it feasible for Microsoft to provide Aldridge access to Windows95*

Aldridge argues that Cache86 runs as designed in DOS-compatibility mode and that Cache86 could have been updated to function in protect mode as well. [151] Microsoft does not contest these arguments and, indeed, **[**87]** Aldridge did redesign Cache86 to disable itself in protect mode and to operate as designed when Windows95 runs

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Bellsouth falls under the category of facilities (a copy-righted telephone directory) whose duplication is forbidden by law. *Bellsouth, 719 F. Supp. at 1563*. The facility in *Hecht* enjoyed public subsidies. *Hecht, 570 F.2d at 985* & n.1 (identifying the United States as owner and the District of Columbia Armory Board as operator of the allegedly essential facility, RFK stadium). The facilities at issue in *Zschaler, Blue Cross*, and *Fishman* were effectively the only ones in town. *Fishman, 807 F.2d at 540*; *Zschaler, 958 F. Supp. at 944-45*; *Blue Cross, 881 F. Supp. at 1312-13*.

[147] Plaintiffs' Response at 20, 21.

[148] Aldridge Deposition at 24.

[149] Plaintiffs' Response at 20.

[150] Because Windows95 only disables those programs that appear in the SETUPC.INF file and because Cache86 does not appear on this list, the evidence establishes that Windows95 does not disable Cache86.

[151] Plaintiffs' Response at 20.

other programs in DOS-compatibility mode. The court therefore concludes that Aldridge has shown that it was feasible to provide access.

7. *Conclusion*

While Aldridge has shown feasibility, and the parties have not contested that Microsoft is a monopolist and that duplicating Windows95 would be unreasonable or impractical, Aldridge has failed to establish the remaining elements required for an essential facilities claim. Aldridge has not shown that Windows95 is essential, that Microsoft has the type of control over Windows95 that is forbidden by the Sherman Act, or that Microsoft has illegally denied Aldridge access to Windows95. Accordingly, Aldridge cannot recover under the Sherman Act on the theory that Microsoft denied him access to an essential facility.

IV. *CONCLUSION*

Because Aldridge has only raised issues of fact as to the truth of Messages Three **[**88]** and Four, Microsoft is entitled to summary judgment on Aldridge's state law claims as to Messages One and Two. Because Aldridge has failed to rebut the presumption of *de minimis* damage in his antitrust product disparagement claim and has failed to establish an antitrust claim under the essential facilities doctrine, Microsoft is also entitled to summary judgment on those claims.

Microsoft's Motion for Summary Judgment (Docket Entry No. 26) is **GRANTED IN PART** and **DENIED IN PART**. Aldridge's antitrust claims will be dismissed with prejudice. Aldridge's state law claims will be dismissed with prejudice as to Messages One and Two.

SIGNED at Houston, Texas, on this 5th day of February, 1998.

SIM LAKE

UNITED STATES DISTRICT JUDGE

[Gateway Western Ry. v. Terminal R.R. Ass'n of St. Louis]

United States District Court for the Southern District of Illinois

February 5, 1998, Decided ; February 5, 1998, Filed

NO: 95-CV-0429-PER

Reporter
1998 U.S. Dist. LEXIS 4614 *

GATEWAY WESTERN RAILWAY COMPANY, Plaintiff, vs. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Defendant.

Disposition: [*1] Defendant's motion for partial summary judgment GRANTED. Plaintiff Gateway's motion for summary judgment on liability for Counts II, III and IV of the Second Amended Complaint DENIED.

Core Terms

crossing, summary judgment, Railroad, track, Transportation, construct

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate and should be granted where there exists no genuine issue of material fact. A motion for partial summary judgment should be granted on an issue as to which there is no material factual dispute, even if there exists a substantial controversy with respect to other issues. The existence of a factual dispute, standing alone, is not sufficient to bar summary judgment. A factual dispute will not preclude summary judgment unless the disputed fact is outcome determinative under the governing law.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN2[] **Scope, Exemptions**

The immunity provided by the Noerr-Pennington doctrine certainly extends to opposition to competitors' petitions at administrative agencies.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Torts > ... > Commercial Interference > Contracts > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Illinois courts have extended the protections of the Noerr-Pennington doctrine to insulate parties from claims alleging intentional interference with a contract right or other economic expectation. Rather than limit the application of the doctrine to antitrust claims, the courts view the *First Amendment* right to petition the government for redress to be superior to contract rights as well.

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For TERMINAL RAILROAD ASSOCIATION OF ST LOUIS, defendant: Rebecca R. Jackson, J. Michael Cooper, Bryan Cave, St. Louis, MO. James J. Murphy, Bryan Cave, Washington, DC.

Judges: PAUL E. RILEY, United States District Judge.

Opinion by: PAUL E. RILEY

Opinion

MEMORANDUM AND ORDER

RILEY, District Judge:

I. Introduction

The operative Second Amended Complaint in this matter was filed on December 19, 1997. Plaintiff seeks damages under theories of contract, property and under Sections 1 and 2 of the Sherman Act. **[*2]** This matter is now before the Court on Defendant's motion for partial summary judgment on Counts II through VII (Doc. 151).

II. Facts

Terminal Railroad Association of St. Louis ("TRRA"), a Class II railroad, operates in Illinois and Missouri as a local switching carrier. It is subject to regulation by the Surface Transportation Board ("STB"), the successor to the Interstate Commerce Commission ("ICC"). It switches freight between railroads that meet in the St. Louis area and provides transportation across the Mississippi River via the McArthur and Merchants bridges. Gateway Western Railway Company ("Gateway") (now owned by Kansas City Southern Transportation) began operating as a Class II railroad in 1990. It primarily transports freight between Kansas City and East St. Louis. Gateway is also subject to STB regulation.

For more than 100 years, TRRA has operated a rail line known as the Eads Main Line. In November 1991, Gateway purchased a small strip of land from CSX Transportation, Inc., which is a major east-west carrier. A portion of the land lies underneath TRRA's Eads Main Line. In 1991, Gateway informed TRRA that Gateway was undertaking construction of a new segment **[*3]** of track, known as the Q connection and that a new track would cross TRRA's Eads Main Line.

Gateway originally applied for and received ICC authority to construct the track as a "relocation" but failed to include in its application the fact that the Q connection track would cross the Eads Main Line.

TRRA objected to the proposed crossing and refused to allow Gateway to construct a crossing over the Eads Main Line. When Gateway notified TRRA that Gateway crews planned to unilaterally install the crossing without TRRA's consent, TRRA filed an action in this Court, *Terminal Railroad Association of St. Louis v. Gateway Western Railway Company,* No. 92-CV-0210-WLB. Judge William L. Beatty held in an Order of Referral that the question of whether Gateway had also to obtain authority under **29 U.S.C. § 10901(d)** to cross the Eads Main Line was within the primary jurisdiction of the ICC. The ICC held in September 1992 that Gateway had to obtain both construction and crossing authority from the ICC before constructing and operating the Q connection.

On November 23, 1994, after Gateway acknowledged the planned crossings and made appropriate application to the ICC seeking crossing **[*4]** authority, the ICC granted authority for Gateway to cross TRRA's Eads Main Line at grade level and required Gateway to pay TRRA compensation for the crossing. TRRA and Gateway were unable to agree on the appropriate compensation to be paid by Gateway to TRRA for each Gateway train that crosses TRRA's track. TRRA took the position that the compensation issue should be resolved before Gateway began running trains over the crossing. When the track and signals were completed in May 1995, Gateway initiated this action by seeking a temporary restraining order allowing Gateway to cross while the compensation issue remained unresolved. This Court granted the order. The parties subsequently agreed on the terms of an operating agreement and this Court entered an agreed injunction incorporating that agreement. TRRA filed a proceeding before the STB to resolve the amount of the compensation. Gateway objected and asked that the matter be stayed. There has been no decision by the STB, and Gateway has been utilizing the Q connection and crossing the Eads Main Line since May 1995 without paying any compensation to TRRA.

III. Summary Judgment Standard

HN1[] Summary judgment is appropriate and **[*5]** should be granted where there exists no genuine issue of material fact. A motion for partial summary judgment should be granted on an issue as to which there is no material factual dispute, even if there exists a substantial controversy with respect to other issues. ***Celotex Corp. v.***

Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); ***Unterreiner v. Volkswagen of Am., Inc., 8 F.3d 1206, 1209 (7th Cir. 1993)***. The existence of a factual dispute, standing alone, is not sufficient to bar summary judgment. ***Posey v. Skyline Corp., 702 F.2d 102, 105*** **(7th Cir.), cert. denied, *464 U.S. 960, 78 L. Ed. 2d 336, 104 S. Ct. 392 (1983)*.** A factual dispute will not preclude summary judgment unless the disputed fact is outcome determinative under the governing law. ***Egger v. Phillips, 710 F.2d 292, 296*** **(7th Cir.), cert. denied, *464 U.S. 918, 78 L. Ed. 2d 262, 104 S. Ct. 284 (1983)*.** There are no disputed, outcome determinative facts with respect to Counts II, III, IV, V, VI and VII of Plaintiff's Second Amended Complaint.

IV. Analysis

TRRA's opposition to Gateway's crossing plan in this Court and before the ICC was not "wrongful" conduct and, **[*6]** thus, cannot be the basis for any damage allegedly resulting from a delay in the construction from 1991 until the ICC ruling authorizing the crossing on November 28, 1994, Accordingly, Counts II through VII should be dismissed.

The *Noerr-Pennington* doctrine protects TRRA from liability under Sections 1 and 2 of the Sherman Act and from Gateway's contract claim. ***HN2***[] The immunity provided by the *Noerr-Pennington* doctrine certainly extends to opposition to competitors' petitions at administrative agencies. **See *Envirosource, Inc. v. Horsehead Resource Development Company, 1996 U.S. Dist. LEXIS 9099, 1996-1 Trade Cas. (CCH) P71,492 (S.D.N.Y. 1996)*; *State ex rel. Hartigan v. Panhandle Eastern Pipe Line Company, 730 F. Supp. 826, 937-39 (C.D. Ill. 1990)*, aff'd, *935 F.2d 1469 (7th Cir. 1991)*.** Further, as the Supreme Court held in the *Pennington* case itself, Gateway cannot collect any damages from TRRA under the Sherman Act for any injury it suffered as a result of the injunctive relief and Order of Referral issued by this Court and the ICC's "delay" in granting Gateway authority to construct and use the Q Connection Project. ***United Mine Workers v. Pennington, 381 U.S. 657, 671, 14 L. Ed. 2d 626, 85 S. Ct. 1585*, [*7] (1965).** Moreover, ***HN3***[] Illinois courts have extended the protections of the *Noerr-Pennington* doctrine to insulate parties from claims alleging intentional interference with a contract right or other economic expectation. Rather than limit the application of the doctrine to antitrust claims, the courts view the *First Amendment* right to petition the government for redress to be superior to contract rights as well. ***Village of Lake Barrington v. Hogan, 272 Ill. App. 3d 225, 649 N.E.2d 1366, 208 Ill. Dec. 705 (Ill. App. 1995)*, cert. denied, *516 U.S. 1172, 116 S. Ct. 1263, 134 L. Ed. 2d 211 (1996)*.** Accordingly, Gateway cannot prevail in its claim and summary judgment should be entered for TRRA on Count II, III, IV, V, VI and VII of Plaintiff's Amended Complaint.

Additionally, Gateway has no claim based on contractual rights allegedly arising from an 1885 agreement between the Ohio & Mississippi Railway Company and the St. Louis Bridge Company which memorialized a verbal agreement between those parties entered into in June 1881. There is nothing in the 1885 agreement which prohibits TRRA from opposing the ICC petitions filed by Gateway. Thus, the 1885 agreement **[*8]** is not relevant to this dispute and TRRA is entitled to summary judgment on Counts III and IV.

Finally, Gateway has no claim based on property rights it alleges it obtained as a result of its acquisition of property from CSXT in November 1991. This Court has already held in an Order of Referral in *Terminal Railroad Association of St. Louis v. Gateway Western Railway Company,* No. 92-CV-0210-WLB, that the question of whether Gateway had to obtain § 10901(d) authority to cross the Eads Main Line was within the primary jurisdiction of the ICC. The ICC held, in September 1992, that Gateway had to obtain both construction and crossing authority from the ICC before constructing and operating the Q connection. These two decisions establish that Gateway did not have any "property rights" which precluded TRRA from objecting to the construction of the Q Connection Project and the crossing of its Eads Main Line. Summary judgment is appropriate on Counts II and V.

V. Conclusion

Accordingly, the Court **GRANTS** Defendant's motion for partial summary judgment (Doc. 151).

IT IS SO ORDERED.

DATED this 5th day of February, 1998.

PAUL E. RILEY

United States District **[*9]** Judge

ORDER

RILEY, District Judge:

Plaintiff Gateway's motion for summary judgment on liability for Counts II, III and IV of the Second Amended Complaint is hereby **DENIED.**

IT IS SO ORDERED.

DATED this 5th day of February, 1998.

PAUL E. RILEY

United States District Judge

Continental Orthopedic Appliances v. Health Ins. Plan

United States District Court for the Eastern District of New York

February 7, 1998, Decided

CV 95-4541 (ADS)

Reporter

994 F. Supp. 133 *; 1998 U.S. Dist. LEXIS 1337 **; 1998-1 Trade Cas. (CCH) P72,071

CONTINENTAL ORTHOPEDIC APPLIANCES, INC., NEW YORK ORTHOPEDIC, STAHL SURGICAL SUPPLY INC., UNITED ORTHOPAEDIC APPLIANCES, INC., A-1 SURGICAL AND MEDICAL SUPPLIES, INC., ARCHFAME, INC., ORTHO SURGICAL, J.C. ORTHOPEDIC CO., INC., DAY DRUG & ORTHOPEDIC TREATMENT FACILITY, ORTHOTIC CONSULTANTS, INC., JAMES CASE ENTERPRISES, INC., CERTIFIED ORTHOPEDIC, PROTHOTIC LABS, ELMONT PHARMACY & SURGICAL, FOOT MOLDS, INC., and A PERSONAL TOUCH GARMENT CORPORATION, on behalf of themselves and all others similarly situated, Plaintiffs, -against- HEALTH INSURANCE PLAN OF GREATER NEW YORK, INC., ADVANCED ORTHOPEDIC TECHNOLOGIES, INC., A wholly owned subsidiary of NOVACARE PROSTHETICS and ORTHOTICS, INC., NOVACARE PROSTHETIC and ORTHOTICS, INC., and ARIMED ORTHOTICS, PROSTHETICS, AND PEDORTHICS INC., ANDREW H. MEYERS, MATTHEW MIRONIS, STEVEN MIRONIS, BERNARD NEECK AND ANTHONY L. WATSON, Defendants.

Disposition: **[**1]** Defendants' motion to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, for failure to state a claim based on the relevant product market issue and as against the defendant Novacare Prosthetic and Orthotics, Inc., GRANTED without prejudice. Defendants' motion to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, for failure to state a claim, DENIED in all other respects.

Core Terms

providers, conspiracy, Region, allegations, defendants', motion to dismiss, plaintiffs', termination, antitrust, bids, enrollees, individual defendant, alleged conspiracy, Memorandum, Prosthetic, Orthotics, contracts, cases, pleadings, patients, circumstantial evidence, competitive bidding, preferred provider, anti trust law, Sherman Act, effects

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss for failure to state a claim, the court should not dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Evidence > Judicial Notice > General Overview

HN2[] **Motions to Dismiss, Failure to State Claim**

The United States Court of Appeals for the Second Circuit has stated that in deciding a *Fed. R. Civ. P. 12(b)(6)* motion, a court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN3[] **Motions to Dismiss, Failure to State Claim**

In ruling on a *Fed. R. Civ. P. 12(b)(6)* motion, it is not the court's function to weigh the evidence that might be presented at a trial; the court must merely determine whether the complaint itself is legally sufficient, and in doing so, the court must accept the allegations of the complaint as true, and construe all reasonable inferences in favor of the plaintiff.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4[] **Complaints, Requirements for Complaint**

Under the modern rules of pleading, a plaintiff need only provide a short and plain statement of the claim showing that the pleader is entitled to relief, *Fed. R. Civ. P. 8(a)(2)*, and all pleadings shall be so construed as to do substantial justice, *Fed. R. Civ. P. 8(f)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN5[] **Motions to Dismiss, Failure to State Claim**

Recovery may appear remote and unlikely on the face of a pleading, but that is not the test for dismissal under *Fed. R. Civ. P. 12(b)(6)*.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN6[] **Antitrust & Trade Law, Sherman Act**

In antitrust cases it must appear on the face of the complaint that the plaintiff could prove no set of facts to sustain a recovery. The complaint need only allege sufficient facts to state the elements of injury from an act prohibited by the antitrust laws. On the other hand, for the court to grant a *Fed. R. Civ. P. 12(b)(6)* motion, a defendant in an antitrust case must meet a more stringent standard because the proof is often in the hands of the alleged conspirators, and the plaintiff may need an opportunity to discover the facts necessary to withstand the motion.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

HN7[] **Antitrust & Trade Law, Sherman Act**

To state a claim under *§ 1* of the Sherman Act, a plaintiff must allege: (1) concerted action, (2) by two or more persons that (3) unreasonably restrains trade. The complaint must identify the co-conspirators, and describe the nature and effects of the alleged conspiracy. To measure the sufficiency of the plaintiffs' claim, the court must determine whether the complaint contains either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

Concerted action need not be proved directly, but can be based upon circumstantial evidence; for example, from inferences drawn from the words and conduct of the parties to the agreement and from their course of dealing.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Regulated Industries, Higher Education & Professional Associations**

The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

A corollary of a firm's right to select with whom it will deal is that, if it determines to solicit bids or proposals, it can select from whom it wishes to receive proposals.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Sherman Act, Claims**

A departure from competitive bidding does not in itself constitute or prove a violation of the Sherman Act, and cannot be helpful to plaintiff unless he can rationally relate it to other conduct by the alleged conspirators.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Regulated Practices, Price Fixing & Restraints of Trade**

In order to survive a motion to dismiss, a claim under §§ 1 and 2 of the Sherman Act must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized. A complaint must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed. A relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

The United States Court of Appeals for the Second Circuit has not made a showing of market power a prerequisite for recovery in all § 1 of the Sherman Act cases. If a plaintiff can show an actual adverse effect on competition, such as reduced output, we do not require a further showing of market power. To prevail on a § 1 claim, plaintiffs must demonstrate an adverse effect in competition among different sellers of the same product (intrabrand competition). Then, because the focus of our inquiry is the relevant market as a whole, restriction of intrabrand competition must be balanced against any increases in interbrand competition. The overarching standard is whether defendants' actions diminish overall competition, and hence consumer welfare.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN14[] **Antitrust & Trade Law, Sherman Act**

Individual officers of corporations may be held liable under § 1 of the Sherman Act for conspiracies or combinations in restraint of trade where those conspiracies or combinations are with persons other than the corporations for whom they serve as officers.

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Charles Capetanakis, Esq., Of Counsel, CAPETANAKIS & PREITE, Brooklyn, New York, for Arimed Orthodics, Prosthetics, and Pedorthics, Inc., Matthew Mirones and Steven Mirones, Defendants.

Judges: ARTHUR D. **[**2]** SPATT, United States District Judge.

Opinion by: ARTHUR D. SPATT

Opinion

[*135] ***MEMORANDUM OF DECISION AND ORDER***

SPATT, District Judge.

This putative class action seeks redress for alleged violations of the federal and state antitrust laws arising from the defendants' alleged unlawful and conspiratorial bid-rigging, price fixing, and termination and exclusion of all orthotic and prosthetic ("O&P") providers within the five boroughs of New York City and the surrounding six Counties of Nassau, Suffolk, Westchester, Rockland, Orange and Putnam, by the defendants Health Insurance Plan of Greater New York, Inc. ("HIP"), Advanced Orthopedic Technologies, Inc. ("Advanced"), Arimed Orthotics, Prosthetics and Pedorthics, Inc. ("Arimed"), and five individual officers and executives of the corporate defendants, beginning on or about July 31, 1995, and continuing to date. Presently before the Court is the defendants' motion to dismiss the plaintiffs' First Amended Complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, for failure to state a claim upon which relief can be granted.

I. BACKGROUND

A. *Factual background*

This lawsuit arises from a decision made by HIP, a health management organization **[**3]** ("HMO"), to enter into certain exclusive contracts for O&P service with Advanced and Arimed, which became effective on August 1, 1995 and February 13, 1997. Orthotics is the design, fabrication, fitting, and supervised use of custom-made braces and other devices that provide external support to treat musculoskeletal disorders. Prosthetics is the design, fabrication, and fitting of custom-made artificial limbs for patients who have lost limbs as a result of traumatic injuries, diabetes, cancer, mastectomy, vascular disease, or congenital disorders. The facts set forth below are taken from the First Amended Complaint.

Effective August 1, 1995, Advanced and Arimed are alleged to be "preferred providers" in regard to O&P services provided to HIP's customers in the Counties of Queens, Nassau, Suffolk, Brooklyn, and Staten Island (collectively, the "Five County Region" or the "Lower County Region"), notwithstanding that these providers, combined, allegedly had at most six outlets in these counties. As a result of these contracts, the former O&P providers, including the plaintiffs, no longer will be the recipient of HIP's business in the Lower County Region. Simultaneously, each and every **[**4]** O&P provider who had previously attempted to become a HIP provider was forever foreclosed from becoming a member in the HIP network comprising of the Lower County Region.

HIP allegedly did not notify any of the O&P providers of their termination or, upon information and belief, the affected enrollees. However, apparently some time later, HIP provided the following memorandum, which it delivered to each terminated provider who inquired as to its termination:

> The Health Insurance Plan of Greater New York (HIP) has recently entered into agreements with Advanced Orthopedic Technology and Arimed whereby these two vendors will be preferred providers of O&P services for HIP members in the Queens-Long Island/Brooklyn and Staten Island Regions.
>
> Any cases which have already been referred to your company will continue to be monitored by the HIP Alternate Care Utilization Management Department. However, any new cases as of August 1, 1995 will be referred to one of the preferred providers. If you have any questions or issues with regard to the above change[,] please feel free to contact the HIP Alternate **[*136]** Care Utilization Management Department at (212) 630-8203.
>
> HIP would like **[**5]** to thank you for your past service to HIP Members and appreciates your anticipated cooperation with this transition.

First Amended Complaint ("Am. Compl.") P 78.

The plaintiffs allege that their termination and exclusion occurred despite their background, experience, training, competence, adherence to the ethics of the profession, good reputation, and the ability to work with others. All plaintiffs were Board-certified pursuant to the American O&P Association. ("AOPA") and the New York State O&P Association ("NYOPA"). Nevertheless, only one entity among the plaintiffs was allegedly afforded an opportunity to submit bids to HIP prior to their termination.

On or about February 13, 1997, HIP disclosed that it had "extended" exclusive contracts to Advanced and Arimed to provide O&P services for "all HIP New York members" in the Counties of New York (i.e., Manhattan), Bronx, Westchester, Orange, Rockland, and Putnam (collectively, the "Upper County Region"). These territories were conferred to Advanced and Arimed even though in most counties comprising the Lower and Upper County Regions, Advanced and Arimed allegedly had only one or two sites, and in some counties, had no O&P **[**6]** sites at all to service HIP's customers. As a result of these contracts, the former O&P providers, including the plaintiffs, would no longer be the recipient of HIP's business in the Upper County Region. Simultaneously, each and every O&P provider who had previously attempted to become a HIP provider was forever foreclosed from becoming a member in the HIP network in the Upper County Region.

The plaintiffs allege that, once again, HIP did not timely notify any of the affected O&P providers of their termination or, upon information and belief, the affected enrollees. Rather, HIP prepared a memorandum dated February 13, 1997, which mirrored the language of the July 31, 1995 termination letter, stating that HIP had "recently extended" its "agreements" with Advanced and Arimed "whereby these two vendors will be preferred providers of orthotic and prosthetic services for all HIP New York Members." Am. Compl. P 84. In a later memorandum dated March 15, 1997, which upon information and belief, was provided only to HIP personnel on a distribution list, HIP detailed the partitioning of the Upper County Region among Advanced and Arimed. Upon information and belief, HIP gave no explanation to **[**7]** its personnel for the sudden "extension" of coverage of the Upper County Region to Advanced and Arimed.

The plaintiffs allege that their termination and exclusion occurred despite their background, experience, training, competence, adherence to the ethics of the profession, good reputation, and the ability to work with others. All plaintiffs were Board-certified pursuant to the AOPA and NYOPA. Nevertheless, none of the plaintiffs were allegedly afforded an opportunity to submit bids to HIP prior to their termination.

The plaintiffs allege that "HIP, Advanced and Arimed agreed to carry out a plan whereby HIP would sharply cut its own costs by virtually eliminating the supply of O&P services to HIP enrollees, which services HIP had contracted to provide for its patients." Am. Compl. P 49. The defendants allegedly

> combined, conspired and agreed to (1) terminate all HIP's O&P providers, except Advanced and Arimed ("A&A"); (2) channel all HIP's O&P patients to A&A; (3) artificially restrict the supply of O&P services to HIP's

> patients; (4) fix the prices A&A would charge for providing O&P services; and (5) rig the bidding process for HIP's O&P providers so that A&A would be the **[**8]** only ones chosen as HIP's preferred O&P providers.

Am. Compl. P 68.

The First Amended Complaint sets forth four antitrust claims, two based on federal law and the remaining based on state law. The first and second claims allege structural and tacit conspiracies, respectively, in violation of *section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*. The third and fourth claims allege companion antitrust conspiracy **[*137]** claims based on the New York State Donnelly Act, *N.Y. Gen. Bus. Law § 340, et. seq.*

B. *Procedural history*

The plaintiffs' original complaint alleged structural and tacit conspiracies and monopolization pursuant to federal and state law. By a Memorandum Decision and Order dated February 26, 1997, the Court dismissed with prejudice all claims of monopoly and dismissed the complaint without prejudice, as to the plaintiffs United Orthopaedic Appliances, Inc., Stahl Surgical Supply, Inc., Archfame, Inc., J.C. Orthopedics Co., Inc., and James Case Enterprises, Inc., based on lack of standing. *Continental Orthopedic Appliances, Inc. v. Health Insurance Plan of Greater New York, Inc., 956 F. Supp. 367 (E.D.N.Y. 1997)* (the "Order" or "*Continental*"). In **[**9]** addition, the Court dismissed without prejudice, the federal and state law conspiracy claims, finding the conspiracy allegations insufficient to state a claim. The Court held that the plaintiffs had successfully pleaded all elements of a *section 1* violation of the Sherman Antitrust Act, *15 U.S.C. § 1*, except the allegations of a conspiracy. The Court stated that the complaint asserted

> only conclusory allegations of a conspiracy. In fact, the only factual bases for the "conspiracy" are the agreements by HIP to terminate the plaintiffs as O&P providers and, instead, replace them with the defendants Advanced and Arimed. There are no facts set forth in support of a claim of a conspiracy in restraint of trade other than the replacement of the plaintiffs and the exclusive provider contracts with the two defendants.

Continental, 956 F. Supp. at 373. The Court observed that if it

> were to rule that these facts alone could state a valid *Section 1* antitrust conspiracy cause of action, then every such exclusive contract under similar facts could be the basis for a *Section 1* conspiracy antitrust action. That the plaintiffs' complaint alleges a conspiracy based only **[**10]** on the facts that the defendant HIP terminated the plaintiff and chose two other preferred providers, is clear from a reading of the complaint.

Id. at 373-74. Rather than dismissing the plaintiffs' claims with prejudice, the Court granted the plaintiffs an opportunity to replead their claims but cautioned against squandering this opportunity by making "perfunctory or cosmetic changes." *Id. at 374*. The Court denied the defendants' motion to dismiss in all other respects.

The plaintiffs filed their First Amended Complaint on April 25, 1997, adding five individual defendants who are executives of HIP, Advanced, and Arimed, and asserting allegations of their exclusion from the HIP network encompassing the Upper County Region.

II. DISCUSSION

A. *Fed. R. Civ. P. 12 (b) (6) standard*

HN1[] On a motion to dismiss for failure to state a claim, "the court should not dismiss the complaint pursuant to *Rule 12(b)(6)* unless it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Goldman v. Belden, 754 F.2d 1059, 1065 (2d Cir. 1985)* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d **[**11]** 80, 78 S. Ct. 99 (1957))*; *see also IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1052-53 (2d Cir. 1993)*, *cert. denied*, *513 U.S. 822, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994)*. **HN2**[] The Second Circuit stated that in deciding a *Rule 12(b)(6)* motion, a court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." *Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993)*; *see also*

International Audiotext Network, Inc. v. AT&T, 62 F.3d 69, 72 (2d Cir. 1995); *Paulemon v. Tobin, 30 F.3d 307, 308-09 (2d Cir. 1994)*; *Rent Stabilization Ass'n of the City of New York v. Dinkins, 5 F.3d 591, 593-94 (2d Cir. 1993)* (citing *Samuels, 992 F.2d at 15*).

HN3[] It is not the Court's function to weigh the evidence that might be presented at a trial; the Court must merely determine whether the complaint itself is legally sufficient, *see* *Goldman, 754 F.2d at 1067*, and in doing so, **[*138]** it is well settled that the Court must accept the allegations of the complaint as true, *see* *Leeds v. Meltz, 85 F.3d 51 (2d Cir. 1996)*; *LaBounty v. Adler, 933 F.2d* ***[**12]*** *121, 123 (2d Cir. 1991)*; *Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc., 879 F.2d 10, 14 (2d Cir. 1989)*, *cert. denied*, *493 U.S. 1022, 110 S. Ct. 723, 107 L. Ed. 2d 743 (1990)*, and construe all reasonable inferences in favor of the plaintiff. *See* *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*; *Leeds, supra, 85 F.3d at 51*; *Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1099 (2d Cir. 1988)*, *cert. denied*, *490 U.S. 1007, 109 S. Ct. 1642, 104 L. Ed. 2d 158 (1989)*.

HN4[] The Court is mindful that under the modern rules of pleading, a plaintiff need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief", *Fed. R. Civ. P. 8(a)(2)*, and that "all pleadings. shall be so construed as to do substantial justice," *Fed. R. Civ. P. 8(f)*.

The issue before the Court on a *Rule 12(b)(6)* motion "is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claim." *Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995)*, *cert. denied*, *U.S. , 117 S. Ct. 50, 136 L. Ed. 2d 14 (1996)* (citing *Scheuer, 416 U.S.* ***[**13]*** *at 235-36*). ***HN5***[] Recovery may appear remote and unlikely on the face of the pleading, but that is not the test for dismissal under *Rule 12(b)(6)*. *Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995)* (citing *Scheuer, 416 U.S. at 236*).

HN6[] In addition, in antitrust cases, it must appear on the face of the complaint that the plaintiff could prove no set of facts to sustain a recovery. *Ware v. Associated Milk Producers, Inc., 614 F.2d 413 (5th Cir. 1980)*. The complaint need only allege sufficient facts to state the elements of injury from an act prohibited by the antitrust laws. *Newman v. Universal Pictures, 813 F.2d 1519 (9th Cir. 1987)*, *cert. denied*, *486 U.S. 1059, 108 S. Ct. 2831, 100 L. Ed. 2d 931 (1988)*. On the other hand, for the court to grant this kind of motion, a defendant in an antitrust case must meet a more stringent standard because the proof is often in the hands of the alleged conspirators, and the plaintiff may need an opportunity to discover the facts necessary to withstand the motion. *HRM, Inc. v. Tele-Communications, Inc., 653 F. Supp. 645 (D. Colo. 1987)*; *Hughes Auto v. Mid-Atlantic Toyota Dist., Inc., 543 F. Supp. 1056 (D. Md. 1982)*. **[**14]**

It is within this framework that the Court addresses the present motions to dismiss.

B. *The defendants' motions*

1. *Allegations of a conspiracy*

HN7[] To state a claim under *section 1* of the Sherman Act, a plaintiff must allege: (1) concerted action, (2) by two or more persons that (3) unreasonably restrains trade. *See* *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1059 (2d Cir. 1996)*, *cert. denied*, *U.S. , 139 L. Ed. 2d 14, 118 S. Ct. 49 (1997)*; *Brenner v. World Boxing Council, 675 F.2d 445, 451* (2d Cir.), *cert. denied*, *459 U.S. 835, 103 S. Ct. 79, 74 L. Ed. 2d 76 (1982)*; *In re NASDAQ Market-Makers Antitrust Litigation, 894 F. Supp. 703, 710 (S.D.N.Y. 1995)*. The complaint "must identify the co-conspirators, and describe the nature and effects of the alleged conspiracy." *International Television Products, Ltd. v. Twentieth Century Fox Television Division, 622 F. Supp. 1532, 1537 (S.D.N.Y. 1985)*. To measure the sufficiency of the plaintiffs' claim, the Court must determine whether the complaint "contains either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." **[**15]** *Fort Wayne Telsat v. ESPN, 753 F. Supp. 109, 111 (S.D.N.Y. 1990)* (citation omitted); *see also* *Brenner, 675 F.2d at 451* ***HN8***[] ("Concerted action need not be proved directly, but can be based upon circumstantial evidence; for example, from inferences drawn from the words and conduct of the parties to the agreement and from their course of dealing").

In its prior opinion, the Court recognized that "a health maintenance organization has the right to determine the companies it chooses to recommend to its customers, if it does not do so as a result of an illegal conspiracy to restrain trade. Generally, an HMO 'has the right to recommend or refuse to recommend whatever company it likes, so **[*139]** long as it does so independently.'" *Continental, 956 F. Supp. at 373* (quoting *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984))*; *see also* *Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1030* (2d Cir.) (a manufacturer "is free to choose the type of mechanism through which he will distribute his goods and can designate certain sales representatives as his exclusive agents"), *cert. denied*, *444 U.S. 917, 100 S. Ct. 232, 62 L. Ed.* ***[**16]*** *2d 172 (1979)*. Using the Court's previous opinion as ammunition, the defendants maintain that, once again, the plaintiffs have failed to allege the existence of an agreement. Although the plaintiffs allege that the exclusive provider arrangements were the product of a "conspiracy," the defendants contend that the plaintiffs continue to rely on the same conclusory allegations the Court previously found lacking. According to the defendants, rather than pleading facts, the plaintiffs rely on antitrust jargon to mischaracterize lawful conduct. The Court disagrees.

Although the plaintiffs do not plead facts which would provide direct evidence of a conspiracy, the Court finds that such allegations, if true, provide the requisite circumstantial evidence. The plaintiffs have alleged facts which, if true, would provide circumstantial evidence that the defendants adhered to an agreement that was designed to achieve an unlawful objective, namely, to insulate Advanced and Arimed from increased competition, to artificially restrict the supply of O&P services to HIP's patients, and to fix the prices Advanced and Arimed would charge for providing O&P services. The plaintiffs allege that HIP failed **[**17]** to follow its own internal procedures with regard to accepting bids from O&P providers and that Advanced and Arimed's qualifications were deficient. The plaintiffs also allege that the defendants violated every one of HIP's internal standards for O&P providers in the bidding, selection and administration processes of the Lower and Upper County Region contracts. *See* Am. Compl. PP 69-73. For example, the plaintiffs allege that "HIP did not engage in *any* pre-qualification of O&P providers to determine if they were suitable to participate in the bidding process," *see* Am. Compl. P 73(b) (emphasis in original), which evaluation was allegedly required by HIP's internal Bid Standards, *see id. P 71*.

On the other hand, the defendants assert that these allegations are insufficient, both factually and legally. The defendants maintain that the antitrust laws do not require that HIP select its O&P providers through a process of competitive bidding. *See* *National Society of Professional Engineers v. U.S., 435 U.S. 679, 694-95, 98 S. Ct. 1355, 1367, 55 L. Ed. 2d 637 (1978)* ***HN9***[] ("The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition."). **[**18]** They contend that it was HIP's exclusive prerogative to select the O&P providers with whom it would deal. *See* *United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*. ***HN10***[] A corollary of a firm's right to select with whom it will deal is that, if it determines to solicit bids or proposals, it can select from whom it wishes to receive proposals. *See e.g.,* *Brown v. Western Massachusetts Theatres, Inc., 288 F.2d 302, 304 (1st Cir. 1961)* ***HN11***[] (". . . a departure from competitive bidding does not in itself constitute or prove a violation, and cannot be helpful to the plaintiff unless he can rationally relate it to other conduct by the alleged conspirators."); *Seago v. North Carolina Theatres, Inc., 42 F.R.D. 627, 635 (E.D.N.C. 1966)* ("Plaintiff has inserted the idea that the lack of competitive bidding at all times is in fact evidence of a conspiracy. This Court disagrees."), *aff'd*, *388 F.2d 987 (4th Cir. 1967)*, *cert. denied*, *390 U.S. 959, 88 S. Ct. 1039, 19 L. Ed. 2d 1153 (1968)*.

The Court finds that while HIP had no obligation to choose an O&P provider by means of competitive bidding, once HIP affirmatively and voluntarily decided to undertake such **[**19]** a procedure, allegations that the defendants subverted the competitive machinery so that Advanced and Arimed would be awarded the O&P contract as exclusive providers may provide circumstantial evidence of a conspiracy. Ignorance of its own internal written standards may provide an inference that HIP's rejection of the plaintiffs' request to submit bids in favor of Advanced and Arimed, was in furtherance of the **[*140]** defendants' alleged illegal scheme. *See* *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 545* (2d Cir.) ("Ignoring its own written standards in the case of [the plaintiff's] application for membership [in the defendant's association of member radiologists] strongly suggests the objection to that application based on appellant's geographic location may have been a sham."), *cert. denied*, *510 U.S. 947, 114 S. Ct. 388, 126 L. Ed. 2d 337 (1993)*.

The plaintiffs also allege irregularities in the identification of prospective bidders, namely, that HIP "excluded qualified O&P providers" and sent bid requests to only three out of "335 eligible candidates" in the Lower County Region. Am. Compl. PP 9, 73(a). Arimed and Advanced were allegedly **[**20]** selected exclusively even though they had a limited number of outlets and purportedly did not adequately service the region. Am. Compl. P 73 (g)-(k), (m). The plaintiffs further allege that "HIP itself tacitly, if not outwardly, conceded in a September 21, 1995 letter to New York State Senator Guy J. Velella that Advanced and Arimed would not be able to service all its HIP members." Am. Compl. P 73(g) (emphasis in original). The defendants allegedly conspired to restrict output and fix prices. These allegations of discrepancies between HIP's standard and practice and the allegations as to the restrictions on output and the fixing of prices, if true, may provide circumstantial evidence in support of the plaintiffs' theory of a conspiracy.

In sum, viewing the totality of the plaintiffs' allegations, accepting these allegations as true, construing all inferences in favor of the plaintiffs, and bearing in mind the very stringent burden on a moving defendant in an antitrust case, the Court finds that the plaintiffs have alleged a conspiracy cause of action under *section 1* of the Sherman Act. Therefore, the defendants' motion to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, **[**21]** for failure to sufficiently state a claim of conspiracy under *section 1* of the Sherman Act, is denied.

2. *Market definition*

Initially, the Court notes that the defendants previously moved to dismiss the complaint based on the grounds that the plaintiffs had failed to allege a relevant product market. In its previous opinion, the Court had summarily deemed the defendants' contention to be without merit. Once again, the defendants move to dismiss the complaint for failure to allege a relevant product market. The Court will now reconsider this issue.

HN12[] "In order to survive a motion to dismiss, a claim under *Sections 1* and *2* of the Sherman Act must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized." *Global Discount Travel Services, LLC v. Trans World Airlines, Inc., 960 F. Supp. 701, 704 (S.D.N.Y. 1997)* (citations omitted). A complaint must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed. *See* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. A relevant product market includes all products reasonably interchangeable, **[**22]** determination of which requires consideration of cross-elasticity of demand. *See* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

In the present case, the plaintiffs define the relevant product market as "O&P health care services to all HIP's enrollees." Am. Compl. P 88. The relevant geographic market is defined as the Upper and Lower County Regions. *See id.* The defendants contend that a product market defined by a single firm's product - in this case, O&P referrals to HIP's enrollees - fails as a matter of law and therefore, that the plaintiffs' claims should be dismissed for failure to define a necessary element of their antitrust claim. Memorandum of Law of Defendants Health Insurance Plan of Greater New York, Watson and Neek in Support of Their Motion to Dismiss the Amended Complaint at 15-17.

Although the plaintiffs cite to *Capital Imaging* in support of their assertion that a single firm's product can constitute a relevant product market, a closer examination of the case reveals otherwise. In *Capital Imaging, 996 F.2d at 547*, the plaintiff defined the relevant geographic market as a "100-mile radius of Albany, **[**23]** New York," and it **[*141]** defined the relevant product market as "radiological services." The Second Circuit considered the market to be comprised of either (i) all HMO subscribers; or (ii) all insured patients. *Id.* Hence, the Second Circuit did not accept a market definition, such as the one the plaintiffs propose here, limited to the enrollees of a single defendant HMO.

In addition, the Court finds that the other cases cited by the plaintiffs do not support their contention. The plaintiffs cite *Key Enterprises of Delaware, Inc. v. Venice Hospital, 919 F.2d 1550 (11th Cir. 1990)*, *Advanced Health-Care Services, Inc. v. Radford Community Hospital, 910 F.2d 139 (4th Cir. 1990)*, and *M&M Medical Supplies and Service, Inc. v. Pleasant Valley Hospital, Inc., 981 F.2d 160* (4th Cir.), *cert. denied*, *508 U.S. 972, 113 S. Ct. 2962, 125 L. Ed. 2d 662 (1993)*, for the proposition that the relevant product market in those cases consisted of durable medical equipment referrals stemming from a single hospital. First, the Court notes that *Key Enterprises*, was vacated en banc by the Eleventh Circuit. *See* Key Enterprises, 979 F.2d 806 (11th Cir. 1990). Then the case became moot when **[**24]** the parties settled. *See* Key Enterprises, 9 F.3d 893 (11th Cir. 1993). Second, upon review of the other two cases, the Court finds that each case demonstrates that a single hospital could be found to have market or monopoly power in its market and therefore, foreclosure of the plaintiff from the portion of the durable medical equipment market represented by referrals from that single hospital constituted a substantial foreclosure from the market of all durable medical equipment purchasers. In the present case, although the plaintiffs allege that HIP represents 20% of the HMO market, Am. Compl. P 6, they also allege that HIP's enrollment has "plummeted by more than 30,000 from 1994 to 1995," id. P 57, and that HIP's enrollees constitute 25% of the population of New York State, id. P 60. However, the plaintiffs do not allege what percentage of the O&P market HIP possesses. Without this latter information, the Court is unable to assess whether the present case would be comparable to *Advanced Health-Care Services* and *M&M Medical Supplies*. It may be possible that although HIP represents only 20% of the HMO market, it represents a larger percentage of those using the **[**25]** services of O&P providers to warrant a factual similarity to *Advanced Health-Care Services* and *M&M Medical Supplies*. At this point in the litigation, the Court is unable to make this determination. However, one point is clear. The plaintiffs' alleged product market consisting of O&P health care services to all HIP's enrollees is not an economically viable product market.

However, our inquiry does not end here. ***HN13***[] The Second Circuit "has not made a showing of market power a prerequisite for recovery in all § 1 cases. If a plaintiff can show an actual adverse effect on competition, such as reduced output, we do not require a further showing of market power." K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co., 61 F.3d 123, 129 (2d Cir. 1995) (citations omitted). "To prevail on a § 1 claim, [the] plaintiff[s] must demonstrate an adverse effect in competition among different sellers of the same product ("intrabrand" competition), ..." K.M.B. Warehouse Distributors, 61 F.3d at 127. Then, "because the focus of our inquiry is the relevant market as a whole, restriction of intrabrand competition must be balanced against any increases in interbrand competition." **[**26]** Id. at 128. "The overarching standard is whether defendants' actions 'diminish overall competition, and hence consumer welfare.'" *Id.*

In its prior decision, the Court held that the plaintiffs had adequately pled harmful effect on competition. Continental, 956 F. Supp. at 371-72. The plaintiffs must demonstrate an adverse effect in competition among different O&P providers for HIP enrollees. Since the restriction of intrabrand competition must be balanced against the effects on interbrand competition, the relevant product market cannot consist of merely HIP's O&P referrals. To this extent, the Court finds that the plaintiffs' definition of a relevant product market consisting of only O&P health care services to all HIP's enrollees, does not properly define a relevant product market.

The Court notes that in opposition to the defendants' previous motions to dismiss, the **[*142]** plaintiffs requested an opportunity to replead the complaint should the defendants' motion be granted. If the Court had then granted the defendants' motions to dismiss with regard to the allegations of a relevant product market, the plaintiffs would have had an opportunity to replead those allegations. Since **[**27]** the Court granted, in effect, a reconsideration of the issue of whether the plaintiffs have adequately pleaded a relevant product market, the Court finds that fairness demands that the plaintiffs be afforded an opportunity to replead these allegations.

3. *Individual defendants*

HN14[] Individual officers of corporations may be held liable under section 1 of the Sherman Act for conspiracies or combinations in restraint of trade where those conspiracies or combinations are with persons other than the corporations for whom they serve as officers. *See* Eye Encounter, Inc. v. Contour Art, Ltd., 81 F.R.D. 683, 689 (E.D.N.Y. 1982). In State of New York v. Cedar Park Concrete Corp., 665 F. Supp. 238, 247-48 (S.D.N.Y. 1987), Judge Sand held that the complaint adequately pled antitrust conspiracy against individuals by alleging conspiracy on part of their corporations, including corporations of which they were not officers, to rig bids on public construction projects and alleging that the individual defendants dominated and controlled the corporations as officers, directors, and principal stockholders, and alleging specific overt acts of some defendants.

Like *Cedar Park Concrete*, none **[**28]** of the individual defendants charged as co-conspirators in the present case are minor employees; Andrew H. Meyers was President and Chief Executive Officer of Advanced, Matthew and Steven Mironis were high Executive Officers and/or owners of Arimed, Bernard Neek was Chairman of HIP Hospitals, Anthony L. Watson was President and Chief Financial Officer of HIP. The First Amended Complaint pleads generally, and in some circumstances, specific facts, that the individual defendants held meetings at various times at which they agreed to rig bids, communicated with each other to carry out their illegal scheme, authorized and participated in the conspiracy, and allegedly communicated false information to the media. *See* Am. Compl. PP 54-56, 75. Under these circumstances and in light of the legal principles which govern the liability of conspirators, the case against the individual defendants is sufficiently pled and the Court declines to dismiss the complaint against the individual defendants. *See* *Cedar Park Concrete, 665 F. Supp. at 248*.

5. *Novacare*

The First Amended Complaint names Novacare Prosthetic and Orthotics, Inc. ("Novacare") as a defendant based upon the sole allegation, **[**29]** made upon information and belief that on or about December 1996, it purchased all the assets of Advanced. Novacare maintains that under settled rules of corporate and ***antitrust law***, ownership alone does not afford a basis for holding a parent corporation liable for the actions of its subsidiary.

For the first time, the plaintiffs allege in paragraph 34 of the First Amended Complaint that "on or about November 1996, defendant Novacare purchased all of the shares of Advanced." This is the only allegation in the First Amended Complaint with regard to Novacare. In order to assert liability against Novacare, the plaintiffs maintain that "Novacare acquired all or substantially all of the assets of Advanced by way of merger, making Advanced its wholly-owned subsidiary and then expressly agreed to assume the liabilities of Advanced -- which would, of necessity, include Advanced's liability for violating antitrust laws herein." Class Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint at 23. The plaintiffs request the Court to take judicial notice of the September 30, 1996 Agreement and Plan of Merger between and among Novacare and Advanced (the **[**30]** "Agreement"). The Court notes that this is the first time that the plaintiffs have mentioned the Agreement. The Agreement was not incorporated by reference into the First Amended Complaint and the plaintiffs do not cite to any case law which permits the Court to take judicial notice of a contract. Therefore, the Court declines to do so.

[*143] The Court finds that the plaintiffs have not satisfied the requirements of notice pleading with regard to Novacare. However, the plaintiffs request leave to amend their complaint so that they may "amend the complaint with regarding this narrow issue." *See* *id. at 24*. The Court grants the plaintiffs' request to amend the First Amended Complaint as to this issue.

III. CONCLUSION

Having reviewed the parties' submissions and heard oral arguments, and for the reasons set forth above, it is hereby

ORDERED, that the defendants' motion to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, for failure to state a claim based on the relevant product market issue and as against the defendant Novacare Prosthetic and Orthotics, Inc., is **GRANTED without prejudice**. The plaintiffs are permitted to file a Second Amended Complaint with **[**31]** regard to the defendant Novacare Prosthetic and Orthotics, Inc. and the allegations regarding a relevant product market, within twenty (20) days from February 6, 1998, the date that this decision was orally rendered by the Court; and it is further

ORDERED, that the defendants' motion to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, for failure to state a claim, is **DENIED** in all other respects.

SO ORDERED.

Dated: Uniondale, New York

February 7, 1998

ARTHUR D. SPATT

United States District Judge

Blanco v. Remington Hotel Corp.

United States District Court for the Southern District of New York

February 11, 1998, Decided

96 Civ. 6306 (WK)(JCF)

Reporter

1998 U.S. Dist. LEXIS 5605 *; 1998-1 Trade Cas. (CCH) P72,173

ANDREW B. BLANCO, Plaintiff, - against - REMINGTON HOTEL CORPORATION, and WINES, STEINS AND COCKTAILS, a/k/a WINES, STEINS AND COCKTAILS, LIMITED, Defendant.

Subsequent History: [*1] Adopting Order of April 7, 1998, Reported at: 1998 U.S. Dist. LEXIS 4902.

Disposition: Recommended that this defendant's motion for summary judgment be granted and the plaintiff's motion for summary judgment be denied. WSC's counterclaims be dismissed for lack of jurisdiction.

Core Terms

bartending, antitrust, hotel, summary judgment, market power, detrimental effect, relevant market, courses, competitors, recommend, market share, seminars

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Entitlement as Matter of Law, Appropriateness**

A motion for summary judgment may be granted only when there is no genuine issue of material fact remaining for trial and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The burden of showing the absence of any factual dispute rests on the party seeking summary judgment. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In considering the motion, the trial court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party. In the context of antitrust litigation the range of inferences that may be drawn from ambiguous evidence is limited. The non-moving party must set forth facts that tend to preclude an inference of permissible conduct. Though summary judgment disposition of antitrust cases is difficult to obtain because of their inherent factual complexity, that does not mean that summary disposition is thereby precluded or disfavored in ***antitrust law***.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN2[] Antitrust & Trade Law, Sherman Act

In order to establish a prima facie case under *§ 1* of the Sherman Act, a plaintiff must show that (1) there is an agreement or concerted action between two or more parties, (2) the agreement constitutes an unreasonable restraint of trade either per se or under the rule of reason, and (3) the agreement affects interstate commerce.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN3[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Certain business practices are considered illegal per se, meaning that a defendant's actions are so plainly harmful to competition and so lacking in any redeeming virtue that they are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Evidence of actual effect on competition is not required where there are per se violations. Among the practices found to be per se illegal are agreements among competitors at the same level of the market structure to allocate territories and thus reduce competition (termed a "horizontal" restraint), horizontal price-fixing, some vertical price-fixing schemes, and some group boycotts.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Employer & Physician Covenants

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN4[] Practices Governed by Per Se Rule, Boycotts

The per se approach is generally limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor. In contrast, agreements between single entities at different levels of the market structure are not analyzed under the per se doctrine as group boycotts. Rather, such vertical refusals to deal must be analyzed under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason analysis, the plaintiff bears an initial burden of demonstrating that the defendant's conduct has had a substantially harmful effect on competition. The plaintiff may satisfy this burden by (1) offering proof of actual detrimental effects to the market, or (2) establishing that the defendants possess the requisite market power so that their 'arrangement has the potential for genuine adverse effects on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN6[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In order to determine what effect an alleged antitrust violation has had on a particular market, the trial court must first define the relevant market. A market will include all reasonably interchangeable products and services. A plaintiff's failure to include allegations in the complaint of the relevant geographical and product market and the cross-elasticity of demand is ground for dismissal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Market power is the ability to raise price significantly above the competitive level without losing all of one's business.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN8[] Monopolies & Monopolization, Actual Monopolization

A market share below 50 percent is rarely evidence of monopoly power, and a share between 50 percent and 70 percent can only occasionally show monopoly power.

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For REMINGTON HOTEL CORPORATION, defendant: Michael John Lendino, Michael J. Lendino, P.C., New York, NY.

For WINES, STEINS & COCKTAILS, defendant: Vincent A. DeFalice, DeFalice & Douglas, P.C., Pitssburgh, PA.

For WINES, STEINS & COCKTAILS, counter-claimant: Vincent A. DeFalice, DeFalice & Douglas, P.C., Pitssburgh, PA.

ANDREW B. BLANCO, counter-defendant, Pro se, Wilkes-Barre, PA.

Judges: JAMES C. FRANCIS IV, UNITED STATES MAGISTRATE JUDGE. HONORABLE WHITMAN KNAPP, U.S.D.J.

Opinion by: JAMES C. FRANCIS IV

Opinion

REPORT AND RECOMMENDATION

TO THE HONORABLE WHITMAN KNAPP, U.S.D.J.:

In June 1996, the plaintiff, Andrew Blanco, was purportedly denied the opportunity to rent facilities to teach a bartending course at a Howard Johnson hotel in Middletown, New York. The hotel is allegedly owned by the defendant Remington Hotel Corporation ("Remington"). [1] According to Mr. Blanco, he was barred from the Howard Johnson because Remington **[*2]** had entered into an agreement that gave defendant Wines, Steins, and Cocktails ("WSC") the exclusive right to conduct bartending courses at that hotel. The plaintiff alleges that this agreement was a violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1* ("*Section 1*"). All parties have now moved for summary judgment. For the reasons that follow, I recommend that the plaintiff's motion be denied and the defendants' motions be granted.

Background

The background of this case is straightforward, and the defendants do not contest the facts as set forth in the Amended Complaint for purposes of the pending motion. Mr. Blanco contends **[*3]** that on or about June 20, 1996, he called a sales manager at the Middletown Howard Johnson hotel to discuss the availability of banquet rooms for three dates in August. Am. Compl., Count I, P 7. The sales manager informed the plaintiff that the dates were available for rent, but that WSC had an exclusive agreement, pursuant to which no other organization could conduct bartending seminars at the hotel. Am. Compl., Count I, PP 8-10. Mr. Blanco maintains that the Howard Johnson and another hotel -- the Holiday Inn -- are the only hotels in Middletown that rent banquet rooms. Am. Compl., Count II, P 3. The plaintiff contacted the Holiday Inn at that time and was advised that it did not allow any bartending courses to be conducted there. Am. Compl., Count II, P 5.

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[1] Remington asserts that the Howard Johnson hotel is actually owned by Middletown New York Limited Partnership and that Remington acts only as consultant to the operator of the hotel, Remington Employers Corporation. Defendant's Amended Statement Pursuant to Local Rule 3(g), PP 1-3. Nevertheless, Remington has not raised the issue of ownership in the context of this motion.

Nonetheless, the plaintiff concedes that both he and WSC have subsequently conducted seminars at the Holiday Inn. Plaintiff's Answer to Defendant Wines, Steins & Cocktails, a/k/a Wines, Steins & Cocktails, Limited, Statement of Material Facts Pursuant to S.D.N.Y. Rule 3(g) ("Plaintiff's 3(g) Answer") P 2. Mr. Blanco himself apparently held two programs there in the winter of 1996. Deposition of Andrew B. Blanco dated June 23, **[*4]** 1997 ("Blanco Dep."), attached as Exh. B to Affidavit of Michael J. Lendino dated September 29, 1997 ("Lendino Aff.") at 17. The plaintiff also conducted bartending classes in Newburgh, New York, about thirty miles from Middletown. Blanco Dep. at 86-87. Finally, the plaintiff appears to have conducted bartending seminars on January 5, 12, and 19, 1997, at the Howard Johnson hotel which is the subject of this dispute. *See* Facsimile Transmission of Andrew Blanco dated June 24, 1997, attached as Exh. D. to Lendino Aff. ("Blanco Letter").

The defendants argue that they are entitled to summary judgment because the plaintiff has failed to present evidence that would establish an antitrust violation.

Discussion

A. *Standard for Summary Judgment*

HN1[] A motion for summary judgment may be granted only when there is no genuine issue of material fact remaining for trial and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *see also* *Tomka v. Seiler Corp., 66 F.3d 1295, 1304 (2d Cir. 1995)*; *Richardson v. Selsky, 5 F.3d 616, 621 (2d Cir. 1993)*. The burden of showing the absence of any factual dispute rests on the party seeking summary judgment. **[*5]** *See* *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*; *Gummo v. Village of Depew, 75 F.3d 98, 107* (2d Cir.), *cert. denied, 517 U.S. 1190, 116 S. Ct. 1678, 134 L. Ed. 2d 780 (1996)*. "When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. In considering the motion, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. United States Fire Insurance Co., 804 F.2d 9, 11 (2d Cir. 1986)*.

"In the context of antitrust litigation the range of inferences that may be drawn from ambiguous evidence is limited; the non-moving party must set forth facts that tend to preclude an inference of permissible conduct." *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, 996 F.2d 537, 542 (2d Cir. 1993)* (citing **[*6]** *Matsushita, 475 U.S. at 587-88*). Moreover, though "summary judgment disposition of antitrust cases is difficult to obtain because of their inherent factual complexity[,] . . . that does not mean that summary disposition is thereby precluded or disfavored in ***antitrust law***." *Id. at 541*. Rather, "summary judgment remains a vital procedural tool to avoid wasteful trials and may be particularly important in antitrust litigation to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces." *Id.*

B. *Section 1* *Antitrust Analysis*

Mr. Blanco argues that the defendants violated *Section 1* of the Sherman Act when they allegedly agreed that WSC alone would be permitted to teach bartending courses at the Howard Johnson. ***HN2***[] In order to establish a prima facie case under *§ 1*, a plaintiff must show that (1) there was an agreement or concerted action between two or more parties; (2) the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason; and (3) the agreement affected interstate commerce. *Maric v. St. Agnes Hospital Corp., 65 F.3d 310, 313 (2d Cir. 1995)*; *Blaine v. Meineke, 670 F. Supp. 1107,* **[*7]** *1113 (D. Conn. 1987)*.

HN3[] Certain business practices are considered illegal per se, meaning that the defendant's actions are so plainly harmful to competition and so lacking in any redeeming virtue that they are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)* (evidence of actual effect on competition is not required where there are per se violations). Among the practices found to be per se illegal are agreements among competitors at the same level of the market structure to allocate territories and thus reduce competition (termed a "horizontal" restraint), horizontal price-fixing, some vertical price-fixing schemes, and some group boycotts. *See* *United States v. Topco Associates, Inc., 405 U.S. 596, 608, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211-12, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; *Capital Imaging, 996 F.2d at 542-43* (citing cases).

This case, like most antitrust actions, deals with conduct **[*8]** that is not illegal per se. The business practice alleged here is an agreement between the defendants that Howard Johnson would refuse to deal with competitors of WSC. The per se rule is applied to only a narrow class of refusal-to-deal situations. In *Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*, the Court stated that ***HN4***[] the per se approach has generally been "limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *Id. at 458*. In contrast, agreements between single entities at different levels of the market structure are not analyzed under the per se doctrine as group boycotts. *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978)*. Rather, such vertical refusals to deal must be analyzed under the rule of reason. *Id.; see also* *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 298, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)* ("mere allegation of a concerted refusal to deal does not suffice [as a per se violation] because not all concerted refusals to deal are predominantly **[*9]** anticompetitive.").

HN5[] Under the rule of reason analysis, the plaintiff bears an initial burden of demonstrating that "the defendant's conduct has had a substantially harmful effect on competition." *Capital Imaging, 996 F.2d at 546*. The plaintiff may satisfy this burden by (1) offering proof of actual detrimental effects to the market, or (2) establishing that the defendants "possess the requisite market power so that their 'arrangement has the potential for genuine adverse effects on competition.'" *Id.* (quoting *Indiana Federation of Dentists, 476 U.S. at 460-61*).

1. *Actual Detrimental Effects to the Market*

HN6[] In order to determine what effect the alleged antitrust violation has had on a particular market, the court must first define the relevant market. *Re-Alco Industries, Inc. v. National Center for Health Education, Inc., 812 F. Supp. 387, 391 (S.D.N.Y. 1993)* (citing *Jefferson Parish Hospital District Number 2 v. Hyde, 466 U.S. 2, 29, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984))*. A market will include all reasonably interchangeable products and services. *Id.* A plaintiff's failure to include allegations in the complaint of the relevant geographical and product **[*10]** market and the cross-elasticity of demand is ground for dismissal. *B.V. Optische Industrie de Oude Delft v. Hologic, 909 F. Supp. 162, 172 (S.D.N.Y. 1995)*; *Kramer v. Pollock-Krasner Foundation, 890 F. Supp. 250, 255 (S.D.N.Y. 1995)*; *Re-Alco, 812 F. Supp. at 391*.

Mr. Blanco makes no reference in his complaint to any relevant market area. Nor does he allege any reasonably available substitutes for the Howard Johnson banquet room. These failures alone would warrant dismissal. *Id.; B.V. Optische, 909 F. Supp. at 172* (plaintiff's pleadings failed to refer to any reasonably interchangeable alternatives); *Theatre Party Associates, Inc. v. Shubert Organization, Inc., 695 F. Supp. 150, 154 (S.D.N.Y. 1988)* (requiring "a theoretically rational explanation to support [the plaintiff's] proposed relevant product market").

Even looking beyond the complaint, Mr. Blanco has failed to enunciate a consistent view of the relevant market. He has defined it variously as the city of Middletown alone, Plaintiff's Answer to Defendant Wines, Steins & Cocktails, a/k/a Wines, Steins & Cocktails, Limited Motion for Summary Judgment ("Plaintiff's Motion Answer") at P 10, or as a geographical **[*11]** area extending either 60 or 100 miles in all directions from Middletown. Blanco Dep. at 26-28.

Regardless of the appropriate definition of the relevant market, Mr. Blanco has failed to demonstrate any antitrust injury. To prove "actual detrimental effects to the market" under the rule of reason, the plaintiff must show an adverse effect on competition as a whole in the relevant market, not merely harm to an individual competitor. Insisting on proof of harm to the market fulfills the broad purpose of the ***antitrust law*** to promote competition in general, not merely to protect individual competitors. *Capital Imaging, 996 F.2d at 543* (citing *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 343-44, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*; *Austin v. McNamara, 979*

F.2d 728, 739 (9th Cir. 1992)). Otherwise, "routine disputes between business competitors would be elevated to the status of an antitrust action, thereby trivializing the Act because of its too ready availability." *Id.* (citations omitted).

Mr. Blanco has proffered no evidence to indicate actual detrimental effects to the market for bartending courses as a result of his exclusion from the Middletown Howard **[*12]** Johnson hotel. *See, e.g.* Capital Imaging, 996 F.2d at 546 (no antitrust violation where plaintiff conceded that price of services would remain the same, and failed to adduce significant evidence that any decrease in the quality of services would result from its exclusion). Rather, he has alleged only that the defendants have "produced adverse anticompetitive effects." *See* Am. Compl. Count I, P 14. Mr. Blanco is apparently unable to offer any "proof of actual detrimental effects, such as a reduction of output." Capital Imaging, 996 F.2d at 546 (quoting Indiana Federation of Dentists, 476 U.S. at 460-61). Even in substantiating his own injury, the plaintiff states merely that "plaintiff has been injured as a proximate result of the conspiracy." Am. Compl., Count I, P 15. Indeed, Mr. Blanco admitted at his deposition that he was unable to quantify his damages and had no records that would indicate lost revenue. Blanco Dep. at 38-41.

Finally, Mr. Blanco's own allegations cut against any inference of harm to the market for bartending training courses in the greater Middletown area. He has apparently been able to continue conducting his business. He concedes that he held **[*13]** bartending courses in Newburgh, New York, about thirty miles from Middletown. Blanco Dep. at 86-87. Even if the market analysis focussed on Middletown alone, the evidence demonstrates that Mr. Blanco has not been prevented from conducting his business. The plaintiff has apparently held three bartending seminars in January 1997 at the very same Howard Johnson hotel that is the subject of this dispute. Blanco Letter at 1. *See* Balaklaw v. Lovell, 14 F.3d 793, 799 (2d Cir. 1993) (three year exclusivity contract that could be terminated without cause by either party on six months' notice did not sufficiently harm competition so as to establish an antitrust injury). Further, Mr. Blanco acknowledges that the other hotel in Middletown now allows bartending seminars. Plaintiff's 3(g) Answer P 2. *See* Optivision, Inc. v. Syracuse Shopping Center Associates, 472 F. Supp. 665, 677 (N.D.N.Y. 1979) (availability of market alternatives is an important factor in determining whether an exclusivity clause unreasonably restrains competition). Thus, the plaintiff has not demonstrated any detrimental effects to the market, however the relevant market is defined.

2. *Market Power*

Mr. Blanco **[*14]** is also unable to prove an antitrust violation based on the defendants' market power. He has failed to provide evidence from which to infer that the defendants possess the economic force needed for their agreement to have genuine adverse effects on competition. The Second Circuit has defined ***HN7***[] market power as "the ability to raise price significantly above the competitive level without losing all of one's business." K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co., 61 F.3d 123, 129 (2d Cir. 1995) (quoting Graphic Products Distributors, Inc. v. Itek Corp., 717 F.2d 1560, 1570 (11th Cir. 1983)); *see also* Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122, 126-27 (2d Cir. 1981) (defining market power as "the power to control prices or exclude competition" in the context of § 2 monopolization claim). An analysis of market power may take into account market share. *Id.*

Mr. Blanco has proffered no evidence to indicate that either WSC or Howard Johnson is able to influence the market for bartending courses by virtue of their respective market shares. There is nothing in the record showing the size of the market for bartending services **[*15]** or for rentable banquet space, or the share of each market that WSC or Howard Johnson commands. The plaintiff has therefore failed present evidence to indicate either defendant's ability to affect prices.

Even if the Court gave Mr. Blanco the benefit of any possible inference and limited its analysis to Middletown alone, the plaintiff still would be unable to demonstrate market power. *See* Zschaler v. Claneil Enterprises, Inc., 958 F. Supp. 929, 942 (D. Vt. 1997) (axiomatic that the smaller the market, the easier it is for the plaintiff to establish market share). Assuming that the two hotels in Middletown are interchangeable from the perspective of a business attempting to rent facility space -- and there is no evidence here to the contrary -- the Howard Johnson was unable to control more than fifty percent of even the smallest possible market. Yet, ***HN8***[] "a market share below 50% is rarely evidence of monopoly power, [and] a share between 50% and 70% can [only] occasionally show monopoly power." *Broadway Delivery Corp., 651 F.2d at 129*; *see also* *Graphic Products Distributors, 717 F.2d at 1570* (70-75% market share indicative of significant market power).

Because Mr. Blanco **[*16]** has been unable to demonstrate either actual detrimental effects to the relevant market or the requisite market power that might substitute for a showing of detrimental effects, I recommend that the defendants' motion for summary judgment be granted, and the plaintiff's motion be denied.

C. *State Counterclaims*

In its answer, WSC asserted counterclaims based on a settlement in a prior case that the plaintiff had filed in the Court of Common Pleas of Lehigh County, Pennsylvania. Since the plaintiff's federal claims should be dismissed before trial, the state claims also should be dismissed in the exercise of the Court's discretion. *28 U.S.C. § 1367(c)(3)*; *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*; *Purgess v. Sharrock, 33 F.3d 134, 138-39 (2d Cir. 1994)* (exercise of pendent or supplemental jurisdiction is best left to the discretion of the district court). [2]

[*17] *Conclusion*

For the reasons stated above, I recommend that the defendant's motion for summary judgment be granted and the plaintiff's motion be denied. I further recommend that WSC's counterclaims be dismissed for lack of jurisdiction.

Pursuant to *28 U.S.C. § 636(b)(1)* and *Rules 72*, *6(a)* and *6(e) of the Federal Rules of Civil Procedure*, the parties shall have ten (10) days to file written objections to this report and recommendation. Such objections will be filed with the Clerk of the Court, with extra copies mailed to the chambers of the Honorable Whitman Knapp, Room 1201, 40 Foley Square, New York, New York 10007, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York

February 11, 1998

End of Document

[2] In fact, where a counterclaim is permissive, rather than compulsory, there is no basis for federal jurisdiction after the primary claim has been dismissed. *See* *Harris v. Steinem, 571 F.2d 119, 121-25 (2d Cir. 1978)*; *see also* *Scott v. Long Island Savings Bank, FSB, 937 F.2d 738, 743 (2d Cir. 1991)*.

Classic Communs. v. Rural Tel. Serv. Co.

United States District Court for the District of Kansas

February 11, 1998, Decided ; February 12, 1998, Filed

CIVIL ACTION Case No. 96-2166-DES

Reporter
995 F. Supp. 1185 *; 1998 U.S. Dist. LEXIS 2515 **; 1998-2 Trade Cas. (CCH) P72,331

CLASSIC COMMUNICATIONS, INC.; CLASSIC TELEPHONE, INC.; and CLASSIC CABLE, INC., Plaintiffs, v. RURAL TELEPHONE SERVICE CO., INC.; VISION PLUS, INC.; LARRY E. SEVIER; MERLIN DENNIS; BARNEY HICKERT; F. C. BRUNGARDT; DOUGLAS ZIEGLER; CHARLEY MINIUM; MARION OTTER; GLENN LAMBERT; ROBERT E. McCALL; SHANE BRADY; KENNETH CLARK; CITY OF HILL CITY, KANSAS; CITY OF BOGUE, KANSAS; CITY OF QUINTER, KANSAS; CITY OF MORLAND, KANSAS; CITY OF NORCATUR, KANSAS; CITY OF GORHAM, KANSAS; CITY OF DAMAR, KANSAS; CITY OF PALCO, KANSAS; and CITY OF LOGAN, KANSAS, Defendants.

Disposition: **[**1]** Classic's Motion to Dismiss the Counterclaims Asserted by Rural Telephone Service Co., Inc. and Vision Plus, Inc. (Doc. 220) granted as to Rural's federal antitrust counterclaim and denied as to Rural's state law defamation counterclaim.

Core Terms

counterclaim, telephone, antitrust, defamation, anti trust law, allegations, motion to dismiss, horizontal

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

The court may not dismiss a cause of action for failure to state a claim under Fed. R. Civ. P. 12(b)(6) unless it appears beyond doubt that the claimant can prove no set of facts supporting its claim which would entitle it to relief. In considering a Rule 12(b)(6) motion, the court must assume as true all well-pleaded facts, as distinguished from conclusory allegations, and must draw all reasonable inferences in favor of the nonmovant. The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support its claim.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Private Actions, Standing**

Six factors are relevant in ascertaining whether a plaintiff has standing to pursue an antitrust claim: (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the defendant's intent or motivation; (3) the nature of the plaintiff's injury, or whether it is one intended to be redressed by the antitrust laws; (4) the directness or the indirectness of the connection between the plaintiff's injury and the market restraint resulting from the alleged antitrust violation; (5) the speculative nature of the damages sought; and (6) the risk of duplicative recoveries or complex damages apportionment.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Regulated Practices, Monopolies & Monopolization**

Whether a practice violates the antitrust laws is determined by its effect on competition, not its effect on an individual competitor. Antitrust laws were enacted to protect competition, not to protect competitors.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Intentional Torts > Defamation > Defamation Per Se

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defamation > Elements > General Overview

HN4[] **Pleadings, Heightened Pleading Requirements**

To state a claim for defamation under Kansas law, the plaintiff must plead false and defamatory words, communicated to a third person, and which result in harm to the reputation of the person defamed. Since Kansas no longer recognizes a cause of action for defamation per se, every claim for defamation requires proof of damage to the plaintiff's reputation.

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Judges: DALE E. SAFFELS, United States District Judge.

Opinion by: DALE E. SAFFELS

Opinion

[*1186] **MEMORANDUM AND ORDER**

This matter is before the court on Classic Communications, Inc.'s, Classic Telephone, Inc.'s, and Classic Cable, Inc.'s Motion to Dismiss the Counterclaims Asserted by Rural Telephone Service Co., Inc. and Vision Plus, Inc. (Doc. 220). For the reasons set forth below, plaintiffs' motion is granted in part and denied in part.

I. BACKGROUND

This action arises from the efforts of Classic Communications, Inc. and its subsidiary telephone and cable companies (collectively "Classic") to expand its telecommunications business into western Kansas. In each of the cities into which Classic attempted to expand its business, Rural Telephone Service Co., Inc. or its wholly-owned subsidiary, Vision Plus, Inc. (collectively "Rural"), was already operating a local telephone exchange or a cable television system, or both.

Classic alleges that Rural has engaged in **[**4]** illegal conduct and schemes designed to prevent Classic from competing with Rural. Specifically, Classic alleges that Rural has interfered with Classic's business relationships, made misrepresentations in order to injure Classic's business reputation, and conspired with members of the local city governments to prevent Classic from entering into and competing in the region's telecommunications market. At present, Classic's only remaining claim against Rural is a federal Lanham Act claim brought pursuant to *15 U.S.C. § 1125*.

In answer to Classic's amended complaint, Rural asserts a counterclaim against Classic alleging an illegal horizontal market allocation in violation of the Sherman Antitrust Act, *15 U.S.C. § 1*. By an "illegal horizontal market allocation" Rural refers to the agreement between Classic and Pioneer Telephone Association Incorporated ("Pioneer") not to compete with each other in certain product and geographical markets including the western Kansas cities of Wakeeny, Hill City, and Quinter. According to Rural, but for the agreement between Classic and Pioneer, which horizontally allocated the telephone exchange and cable television markets, Rural Telephone, as the **[**5]** highest qualified final bidder, would have purchased Sprint/United's Wakeeney, Hill City, and Quinter local telephone exchanges in 1995. Rural also asserts a counterclaim against Classic alleging defamation under Kansas state law. Specifically, Rural claims that J. Meritt Belisle, Classic's Chief executive Officer, made two statements concerning Rural that are *per se* defamatory.

II. *RULE 12(B)(6)* MOTION TO DISMISS STANDARD

HN1[] The court may not dismiss a cause of action for failure to state a claim under *Rule 12(b)(6)* unless it appears beyond doubt that the claimant can prove no set of facts supporting its claim which would entitle it to relief. *H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989)*. In considering a *Rule 12(b)(6)* motion, the court must assume as true all well-pleaded facts, as distinguished from conclusory allegations, and must draw all reasonable inferences in favor of the nonmovant. *Housing Auth. of the Kaw Tribe v. City of Ponca City, 952 F.2d 1183, 1187 (10th Cir. 1991)*; *Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984)*. The issue in reviewing the sufficiency of a complaint is not whether **[**6]** the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support its claim. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*.

III. DISCUSSION

A. Rural's Antitrust Counterclaim

Classic moves to dismiss Rural's antitrust counterclaim for lack of standing. In *Roman v. Cessna Aircraft*, the Tenth Circuit enumerated ***HN2***[] six factors that are relevant in **[*1187]** ascertaining whether a plaintiff has standing to pursue an antitrust claim:

> (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the defendant's intent or motivation; (3) the nature of the plaintiff's injury--i.e., whether it is one intended to be redressed by the antitrust laws; (4) the directness or the indirectness of the connection between the plaintiff's injury and the market restraint resulting from the alleged antitrust violation; (5) the speculative nature of the damages sought; and (6) the risk of duplicative recoveries or complex damages apportionment.

55 F.3d 542, 543 (10th Cir. 1995)(citing *Sharp v. United Airlines, Inc., 967 F.2d 404, 406-07* (10th Cir.), *cert. denied*, *506 U.S. 974, 121* ***[**7]*** *L. Ed. 2d 372, 113 S. Ct. 464 (1992))*. The third factor set forth in *Roman* requires that a plaintiff's injury must be "intended to be redressed by the antitrust laws." *Id.* Classic contends that Rural's counterclaim fails to adequately allege the requisite antitrust injury to establish its standing to pursue a private cause of action under the Sherman Act.

The heart of Rural's antitrust claim is that the Classic/Pioneer agreement enabled Classic to outbid Rural for the Sprint/United telephone system. Rural attempts to establish the anticompetitive effect of the Classic/Pioneer agreement by alleging that it caused Rural to suffer damages as a result of losing the bid for the telephone system.

According to Classic, Rural's alleged injury does not result form a reduction in competition and, therefore, is not the type of injury for which the federal antitrust laws were intended to redress. The court agrees. ***HN3***[] "Whether a practice violates the antitrust laws is determined by its effect on competition, not its effect on an individual competitor." *Bright v. Moss Ambulance Service, Inc., 824 F.2d 819, 824 (10th Cir. 1987)* (citing *Richter Concrete Corp. v. Hilltop Concrete Corp., **[**8]** 691 F.2d 818, 825 (6th Cir. 1982))*. Injury to Rural as a competitor, therefore, does not constitute injury to Rural's ability to fairly compete; and it is the latter type of injury for which the antitrust laws were enacted to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* (Antitrust laws were enacted to protect competition, not to protect competitors.).

Furthermore, simply alleging that the Classic/Pioneer agreement is a horizontal restraint on trade and therefore presumptively anticompetitive is not enough to preserve its claim absent allegations that Classic's conduct hampered Rural's ability to compete. This is particularly true in the present case, since Rural's allegation that the nature of the agreement was anticompetitive is contradicted by its allegation that, but for the agreement, Sprint/United would have received a lower price for telephone system offered for sale. Rural is essentially saying that, but for the agreement, it would have had no serious competition for the Sprint/United telephone system. This is not the kind of "distorted" biding process, however, from which antitrust actions arise. It would thus **[**9]** be contrary to the purpose of the antitrust laws to permit Rural to rest its claim on allegations that the Classic/Pioneer agreement is a horizontal restraint on trade and therefore presumptively anticompetitive. The court concludes that the allegations in Rural's antitrust counterclaim, taken as true, are not sufficient to state antitrust standing.

B. Rural's Defamation Counterclaim

Classic also moves to dismiss Rural's defamation counterclaim. ***HN4***[] To state a claim for defamation under Kansas law, the plaintiff must plead false and defamatory words, communicated to a third person, and which result in harm to the reputation of the person defamed. *Batt v. Globe Engineering Co., Inc., 13 Kan. App. 2d 500, 774 P.2d 371 (1989)*. Since Kansas no longer recognizes a cause of action for defamation *per se*, every claim for defamation requires proof of damage to the plaintiff's reputation. *Gobin v. Globe Publ. Co., 232 Kan. 1, 649 P.2d 1239 (1982)*. Classic contends that Rural's defamation counterclaim must fail because the statements complained of were true when published. The court disagrees. At this stage of the pleadings, there is sufficient doubt concerning the truth or falsity **[**10]** of the alleged defamatory statements to prevent the court from finding beyond doubt that Rural can prove no set of facts supporting its claim **[*1188]** which would entitle it to relief. The court concludes that the allegations in Rural's defamation counterclaim, taken as true, are sufficient to state a claim for defamation.

IT IS THEREFORE BY THE COURT ORDERED that Classic's Motion to Dismiss the Counterclaims Asserted by Rural Telephone Service Co., Inc. and Vision Plus, Inc. (Doc. 220) is granted as to Rural's federal antitrust counterclaim and is denied as to Rural's state law defamation counterclaim.

Dated this 11 day of February, 1998, at Topeka, Kansas.

/s/ DALE E. SAFFELS

United States District Judge

End of Document

[Double D Spotting Serv. v. Supervalu, Inc.](#)

United States Court of Appeals for the Eighth Circuit

October 23, 1997, Submitted ; February 11, 1998, Filed

No. 97-1456

Reporter

136 F.3d 554 *; 1998 U.S. App. LEXIS 1820 **; 1998-1 Trade Cas. (CCH) P72,058

Double D Spotting Service, Inc., Plaintiff-Appellant, v. Supervalu, Inc.; World Super Services, Inc., Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of Iowa. 4-96-cv-70673. Honorable Harold Vietor.

Disposition: Affirmed the judgment of the district court dismissed counts I through IV of the amended and substituted complaint. Reversed the judgment of the district court dismissed count V and remanded to the district court for further proceedings on that count.

Core Terms

unloading, warehouse, relevant market, district court, trucking company, truck, restraint of trade, semitrailer, antitrust, transportation, vertical, rule of reason, Sherman Act, asserts, counts, interstate commerce, tying arrangement, per se violation, coerced, antitrust claim, failure to state a claim, antitrust violation, motor carrier, price-fixing, geographic, pleaded, driver, levels

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

When reviewing a *Fed. R. Civ. P. 12(b)(6)* dismissal for failure to state a claim, the appellate court looks only to the facts alleged in the complaint and construe them in the light most favorable to the plaintiff.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

Under the Sherman Antitrust Act, it unlawful to contract or form a conspiracy in restraint of trade or commerce among the several states. 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN3[] **Antitrust & Trade Law, Sherman Act**

Under the Sherman Antitrust Act, it is a felony to monopolize, or attempt to monopolize any part of the trade or commerce among the several states. 15 U.S.C.S. § 2.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN4[] **Regulated Practices, Private Actions**

The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's Fed. R. Civ. P. 12(b)(6) motion.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Regulated Practices, Monopolies & Monopolization**

See Iowa Code § 553.4 (1997).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Monopolies & Monopolization, Attempts to Monopolize**

See Iowa Code § 553.5.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Sherman Act, Claims

To demonstrate a violation of *section 1* of the Sherman Antitrust Act, codified at *15 U.S.C.S. § 1*, a plaintiff must provide proof of an illegal contract, combination, or conspiracy, which results in an unreasonable restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Most antitrust claims are analyzed under a rule of reason, according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition. This "rule of reason" analysis involves an inquiry into the market structure and the defendant's market power in order to assess the actual effect of the restraint.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Certain types of restraint are so inherently anticompetitive that they are illegal per se, without inquiry into the reasonableness of the restraint or the harm caused. It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Antitrust Act. Per se treatment is appropriate once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Practices which have been held to be illegal per se include price-fixing, division of markets, group boycotts, and tying arrangements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN11[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Horizontal restraints of trade result when combinations of traders at one level of the market structure agree to exclude direct competitors from the same level of the market. A plaintiff alleging a horizontal restraint must at least define the market and its participants.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN12[] **Vertical Restraints, Nonprice Restraints**

Vertical restraints of trade result from agreements among combinations of persons at different levels of the market structure, e.g., manufacturers and distributors. Vertical nonprice restrictions are governed by the rule of reason and are not per se violations, because they promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN13[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Vertical refusals to deal are subject to the rule of reason unless they are price-related or are designed to enforce underlying restrictions that would otherwise be subject to per se analysis, such as an illegal tying arrangement.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN14[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Generally, vertical price restrictions are per se antitrust violations.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN15[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Vertical maximum price-fixing is not a per se violation but is subject to the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Contracts Law > Personal Property > Personalty Leases > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN16[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is the sale or lease of one item, the tying product, on the condition that the buyer or lessee purchase a second item, the tied product, from the same source. A per se illegal tying arrangement does not exist unless the defendant has coerced buyers into purchasing a product or service, which such buyers otherwise would not have purchased or would have purchased from a different source than the defendant.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Sherman Act, Claims**

The "rule of reason" analysis involves an inquiry into market power and market structure to assess the actual effect of the restraint. The plaintiff must allege a valid relevant market in order to prevail on its monopoly claim. *Section 2* the Sherman Antitrust Act, codified at *15 U.S.C.S. § 2*, requires a plaintiff to plead and prove that the defendant (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power as opposed to gaining it as a result of a superior product, business acumen, or historical accident.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN18[] **Market Definition, Relevant Market**

It is the plaintiff's burden to define the relevant market. The definition of the relevant market has two components - a product market and a geographic market. The relevant product market includes all reasonably interchangeable products. The geographic market is defined by considering the commercial realities faced by consumers. It includes the geographic area in which consumers can practically seek alternative sources of the product, and it can be defined as the market area in which the seller operates.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN19[] **Regulated Industries, Transportation**

See *49 U.S.C.S. § 14103(b)*.

Counsel: Counsel who presented argument on behalf of the appellant was G. Stephen Walters of Winterset, Iowa.

Counsel who presented argument on behalf of the appellee was Edward M. Mansfield of Des Moines, IA. Roger T. Stetson of Des Moines appeared on the brief.

Judges: Before RICHARD S. ARNOLD, Chief Judge, LOKEN and HANSEN, Circuit Judges.

Opinion by: HANSEN

Opinion

[*556] HANSEN, Circuit Judge.

Double D Spotting Service, Inc. (Double D) brought this suit against Supervalu, Inc. (Supervalu) and World Super Services, Inc. (World Super Services), alleging that the defendants violated federal antitrust laws, state competition laws, and a federal motor carrier law. The district court dismissed Double D's complaint for failure to state a claim. See *Fed. R. Civ. P. 12(b)(6)*. We affirm in part and reverse in part.

I.

HN1[] When reviewing a *Rule 12(b)(6)* dismissal for failure to state a claim, we look only to the facts alleged in the complaint and construe them in the light most favorable to the plaintiff. See *Doe v. Norwest Bank Minnesota, N.A., 107 F.3d 1297, 1303-04 (8th Cir. 1997)*. In its amended and substituted **[**2]** complaint, Double D pleaded that until 1996, it had been in the business of competing with other companies to provide semitrailer unloading services for over the road trucking companies that deliver goods to the Supervalu warehouse in Urbandale, Iowa. The semitrailers travel in interstate commerce, carrying goods that are unloaded at the Supervalu warehouse and subsequently shipped to grocery stores in several states. In addition to unloading trucks driven to the warehouse by **[*557]** the trucking company drivers, Double D offered trucking companies a more involved unloading service. By agreement with Double D, the trucking company could drop its loaded, unhooked semitrailer at a nearby interstate truck stop. A Double D driver driving a Double D tractor would then hook on to the trailer and transport it to the Supervalu warehouse. The Double D driver would then unload the semitrailer and return it empty to the same truck stop location for the over the road trucking company to retrieve at its convenience. This service allowed the over the road trucking company to save the time and expense of paying its own driver both to deliver the semitrailer to the warehouse and to wait for it to be unloaded. **[**3]** It also freed up the trucking company's tractor for other work.

In 1996, Supervalu entered into an agreement granting World Super Services the exclusive right to provide unloading services at the Urbandale warehouse. The agreement provided fixed prices to be charged by World Super Services and barred all other unloading companies from performing any unloading services at the Urbandale warehouse. Thereafter, trucking companies could choose either to unload their own trucks at the warehouse or to hire World Super Services to unload them. Double D complains that the agreement between Supervalu and World Super Services wrongfully eliminated competition and imposed an unreasonable restraint on the unloading services trade at Supervalu's Urbandale warehouse.

Double D originally brought suit against Supervalu and World Super Services in state court, seeking an injunction and damages for the defendants' alleged restraint of trade and competition in violation of state and federal ***antitrust law*** and for alleged tortious interference with Double D's business relationships. The defendants removed the case to federal district court and moved to dismiss the complaint pursuant to *Rule 12(b)(6)* for **[**4]** failure to state a claim upon which relief may be granted. Double D filed an amended and substituted complaint in federal district court, alleging in counts I through IV that the defendants contracted to restrain trade in violation of *Iowa Code § 553.4* (1997) and *Section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1 (1994)*; and that they attempted to establish a monopoly in violation of *Iowa Code § 553.5* and Section 2 of the Sherman Antitrust Act, *15 U.S.C. § 2*. Count V alleges a violation of *49 U.S.C.A. § 14103(b) (West 1997)*, which prohibits the act of coercing any motor carrier operator to pay someone to load or unload the property being transported in interstate commerce.

The district court granted the defendants' motion to dismiss. The court held that Double D failed to state a claim of restraint of trade or monopoly as alleged in counts I through IV, concluding that the facts as alleged do not constitute a legally cognizable relevant market or demonstrate an actual adverse impact on competition within that market. Additionally, the district court concluded that count V, asserting coercion of a "person providing transportation of property by motor vehicle for compensation **[**5]** in interstate commerce," fails to state a claim because there is no allegation that any trucking companies were forced or coerced to pay World Super Services to unload their semitrailers. Double D appeals the dismissal of its complaint.

II.

We review de novo the district court's grant of a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. *Association of Commonwealth Claimants v. Moylan, 71 F.3d 1398, 1402 (8th Cir. 1995)*. Using the same standard as the district court, we must accept the factual allegations of the complaint as true and construe the complaint in the light most favorable to the plaintiff. *Doe, 107 F.3d at 1303-04*. We affirm a *Rule 12(b)(6)* dismissal if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir. 1996)* (internal quotations omitted), cert. denied, *137 L. Ed. 2d 216, 117 S. Ct. 1081 (1997)*.

A. Antitrust Claims

The first four counts of Double D's complaint allege violations of state and federal ***antitrust law***. Two counts are based on the **[*558]** Sherman Antitrust Act, which declares ***HN2***[] it unlawful **[**6]** to contract or form a conspiracy "in restraint of trade or commerce among the several States," *15 U.S.C. § 1*, and which makes ***HN3***[] it a felony to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States," *15 U.S.C. § 2*. Two counts are based on Iowa statutes that mirror these federal prohibitions, absent the interstate commerce element. See *Iowa Code §§ 553.4*, *553.5*. [1] "***HN4***[] The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's [Rule] 12(b)(6) motion." *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988)*.

[7]** The district court concluded that Double D's antitrust claims failed to state a claim because Double D failed to plead a valid relevant market. Double D contends that it was not required to plead a relevant market because it pleaded per se antitrust violations. Alternatively, Double D asserts that even if it was necessary for it to plead a relevant market, the Supervalu warehouse in Urbandale itself is the relevant market for trailer unloading services.

HN7[] To demonstrate a violation of *section 1* of the Sherman Act, a plaintiff must provide proof of an illegal contract, combination, or conspiracy which results in an unreasonable restraint of trade. *State Oil Co. v. Khan, 139 L. Ed. 2d 199, 118 S. Ct. 275, 279 (1997)*. "***HN8***[] Most antitrust claims are analyzed under a rule of reason,'

[1] ***HN5***[] *Section 553.4* provides, "A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market." ***HN6***[] *Section 553.5* provides, "A person shall not attempt to establish . . . a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing, or maintaining prices."

according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition." Id. This "rule of reason" analysis involves an inquiry into the market structure and the defendant's market power in order to assess the actual effect of the restraint. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*; **[**8]** see also *Flegel v. Christian Hosp., Northeast-Northwest, 4 F.3d 682, 688 (8th Cir. 1993)*.

HN9[] Certain types of restraint are so inherently anticompetitive that they are illegal per se, without inquiry into the reasonableness of the restraint or the harm caused. *Copperweld Corp., 467 U.S. at 768*; see also *Khan, 118 S. Ct. at 279*. "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Assocs., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. "*Per se* treatment is appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Khan, 118 S. Ct. at 279* (internal quotations and alterations omitted).

HN10[] Practices which have been held to be illegal per se include price-fixing, division of markets, group boycotts, and tying arrangements. See *Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 344 n.15, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*; *Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. The district court concluded that under a liberal **[**9]** construction of the factual circumstances pleaded, Double D failed to plead circumstances under which it could prove a per se antitrust violation. We agree.

In support of its contention that it has pleaded per se violations, Double D contends that the agreement between Supervalu and World Super Services amounts to a horizontal restraint of trade, which the Supreme Court has described as a "naked restraint[] of trade with no purpose except stifling of competition." *Topco, 405 U.S. at 608* (internal quotations omitted). ***HN11***[] Horizontal restraints of trade result when combinations of traders at one level of the market structure agree to exclude direct competitors from the same level of the market. See id. Thus, a plaintiff alleging a **[*559]** horizontal restraint must at least define the market and its participants, which, for reasons discussed below, Double D has failed to do. Supervalu is not a participant in the unloading services market at the same level as Double D or World Super Services. Furthermore, for reasons discussed more fully below, we conclude that Supervalu's agreement with World Super Services has no improper effect of restraining trade in the relevant unloading services **[**10]** market, because Double D has failed to plead a valid relevant market. Thus, Double D has not stated a claim of a per se horizontal restraint of trade.

Double D asserts that it has also alleged vertical price-fixing as a per se violation. ***HN12***[] Vertical restraints of trade result from agreements among "combinations of persons at different levels of the market structure, *e.g.*, manufacturers and distributors." Id. Vertical nonprice restrictions are governed by the rule of reason and are not per se violations, because they "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. We have noted that ***HN13***[] vertical refusals to deal are subject to the rule of reason unless they are price-related "or are designed to enforce underlying restrictions that would otherwise be subject to *per se* analysis," such as an illegal tying arrangement. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 590 (8th Cir. 1987)*, cert. denied, *484 U.S. 1010, 98 L. Ed. 2d 658, 108 S. Ct. 707 (1988)*. ***HN14***[] Generally, **[**11]** vertical price restrictions are per se antitrust violations. *Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 735-36, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)* ("A vertical restraint is not illegal per se unless it includes some agreement on price or price levels."). Recently, however, the Supreme Court has clarified that ***HN15***[] vertical maximum price-fixing is not a per se violation but is subject to the rule of reason. See *Kahn, 118 S. Ct. at 283*. Double D asserts that the agreement between Supervalu and World Super Services is one fixing prices between market participants at different levels of the market structure and therefore amounts to a vertical per se price-fixing violation. We disagree. The agreement at issue does not fix prices between different levels of the market structure. Instead, the agreement fixes the price that one unloading service provider can charge at Supervalu's one warehouse in Urbandale, Iowa. Such an arrangement does not amount to an unlawful restraint between different levels of the market structure. Rather, it demonstrates an isolated agreement concerning Supervalu's operation of its warehouse. Double D has not stated a claim of a per se vertical **[**12]** price-fixing violation.

Double D also asserts that it has stated an unlawful tying arrangement. "***HN16***[] A tying arrangement is the sale or lease of one item (the tying product) on the condition that the buyer or lessee purchase a second item (the tied product) from the same source.'" *Marts v. Xerox, Inc., 77 F.3d 1109, 1112 (8th Cir. 1996)* (quoting *Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1498 (8th Cir. 1992))*, cert. denied, *506 U.S. 1080, 122 L. Ed. 2d 356, 113 S. Ct. 1048 (1993))*. "[A] per se illegal tying arrangement does not exist unless the defendant has coerced buyers into purchasing a product [or service] which such buyers otherwise would not have purchased or would have purchased from a different source than the defendant." *Amerinet, 972 F.2d at 1499*. In this case, Double D asserts that a tying arrangement arose because trucking companies who deliver trailers to Supervalu's Urbandale warehouse (the alleged tying service) and who want to use an unloading service have no choice but to use World Super Service's unloading service (the alleged tied service). Double D's attempt to define this situation as a tying arrangement is unsuccessful. The trucking companies **[**13]** always remain free to unload their own trucks, and they are not coerced into hiring World Super Service's third-party unloading service. Furthermore, to demonstrate a per se tying violation the plaintiff must show that the defendant has sufficient market power in the tying product or service market to restrain competition. *Marts, 77 F.3d at 1112*. As we will discuss below, Double D's complaint fails to plead a valid relevant market, and thus Double D could not demonstrate sufficient market **[*560]** power necessary to state or sustain a tying violation.

Because no per se violation is established, it is necessary for Double D to allege a valid relevant market in order to apply the rule of reason analysis to determine whether the arrangement amounts to an unreasonable restraint of trade within the meaning of *section 1* of the Sherman Act. As we noted above, ***HN17***[] the "rule of reason" analysis involves "an inquiry into market power and market structure" to assess the actual effect of the restraint. *Copperweld Corp., 467 U.S. at 768*. Double D must also allege a valid relevant market in order to prevail on its monopoly claim. *Section 2* of the Sherman Act requires a plaintiff to plead and prove **[**14]** that the defendant "(1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power as opposed to gaining it as a result of a superior product, business acumen, or historical accident.'" *Amerinet, 972 F.2d at 1490* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966))*. Thus, in order to state a Sherman Act claim under either *section 1* or *section 2*, the plaintiff must identify a valid relevant market. See *Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 877 (3d Cir. 1995)*; *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991)*, cert. denied, *505 U.S. 1221, 120 L. Ed. 2d 903, 112 S. Ct. 3034 (1992)*.

We note that courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery, because the proof of illegal conduct lies largely in the hands of the alleged antitrust conspirators. *Huelsman v. Civic Ctr. Corp., 873 F.2d 1171, 1174 (8th Cir. 1989)*. A dismissal on the pleadings should be "granted sparingly and with caution.'" Id. (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1349 (1969)). **[**15]** Most often, "proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*, petition for cert. filed (Jan. 5, 1998). This general rule, however, does not amount to "a *per se* prohibition against dismissal of antitrust claims for failure to plead a relevant market under *Fed. R. Civ. P. 12(b)(6)*." Id.

HN18[] It is the plaintiff's burden to define the relevant market. Id. "Antitrust claims often rise or fall on the definition of the relevant market." *Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 345 (8th Cir. 1995)*. "The definition of the relevant market has two components - a product market and a geographic market." Id. The relevant product market includes all reasonably interchangeable products. See *Queen City Pizza, 124 F.3d at 436*. The geographic market is defined by considering the commercial realities faced by consumers. *Bathke, 64 F.3d at 345*. It includes the geographic area in which consumers can practically seek alternative sources of the product, and it can be defined as "the market area in which the seller **[**16]** operates." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*; see *Bathke, 64 F.3d at 345*.

In each of the four antitrust counts of its complaint, Double D states that Supervalu and World Super Services engaged in anticompetitive activity within the relevant market "for unloading services at the Supervalu, Inc. warehouse in Urbandale, Iowa." (Appellant's App. at 26, 31, 34, and 36.) Thus, the product market is defined as unloading services and the geographic market is alleged to be the Supervalu warehouse in Urbandale, Iowa, which is a suburb of Des Moines. We agree with the district court that, as a matter of law, this stated geographic market is too narrow to support a claim of an antitrust violation. At issue is one contract between the owner of one particular warehouse within the Des Moines metropolitan area and one unloading service provider. The contract provides that this one unloading service provider has the right, subject to an agreed upon price schedule, to provide all of the unloading services at this particular warehouse. Supervalu's one warehouse in Urbandale does not amount to a relevant market for unloading services **[**17]** of this type. Rather, the market for unloading services would seem to be more properly defined as including all warehouses within, at **[*561]** least, the entire Des Moines, Iowa, metropolitan area, if not an even larger area.

"It is axiomatic that the antitrust laws were passed for the protection of *competition*, not *competitors*.'" *Bathke, 64 F.3d at 344* (quoting *Brooke Group, Ltd. v. Brown & Williamson Tobacco, 509 U.S. 209, 224, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993))* (other internal quotations omitted). As the district court in the present case aptly stated, "plaintiff's complaint does no more than state plaintiff's commercial disappointment at losing the unloading business at the Supervalu warehouse." (Appellant's Adden. at 6.) Disappointment at not receiving one unloading contract at one particular warehouse is insufficient as a matter of law to rise to the level of an antitrust violation within a relevant market.

For the same reasons, the Iowa state law claims pursuant to *sections 553.4* and *553.5* of the Iowa Code fail as well. The Iowa Competition Law, *Iowa Code §§ 553.1-553.18* (1997), must "be construed to complement and be harmonized with the applied laws of the **[**18]** United States which have the same or similar purpose as this chapter." *Iowa Code § 553.2*. See also *State v. Cedar Rapids Bd. of Realtors, 300 N.W.2d 127, 128 (1981)*. Double D asserts that several material differences exist between the express language of *section 553.4* of the Iowa Competition Law and *section 1* of the Sherman Act, and likewise between *Iowa Code section 553.5* and section 2 of the Sherman Act, which indicate that a smaller relevant market is acceptable under the Iowa Competition Law than the Sherman Act would tolerate. Aside from the lack of an interstate commerce requirement, the wording of the state provisions is very similar to that of their federal counterparts. Our research has produced no Iowa case law dealing with the requirement to plead a relevant market. In an absence of state case law on point, it is necessary to examine the comparable federal statutes and case law, see *Cedar Rapids Bd. of Realtors, 300 N.W.2d at 128*, which we have done above.

We conclude that Double D has not stated a per se violation or valid relevant market under either federal or state law. Accordingly, the district court properly dismissed counts I through IV of the amended and **[**19]** substituted complaint for failure to state a claim.

B. Motor Carrier Operator Claim

In count V of its complaint, Double D asserts that by precluding it from delivering and unloading semitrailers for trucking companies, Supervalu and World Super Services wrongfully coerced operators of motor carriers into either unloading their semitrailers themselves or employing the only unloading service available, World Super Services, in violation of *49 U.S.C.A. § 14103(b) (West 1997)*. The district court dismissed this count for failure to state a claim, concluding that Double D lacks standing to bring this claim and that Double D did not allege that any carrier was forced to pay someone else to unload its truck. The court noted that each trucker was free to unload his own truck. Thus, the district court concluded that the conduct alleged was not coercive within the meaning of the statute and failed to state a claim. Double D argues on appeal that the district court's ruling ignores its pleaded facts that Double D itself has been engaged in providing transportation of property by motor vehicle within the meaning of the statute when it hooks on to the trailer left for it at nearby truck **[**20]** stops and transports it to the warehouse, and that it acts not just as an unloader.

HN19[] *Section 14103(b)* provides as follows:

> It shall be unlawful to coerce or attempt to coerce any person providing transportation of property by motor vehicle for compensation in interstate commerce (whether or not such transportation is subject to jurisdiction

> under subchapter I of chapter 135) to load or unload any part of such property onto or from such vehicle or to employ or pay one or more persons to load or unload any part of such property onto or from such vehicle . . . .

The wording of this statute is not limited to protecting only actual trucking companies or registered motor carriers "under subchapter I of chapter 135." Id. Instead, the statute says, "any person providing transportation **[*562]** of property by motor vehicle for compensation in interstate commerce" must be allowed to unload his own truck free of coercion to pay someone else to do the job. Id. (emphasis added). We conclude that Double D's complaint alleges facts at least sufficient to survive a *Rule 12(b)(6)* motion to dismiss. As we noted before, Double D alleges that it often provided a service to interstate trucking **[**21]** companies where a Double D driver would transport a semitrailer from a local truck stop to the Supervalu warehouse and would return the semitrailer to the designated location after unloading the truck.

Double D has alleged a set of facts which if proved come within the provisions of the statute. Accordingly, we reverse the dismissal of count V and remand for further proceedings.

III. Conclusion

For the reasons stated above, we affirm the judgment of the district court dismissing counts I through IV of the amended and substituted complaint. We reverse the judgment of the district court dismissing count V and remand to the district court for further proceedings on that count.

Davies v. Genesis Med. Ctr.

United States District Court for the Southern District of Iowa, Davenport Division

February 12, 1998, Decided ; February 12, 1998, Filed

CIVIL NO. 3-97-CV-20068

Reporter

994 F. Supp. 1078 *; 1998 U.S. Dist. LEXIS 1994 **; 1998-1 Trade Cas. (CCH) P72,115

GERALD DAVIES, M.D., AND ANESTHESIA & PAIN CONSULTANTS P.C., Plaintiffs, vs. GENESIS MEDICAL CENTER; ANESTHESIA & ANALGESIA, P.C.; RICHARD J. LETH, M.D.; TIMOTHY J. MILLER, M.D.; JANICE K. BARKER, M.D.; AND MICHAEL A. SWANSON, M.D., Defendants.

Disposition: [1]** Defendants' resisted Motions to Dismiss (Clerk's Nos. 9, 11, 30 and 31) granted.

Core Terms

anesthesiology, antitrust, cardiac, motion to dismiss, amended complaint, peer review, Sherman Act, anesthesiologists, Defendants', enterprise, relevant market, patients, exclusive contract, geographic, anti trust law, monopolize, anesthesia, allegations, Counts, mail, consumers, surgery, antitrust claim, predicate act, prices, pattern of racketeering activity, fraudulent, affirming, pleadings, pled

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

When considering a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court accepts all factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. A court may dismiss a complaint only if it is clear no relief could be granted under any set of facts that petitioner could prove consistent with the allegations. At a minimum, however, a complaint must contain facts sufficient to state a claim as a matter of law and must not be merely conclusory in its allegations.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

In an antitrust case, the complaint's description of the defendant's acts must be consistent with the alleged restraint of trade.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN3[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962* may recover treble damages from the violator. *18 U.S.C.S. § 1964(c)*. *18 U.S.C.S. § 1962(c)* states it is unlawful for any person employed by or associated with, an enterprise as defined under the Racketeer Influenced and Corrupt Organizations Act, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN4[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A "pattern of racketeering activity" includes two or more predicate acts in violation of various criminal statutes, including *18 U.S.C.S. §§ 1341* (mail fraud), 1343 (wire fraud). *18 U.S.C.S. § 1961*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN5[] **Racketeer Influenced & Corrupt Organizations, Claims**

Standing to bring a civil suit under *18 U.S.C.S. § 1964(c)* is limited to persons whose harm has been proximately caused by the commission of the alleged predicate acts under the Racketeer Influenced and Corrupt Organizations Act.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN6[] Private Actions, Racketeer Influenced & Corrupt Organizations

A Racketeering Influenced and Corrupt Organizations Act (RICO) enterprise exhibits the following three characteristics: (1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in a pattern of racketeering. The "distinct structure" requirement focuses on whether the enterprise encompasses more than what is necessary to commit the predicate RICO offense. The enterprise's common activities must extend beyond the minimal association necessary to sustain the pattern of racketeering. The mere fact that each group member carries on activities distinct from the pattern of racketeering is insufficient; the group as a whole must have a common link other than the racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7[] Private Actions, Racketeer Influenced & Corrupt Organizations

An enterprise may be an association in fact, that is, more than one entity or individuals that are associated although not a legal entity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN8[] Private Actions, Racketeer Influenced & Corrupt Organizations

To participate, directly or indirectly, in the conduct of an enterprise's affairs, a person must have some part in directing those affairs.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN9[] Private Actions, Racketeer Influenced & Corrupt Organizations

A pattern of racketeering activity is present only when predicate acts are linked by two elements: continuity plus relationship. The relatedness element is satisfied by criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. To establish a pattern, a plaintiff must show the predicate acts amount to, or otherwise constitute a threat of, continuing racketeering activity. Whether the predicate acts establish a threat of continued racketeering activity depends on the facts of each case.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN10[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In all averments of fraud, including claims of mail and wire fraud as predicate acts in a Racketeer Influenced and Corrupt Organizations Act claim, circumstances constituting fraud must be stated with particularity. *Fed. R. Civ. P. 9(b)*. Normally, the "circumstances" include the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby. In a case where the plaintiffs do not allege the mail or wire fraud involve a misrepresentation of fact, the "circumstances" consist of the following four elements: (1) a scheme to defraud; (2) intent to defraud; (3) reasonable foreseeability that the mails (or wires) would be used; and (4) use of the mails (or wires) in furtherance of the fraudulent scheme. The specificity with which fraud must be pleaded depends on the circumstances of the transaction.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN11[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

When a complaint accuses multiple defendants of participating in a scheme to defraud, plaintiffs must identify which defendants were responsible for the separate acts of fraud.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

HN12[] **Business Administration & Organization, Peer Review**

42 U.S.C.S. §§ 11111(a)(1), *11112(a)* of the Health Care and Quality Improvement Act, provides qualified immunity from damages actions for hospitals, doctors and other participants in professional peer review proceedings, if the participants have met certain standards, including affording adequate notice and hearing procedures to the physician under review.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN13[] **Private Actions, Remedies**

To qualify for standing to maintain a private damages action under federal antitrust laws, a plaintiff must establish the following: (1) the causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; and (6) the risk of duplicative recoveries or complex damage apportionment. Some courts have divided these factors into two prongs, requiring a plaintiff to show: (1) the plaintiff suffered antitrust injury; and (2) that he is a proper antitrust plaintiff, that is, an efficient enforcer of the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN14[] **Private Actions, Remedies**

Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. A private plaintiff can recover on an antitrust claim only where the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN15[] **Private Actions, Remedies**

An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services, and not just its own welfare.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN16[] **Private Actions, Remedies**

The injury alleged in a federal antitrust case must be palpable and distinct, rather than abstract, conjectural or hypothetical.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN17[] **Regulated Practices, Price Fixing & Restraints of Trade**

The mere allegation that prices have or will increase in the future is insufficient for antitrust injury; a plaintiff must allege that prices will increase above competitive levels.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN18[] **Regulated Practices, Market Definition**

In assessing the sufficiency of an antitrust claim, the court cannot ignore commercial realities.

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] **Antitrust & Trade Law, Sherman Act**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal under *15 U.S.C.S. § 1* of the Sherman Act. In passing the Sherman Act, Congress intended to outlaw only unreasonable restraints.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN20[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

An alleged trade restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held per se unreasonable, or because it violates the rule of reason, under which the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. A plaintiff need not prove the anticompetitive effects of a restraint within a class subject to per se analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN21[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To adequately allege the illegality of a restraint of trade under the rule of reason, a complaint must define a relevant market, and refer to genuine market-wide anticompetitive effects, actual or probable.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN22[] **Regulated Practices, Market Definition**

To establish a defendant has market power, a plaintiff must identify the relevant market and the effect on that market of the defendant's alleged acts in restraint of trade. In defining a relevant market, a plaintiff must adequately define both a product and geographic market.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN23[] **Regulated Practices, Private Actions**

The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's *Fed. R. Civ. P. 12(b)(6)* motion.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN24[] **Regulated Practices, Trade Practices & Unfair Competition**

Mere unfair competition, without more, does not violate antitrust laws.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN25[] **Regulated Practices, Private Actions**

A complaint that does no more than state plaintiff's commercial disappointment at losing a segment of business is insufficient as a matter of law to rise to the level of an antitrust violation within a relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN26[] **Regulated Practices, Market Definition**

Products are in the same market when they are reasonably interchangeable for the same uses, thus exhibiting a high cross-elasticity of demand from buyers. A high cross-elasticity of supply, that is, substitution by sellers, must also be considered in determining a relevant product market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN27[] **Regulated Practices, Market Definition**

A court may determine the boundaries of an antitrust market by analyzing such indicia as industry or public recognition of the market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers or prices, sensitivity to price changes, and specialized vendors.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN28[] **Regulated Practices, Market Definition**

Market definition is not determined by formal labels, but rather takes into account the realities of competition.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN29[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act does not require that products be fungible to be considered in the relevant market. In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN30[] **Relevant Market, Geographic Market Definition**

The geographic market encompasses the geographic area to which consumers can practically turn for alternative sources of the product and in which antitrust defendants face competition. Distance and convenience are important in determining the relevant geographic market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN31[] **Regulated Practices, Market Definition**

A geographic market is determined by inquiring into the commercial realities faced by consumers.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN32[] **Regulated Practices, Monopolies & Monopolization**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

***HN33*[]** **Regulated Practices, Market Definition**

To avoid dismissal of its complaint, a plaintiff asserting a claim under *15 U.S.C.S. § 2* of the Sherman Act must allege a relevant product and geographic market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

***HN34*[]** **Regulated Practices, Market Definition**

The United States Court of Appeals for the Eighth Circuit does not require as rigorous a showing for the relevant market in the context of a conspiracy claim as for a showing for the relevant market for other claims under *15 U.S.C.S. § 2* of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

***HN35*[]** **Antitrust & Trade Law, Sherman Act**

An exclusive provider contract, without more, does not violate *15 U.S.C.S. § 2* of the Sherman Act.

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Employers

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

Labor & Employment Law > Discrimination > Racial Discrimination > Scope & Definitions

***HN36*[]** **Title VII Discrimination, Employers**

An employer, as defined by *42 U.S.C.S. § 2000e(b)* of Title VII of the Civil Rights Act of 1964, has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. *42 U.S.C.S. § 2000e(b)*.

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Employers

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Labor & Employment Law > Discrimination > Racial Discrimination > Scope & Definitions

HN37[] Title VII Discrimination, Employers

Courts are limited to a review of the pleadings under a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN38[] Regulated Practices, Monopolies & Monopolization

See *Iowa Code § 553.5* (1996).

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN39[] Regulated Practices, Market Definition

See *Iowa Code § 553.3(6)* (1996).

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Governments > Legislation > Interpretation

HN40[] Regulated Practices, Monopolies & Monopolization

See *Iowa Code § 553.2* (1996).

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN41[] Regulated Practices, Monopolies & Monopolization

When interpreting Iowa antitrust statutes, Iowa courts are required by *Iowa Code § 553.2* (1996) to give considerable weight to federal cases construing similar sections of the Sherman Act.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN42[] Conspiracy to Monopolize, Sherman Act

15 U.S.C.S. § 2 of the Sherman Act's prohibition against conspiracy to monopolize has a counterpart in Iowa Code § 553.4 (1996), which also prohibits the restraint of trade. Section 553.4 provides that a contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN43[] Regulated Practices, Monopolies & Monopolization

Iowa Code § 553.2 (1996) requires a uniform application of state and federal laws prohibiting restraints of economic activity and monopolistic practices.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN44[] Amendment of Pleadings, Leave of Court

Fed. R. Civ. P. 15(a) states that leave to amend shall be given freely when justice so requires. Permission to amend may, however, be denied where amendment would be futile.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN45[] Amendment of Pleadings, Leave of Court

Absent some indication as to what might be added to the complaint to make it viable, a plaintiff is not entitled to leave to amend.

Counsel: For GERALD G DAVIES, MD, ANESTHESIA & PAIN CONSULTANTS, P.C., plaintiffs: BRETT A NELSON, NELSON & SCHULTZ PC, ROCK ISLAND, IL.

For GENESIS MEDICAL CENTER, defendant: MICHAEL P BYRNE, LANE & WATERMAN, DAVENPORT, IA.

For ANESTHESIA & ANALGESIA, P.C., RICHARD J LETH, M D, TIMOTHY J MILLER, M D, JANICE K BAKER, MD, MICHAEL A SWANSON, MD, defendants: MICHAEL K BUSH, WILLIAM J BUSH, CARLIN HELLSTROM & BITTNER, DAVENPORT, IA.

Judges: CELESTE F. BREMER, CHIEF UNITED STATES MAGISTRATE JUDGE.

Opinion by: CELESTE F. BREMER

Opinion

[*1084] ORDER ON MOTION TO DISMISS

This matter is before the Court on Defendants' resisted Motions to Dismiss (Clerk's Nos. 9, 11, 30, and 31). The Court heard argument on the Motions on November 17, 1997. Appearing were Brett Nelson, Michael Byrne and William Bush. This matter is fully submitted.

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Appendix A

[*1085] ***I. Procedural Background***

Plaintiffs' Complaint, **[**2]** filed April 18, 1997, and First Amended Complaint, filed April 24, 1997, contained the following counts: Count I, claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.A. § 1964(c)* (West 1984 & Supp. 1996); Count II, claims arising under the Sherman Act, *15 U.S.C. §§ 1* and *2 (1994)*; Count III, tortious interference with a valid economic expectancy; Count IV, claims under the Health Care and Quality Improvement Act (HCQIA), *42 U.S.C.A. § 11112* (West 1991 & Supp. 1996); Count V, breach of contract; Count VI, conspiracy under Iowa law; Count VII, defamation; Count VIII, intentional infliction of emotional distress; Count IX, negligent supervision; and Count X, breach of the duty of good faith and fair dealing.

On May 30, 1997, Defendant Genesis Medical Center (Genesis) filed a Motion to Dismiss (Clerk's No. 9), seeking dismissal of Counts I, II, IV, VII, and IX. Defendant Anesthesia & Analgesia (A&A) filed a Motion to Dismiss (Clerk's No. 11) on June 2, 1997, seeking dismissal of Counts I, II, and VII.

Plaintiffs filed a Second Amended Complaint on August 18, 1997, and a Corrected Second Amended Complaint on August 19, 1997. Both listed the following **[**3]** counts: Count I, RICO; Count II, Sherman Act, *§ 1*; Count III, Sherman Act, *§ 2*; Count IV, Title VII, *42 U.S.C.A. § 2000e to 2000e-17* (West 1991 & Supp. 1996), ethnicity discrimination; Count V, Iowa antitrust laws, *Iowa Code § 553.5* (1996); Count VI, intentional interference with contractual, prospective contractual, and business relations; Count VII, defamation; Count VIII, intentional infliction of emotional distress; and Count IX, breach of contract.

On September 8 and 9, 1997, Genesis filed a Motion to Dismiss the Corrected Second Amended Complaint and a Brief (Clerk's Nos. 29 & 30), which challenged Counts I through IV, and Count VII. On September 15, 1997, A&A filed a Motion to Dismiss the Corrected Second Amended Complaint and a Brief (Clerk's Nos. 31 & 35), joining in Genesis' Motion to Dismiss, and further alleging that Plaintiffs failed to state a claim under Count V.

In summary, the Court notes that all Defendants' motions to dismiss challenged the following counts: Count I, RICO; Count II, Sherman Act, *§ 1*; and Count III, Sherman Act, *§ 2*. Additionally, in response to claims either added or amended in the Corrected Second Amended Complaint, Defendants challenged **[**4]** the following claims in the second round of motions to dismiss: Count IV, Title VII; Count V, Iowa antitrust laws; and Count VII, Defamation. Defendants did not challenge the following claims: Count VI, intentional interference with contractual relations; Count VIII, intentional infliction of emotional distress; and Count IX, breach of contract. Some issues were raised and resolved through the pleadings process, and thus do not need further order from the **[*1086]** Court. By the Corrected Second Amended Complaint, Plaintiffs dismissed their HCQIA and negligent supervision claims (Counts IV and IX, respectfully, in the First Amended Complaint), which had been challenged in the first Motions to Dismiss (Clerk's Nos. 9 & 11).

II. Standard for Motion to Dismiss

HN1[] When considering a motion to dismiss under *Federal Rules of Civil Procedure 12(b)(6)*, a court accepts all factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 163-65, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993)*; *Springdale Educ. Assoc. v. Springdale Sch. Dist., 133 F.3d 649 **[**5]** (8th Cir. 1998)*; *McSherry v. Trans World Airlines, Inc., 81 F.3d 739, 740 (8th Cir. 1996)*. A court may dismiss a complaint only if it is clear no relief could be granted under any set of facts that petitioner could prove consistent with the allegations. *H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249-250, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989)*; *accord, Double D Spotting Service, Inc. v. Supervalu, Inc., 136 F.3d 554, 562, 1998 U.S. App. LEXIS 1820 (8th Cir. 1998)*. "At a minimum, however, a complaint must contain facts sufficient to state a claim as a matter of law and must not be merely conclusory in its allegations." *Springdale Educ. Assoc.*, No. 97-2284, at 3 (affirming district court's dismissal of complaint, where amended complaint did not allege facts that, if true, would be sufficient to demonstrate elements of claim).

HN2[] In an antitrust case, the complaint's description of the defendant's acts must, however, be consistent with the alleged restraint of trade. *Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 782 (7th Cir. 1994)*.

As set forth in the Corrected Second Amended Complaint, the relevant facts are as follows.

[6]** ***III. Facts***

Plaintiff Gerald G. Davies, M.D. (Davies), is a licensed medical doctor and a board certified anesthesiologist. He is a shareholder in the other Plaintiff, Anesthesia and Pain Consultants, P.C. (APC), which is an Iowa professional corporation of licensed medical doctors formed in 1991 by Davies and Dr. John Dooley, not a party in this case.

Davies and APC provide medical services, including anesthesiology services, to patients in the area known collectively as the Quad Cities, comprising Davenport and Bettendorf, Iowa, and Rock Island and Moline, Illinois. Before 1995, APC provided most of the cardiovascular and thoracic anesthesiology services at St. Luke's Hospital and its successor, Defendant Genesis Medical Center (Genesis).

Genesis is an Iowa non-profit corporation serving the Quad Cities area. Genesis was formed in June 1994, when St. Luke's Hospital and Mercy Hospital merged. Both hospitals are located in Davenport.

Defendant A&A is an Iowa professional corporation of licensed medical doctors. Defendant Richard J. Leth, M.D., an anesthesiologist with medical staff privileges at Genesis, was president of the Anesthesia Department and chairman of the Anesthesia **[**7]** Service Committee (ASC) at Genesis, and he was a shareholder and president of A&A. Defendants Timothy J. Miller, M.D., Janice K. Baker, M.D., and Michael A. Swanson, M.D., are anesthesiologists with medical staff privileges at Genesis, shareholders of A&A, and members of the ASC. All Defendants provide medical services, including anesthesiology services, in the Quad Cities area.

In May 1993, Davies and Dooley announced plans to open an outpatient surgery center. In the same month, St. Luke's and Mercy Hospitals announced their intention of merging. Shortly after the announcement, St. Luke's began reorganizing its anesthesiology department from an open-staff to a closed-staff model. St. Luke's conducted a bidding process to select a single anesthesiology supplier.

Plaintiffs claim that in 1993 Defendants [1] began a campaign of character assassination under the guise of peer review. Plaintiffs allege that certain Defendants placed unfavorable reports in Davies' peer review file, and that Defendants were attacking Davies' **[*1087]** reputation in order to prevent the opening of his outpatient surgery center and eliminate competition in the market for cardiovascular anesthesiology in the Quad Cities **[**8]** and surrounding area.

St. Luke's Hospital opposed Plaintiffs' outpatient surgery center's application for a Certificate of Need in 1993.

In April 1994, A&A was formed.

On May 12, 1994, the Iowa Health Facilities Council granted a Certificate of Need to the outpatient surgery center. St. Luke's and Mercy Hospitals allegedly discouraged an owner from selling his real estate to Davies and his partners for the outpatient surgery center, and the hospitals allegedly suggested to real estate lenders that the project was not credit-worthy.

After St. Luke's and Mercy Hospitals merged to form Genesis Medical Center in June 1994, APC continued to provide most of the cardiovascular and thoracic anesthesiology services at Genesis. Genesis is the largest hospital in the Quad Cities area, and is the only hospital in the Quad Cities with facilities for invasive cardiology and cardiac surgery services.

In August 1994, APC and **[**9]** A&A reached an informal agreement to merge.

Genesis continued St. Luke's efforts to reorganize delivery of anesthesiology at the hospital. On October 12, 1994, Genesis issued a "Request for Proposal" to all anesthesiologists with medical staff privileges at Genesis, which included Davies. The request stated that any anesthesiology group and its members chosen to be the exclusive provider of anesthesiology services, "must agree not to directly or indirectly have an ownership interest in any other entity which renders one or more of the same services," provided by Genesis' anesthesiology department. Plaintiffs allege the bidding process was a sham, and that Genesis designed the request to give an exclusive contract to A&A. APC and A&A ceased work on their plans to merge.

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[1] Plaintiffs do not state which Defendants participated in the alleged character assassination.

In January 1995, Genesis awarded A&A the exclusive contract to provide anesthesiology services at Genesis. [2] Any anesthesiologist who wanted to work at Genesis had to work for A&A, and had to comply with the exclusive contract's prohibition against having an ownership interest in any other entity that rendered the same services as Genesis' anesthesiology department. These terms meant Davies or Dooley, who had financial **[**10]** interests in the outpatient surgery center, could not work at Genesis.

APC was forced to discharge some employees. Some APC members left to join A&A. At some point after obtaining the exclusive contract, A&A raised its prices.

On April 19, 1995, the exclusive contract prevented Davies from providing anesthesiology services at Genesis. On April 25, 1995, Defendants let Davies resume practice at Genesis on a temporary basis, but required him to sign an agreement stating APC would pay 5.5 percent of its net revenues to A&A. Plaintiffs do not state the reason that Davies ultimately stopped practicing at Genesis, or discontinued this contract, on February 4, 1997.

In September 1995, Genesis' Medical Executive Committee (MEC) suspended Davies for 31 days and imposed restrictions on his practice, permitting him to perform only emergencies or high-risk cardiac anesthesiology. [3] MEC told Davies the length of the suspension **[**11]** was based on an intent to report the suspension to the National Practitioner's Data Bank, which would inhibit Davies' ability to practice medicine elsewhere in the United States. Davies appealed the decision to the hospital's Judicial Review Committee.

On January 12, 1996, the Judicial Review Committee reversed MEC's decision and held that Davies' suspension was unwarranted. On February 9, 1996, MEC appealed the Judicial Review Committee's decision to the Genesis Board of Directors, which appointed five of its members, none of whom were **[*1088]** doctors, to an Appellate Review Committee. On April 23, 1996, the Board adopted the MEC's report, imposing a 10-day suspension and restrictions on Davies' practice **[**12]** at Genesis. The complaint alleges that the restrictions were impractical, and were intended to prevent Davies from continuing to provide medical care at Genesis. It is unclear if or when the 10-day suspension was ever effectuated. None of the Genesis Board members who served on the Appellate Review Committee are named as defendants here.

Throughout the peer review process, Davies told the reviewers that his accusers had a personal stake in the review, and he asked to have his performance judged by outside peer reviewers. Plaintiffs allege certain unidentified Defendants denied these requests.

IV. Discussion

A. Civil RICO (Count I)

Defendants allege that Plaintiffs have failed to state a claim for the violation of civil RICO.

"***HN3***[] Any person injured in his business or property by reason of a violation of *section 1962*" may recover treble damages from the violator. *18 U.S.C. § 1964(c)*. *Section 1962(c)* states it is unlawful "for any person employed by or associated with," an enterprise as defined under RICO, "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *18 U.S.C. §* ***[**13]*** *1962(c)*; *Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 990 (8th Cir. 1989)*.

HN4[] A "pattern of racketeering activity" includes two or more predicate acts in violation of various criminal statutes, including *18 U.S.C. §§ 1341* (mail fraud) and 1343 (wire fraud). *18 U.S.C. § 1961*; *see* *Murr Plumbing, Inc. v. Scherer Bros. Financial Services Co., 48 F.3d 1066, 1069 (8th Cir. 1995)*; *Atlas, 886 F.2d at 990*.

[2] The pleadings do not state the length of the contract, when it expires, or how it may be renewed.

[3] At some unidentified time, but presumably before September 1995, the MES appointed three of its members, not defendants in this case, to an ad hoc committee to investigate charges against Davies. The complaint alleges that the committee did not contact Davies, but interviewed his competitors and people hostile to him.

HN5[] Standing to bring a civil suit under *18 U.S.C. § 1964(c)* is limited to persons whose harm has been proximately caused by the commission of the alleged RICO predicate acts. *Bowman v. Western Auto Supply Co., 985 F.2d 383, 386-87 (8th Cir. 1993)*; *DeWit v. Firstar Corp., 879 F. Supp. 947, 962 (N.D. Iowa 1995)*.

Defendants assert Plaintiffs have not adequately plead the conduct and existence of a RICO enterprise; have not adequately pled predicate acts with the required specificity, and thus have failed to properly allege that Defendants engaged in a pattern of racketeering activity; and have not pled proximate cause.

1. Conduct of an Enterprise

HN6[] A RICO enterprise exhibits the following three characteristics: (1) a common or shared purpose; (2) **[**14]** some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in a pattern of racketeering. *United States v. Davidson, 122 F.3d 531, 534 (8th Cir. 1997)*; *United States v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995)*; *Diamonds Plus, Inc. v. Kolber, 960 F.2d 765, 769-70 (8th Cir. 1992)*. The "distinct structure" requirement focuses on "whether the enterprise encompasses more than what is necessary to commit the predicate RICO offense." *Diamonds Plus, 960 F.2d at 770*; *Stephens, Inc. v. Geldermann Inc., 962 F.2d 808, 815 (8th Cir. 1992)*. The enterprise's common activities must extend beyond the minimal association necessary to sustain the pattern of racketeering. *McDonough v. National Home Ins. Co., 108 F.3d 174, 177 (8th Cir. 1997)*. The mere fact that each group member "carries on activities distinct from the pattern of racketeering is insufficient; the group as a whole must have a common link other than the racketeering activity." *Id.* (affirming dismissal of RICO claim, where plaintiffs failed to allege existence of structure distinct from minimal association necessary to defraud plaintiffs into buying defective land **[**15]** and homes; conclusory allegation that alleged enterprise consisted of more than what was necessary to defraud was insufficient).

HN7[] An enterprise may be an association in fact, i.e., more than one entity or individuals that are associated although not a legal entity. *See* *Davidson, 122 F.3d at 534*; *18 U.S.C. § 1961(4)*.

[*1089] *HN8*[] To participate, directly or indirectly, in the conduct of an enterprise's affairs, a person must have some part in directing those affairs. *Reves v. Ernst & Young, 507 U.S. 170, 178-79, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993)* (affirming Eighth Circuit's "operation or management" test); *DeWit, 879 F. Supp. at 964* (holding allegation that defendants conducted enterprise's alleged banking scheme was insufficient to allege conduct of enterprise's affairs, where defendants were not alleged to have had some part in directing affairs of enterprise itself).

Plaintiffs allege the existence of two RICO enterprises: (1) Genesis and A&A, and (2) "certain members of the Board of Directors of Genesis, certain members of the Medical Executive Committee, and certain members of the Anesthesia Service Committee." Plaintiffs allege each enterprise was "separate and distinct **[**16]** from the patterns of racketeering through which they managed or controlled the defendants." (Corr. Sec. Am. Compl. at 17, P 76.)

Plaintiffs have not identified the persons included in the second alleged enterprise. They also have not identified any Defendant who participated in operating or managing the second enterprise, or described the nature of the operation or management by Defendants. In fact, Plaintiffs allege both enterprises managed or controlled the defendants.

The Court can reasonably infer from the pleadings that Genesis and A&A, as an association-in-fact enterprise, had a structure that was required to provide anesthesiology services at Genesis and that was distinct from the alleged pattern of racketeering activity. The Court also can reasonably infer from the facts pled that Genesis and A&A participated in the conduct of this enterprise's affairs.

The Court cannot, however, reasonably draw the same inferences about the second enterprise as pled. Plaintiffs have not alleged the existence of a structure distinct from the minimal association necessary to defraud Plaintiffs through the alleged fraudulent peer review. Plaintiffs' conclusory allegation that the alleged second **[**17]** association-in-fact enterprise consisted of more than what was necessary to defraud was insufficient to meet the pleading requirement. Furthermore, Plaintiffs have not alleged any defendant participated in the conduct of the second enterprise's affairs.

The Court holds the Plaintiffs' pleading regarding the second alleged enterprise is inadequate to establish the elements of an enterprise, and of conducting the enterprise's affairs. The Court therefore grants Defendants' Motion to Dismiss the claims in Count I concerning the second alleged enterprise.

2. Pattern of Racketeering Activity

HN9[] A pattern of racketeering activity is present only when predicate acts are linked by two elements: continuity plus relationship. *H.J., 492 U.S. at 239*. *Handeen v. Lemaire, 112 F.3d 1339, 1353 (8th Cir. 1997)*. The relatedness element is satisfied by criminal acts that have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J., 492 U.S. at 240*; *Manion v. Freund, 967 F.2d 1183, 1185 (8th Cir. 1992)*. To establish a pattern, a plaintiff must show **[**18]** the predicate acts amount to, or otherwise constitute a threat of, continuing racketeering activity. *H.J., 492 U.S. at 240*. Whether the predicate acts establish a threat of continued racketeering activity depends on the facts of each case. *H.J., 492 U.S. at 242*.

Plaintiffs in this case alleged predicate offenses of mail fraud and wire fraud.

HN10[] In all averments of fraud, including claims of mail and wire fraud as predicate acts in a RICO claim, circumstances constituting fraud must be stated with particularity. *Fed.R.Civ.P. 9(b)*; *Murr Plumbing, 48 F.3d at 1069*; *DeWit v. Firstar Corp., 904 F. Supp. 1476, 1524 (N.D. Iowa 1995)*. Normally, the "circumstances" include the "time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." *Murr Plumbing, 48 F.3d at 1069*. In a case such as this, however, where the plaintiffs do not allege the mail or wire fraud involve a misrepresentation of fact, the "circumstances" consist of the following **[*1090]** four elements: (1) a scheme to defraud; (2) intent to defraud; (3) reasonable foreseeability that the mails (or wires) would be used; and **[**19]** (4) use of the mails (or wires) in furtherance of the fraudulent scheme. *See* *Murr Plumbing, 48 F.3d at 1069 n.6* (citing *Atlas, 886 F.2d at 991*); *accord,* *United HealthCare Corp. v. American Trade Ins. Co., 88 F.3d 563, 571 (8th Cir. 1996)*; *Demerath Land Co. v. Sparr, 48 F.3d 353, 356 (8th Cir. 1995)*. The specificity with which fraud must be pleaded depends on the circumstances of the transaction. *Brown v. North Central F.S., Inc., 173 F.R.D. 658, 670 (N.D. Iowa 1997)*.

HN11[] When a complaint accuses multiple defendants of participating in a scheme to defraud, plaintiffs must identify which defendants were responsible for the separate acts of fraud. *Vicom, Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d 771, 778 (7th Cir. 1994)*; *DeWit, 879 F. Supp. at 972*; *see* *Bennett v. Berg, 685 F.2d 1053, 1062 (8th Cir. 1982)*.

Plaintiffs allege the scheme to defraud was a fraudulent peer review process initiated against Davies to control him and other APC physicians. Plaintiffs assert that Defendants used the mails and telephones in furtherance of their unlawful scheme on more than two occasions in the past ten years, and that Defendants had to use the mail and telephone **[**20]** to appear to comply with Genesis' bylaws and the HCQIA requirements for peer review. Plaintiffs state Defendants implemented their scheme against Davies in 1993, have used the scheme against other physicians, and that a threat of continued criminal activity exists.

Three paragraphs in the Corrected Second Amended Complaint present facts relating to the peer review:

> 17. Defendants Leth, Miller, Baker, and Swanson were four of the six members of the Anesthesia Service Committee ("ASC"). The ASC was and is responsible for anesthesia peer review. The ASC was controlled by A&A as five of the six members were shareholders in A&A.
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> . . . .

> 60. That unbeknownst to Dr. Davies a campaign of character assassination, under the guise of peer review, had begun in 1993 after Dr. Dooley and he had announced the idea of building an outpatient surgery center. The "character assignation" was clandestine at the outset, as the Defendants took highly critical positions regarding Dr. Davies' medical performance and judged Dr. Davies [sic] competency against the Defendants' subjective standard of care rather than an objective one. The Defendants "papered" Dr. Davies' peer review file with **[**21]** unfavorable reports that were based upon their subjective standards and contained unsubstantiated hearsay and rumor.
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> . . . .
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> 67. That throughout his "peer review" Dr. Davies advised the peer reviewers that his accusers had a personal stake in the "review" and asked to have his performance judged by outside peer reviewers, but the Defendants denied these requests.

Corr. Sec. Am. Compl. at 5, 12-13, and 14.

Plaintiffs do not state which Defendants allegedly engaged in the fraudulent peer review scheme, or which Defendants engaged in the alleged predicate acts of mail and wire fraud. [4] Plaintiffs do not state when the fraudulent peer review scheme took place, or describe any circumstances surrounding the place, manner, or scope of the mail and wire fraud, including the fraudulent scheme. Are Plaintiffs alleging the fraudulent peer review occurred only in 1993 when the "campaign of character assassination, under the guise of peer review" began? (Corr. Sec. Am. Compl. at 12, P 60.) Or are Plaintiffs alleging the fraudulent scheme included the unspecified time period when the MEC's ad hoc committee investigated allegations against Davies? (*Id.* at 6, P 23.) Possibly, **[**22]** but they may be **[*1091]** alleging that the scheme encompassed activities in 1996, as evidenced by paragraph 67, quoted above, which refers generally to "peer review," and follows several paragraphs describing actions by the MEC and the Judicial Review Committee. (*Id.* at 13-14, PP 62-66.) Plaintiffs' allegations supply no information regarding the identity of the other physicians purportedly harmed by the alleged scheme of fraudulent peer review, or of the circumstances, including the time frame, of such acts.

[23]** Nothing in the Corrected Second Amended Complaint, other than Defendants' conclusive assertions, suggests the peer review process was fraudulent. Plaintiffs allege Defendants engaged in character assassination and took critical positions of Davies' medical performance based on subjective judgments of his competency. Plaintiffs claim Defendants placed in Davies' peer review file unfavorable reports based on subjective judgments and unsubstantiated hearsay and rumor. Some or all Defendants allegedly attacked Davies' reputation and the public's view of his character to eliminate him from the competitive market of cardiac anesthesiology. Again, Plaintiffs do not identify which defendants were responsible for these acts.

Moreover, Plaintiffs do not set forth any content of any specific statements made by any defendant about Davies' performance, competence, or character. There is nothing obviously false about subjective judgments, disparaging or offensive comments, hearsay or rumors. *Cf.* *Jepson, Inc. v. Makita Corp., 34 F.3d 1321, 1330 (7th Cir. 1994)* (affirming dismissal of complaint; holding competitor's statement in trade magazine regarding "rip-offs," although perhaps disparaging **[**24]** to manufacturer, did not rise to level of fraud that would support RICO claim, where there was nothing obviously false about these statements; followed on other grounds by *DeWit, 879 F. Supp. at 973*). Plaintiffs do not state which statements are allegedly false, which allegedly false statements were made by particular defendants, or to whom the allegedly false statements were made.

The Board suspended Davies and placed restrictions on his staff privileges, which indicates that generally the statements were not obviously false, although certain defendants may have taken an aggressive posture toward Davies. *See* *Jepson, 34 F.3d at 1330* (holding even to extent one or two statements defendant purportedly made may have contained misrepresentations, they were insufficient to establish pattern of racketeering RICO requires).

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[4] At the hearing on this matter, Plaintiffs argued, in another context, that the defendants on the ASC were acting as A&A's agents. If the Defendants on the ASC were responsible for the acts alleged to be mail and wire fraud, A&A and Genesis cannot be held responsible on a theory of respondeat superior. *Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987)* (declining to apply respondeat superior doctrine to RICO claims); *Prochaska & Assocs., Inc. v. Merrill Lynch Pierce Fenner & Smith, 798 F. Supp. 1427, 1431 (D. Neb. 1992)*; *K&S Partnership v. Continental Bank, 127 F.R.D. 664, 669 (D. Neb. 1989)*.

Plaintiffs have not alleged the content of any misrepresentations that reasonably could be characterized as fraud. *See Demerath, 48 F.3d at 355* (holding mere labeling of representations as fraudulent did not make them so without evidence to support assertion). The Corrected Second Amended Complaint fails to allege with particularity either the falsity of **[**25]** the alleged misrepresentations or the defendants' knowledge of such falsity. *See Brown, 173 F.R.D. at 670*. Plaintiffs thus have failed to adequately allege mail and wire fraud in furtherance of an alleged fraudulent scheme. *See Vicom, 20 F.3d at 778*; *DeWit, 879 F. Supp. at 973*.

Furthermore, hospital bylaws and HCQIA regulations required the use of certain notice procedures, [5] which were apparently followed through the alleged predicate acts involving the mail and telephones. Plaintiffs do not allege any predicate acts other than compliance with these requirements. Plaintiffs' attempts to characterize commonly accepted hospital procedures as racketeering are insufficient alone to plead a pattern of racketeering activity, where Plaintiffs have not adequately pled a fraudulent scheme. *Cf. Lambert A. Plumbing v. Western Sec. Bank, 934 F.2d 976, 981 (8th Cir. 1991)* (holding fact bank had problem loans in past and moved to protect its position in regard to current problem loan did not alone indicate pattern of racketeering; "Bankers do not become racketeers by acting like bankers").

[26]** Plaintiffs' general allegations fail to apprize Defendants of the claims against them and the acts relied on as constituting the **[*1092]** alleged fraud, even though Davies, as recipient of the mailed notices and telephone calls allegedly constituting the mail and wire fraud, and as the subject of the peer review, had the ability to obtain the necessary information to state the circumstances of the communications and peer review alleged to constitute the fraud. In light of the circumstances of this case, Plaintiffs' conclusory allegations fail to satisfy the requirement in *Rule 9(b) of the Federal Rules of Civil Procedure* for stating allegations of fraud with particularity, and therefore the allegations cannot be relied on to show a continuing pattern of fraudulent acts. *See Menasco, Inc. v. Wasserman, 886 F.2d 681, 684 (4th Cir. 1989)* (cited with approval on other grounds in *Lambert Plumbing, 934 F.2d at 981*). These allegations thus lack the specificity needed to show a threat of continuing racketeering activity. *See Menasco, 886 F.2d at 684*. The Court holds Plaintiffs have not stated a claim for violation of civil RICO.

3. Proximate Cause

The hospital's Judicial Review **[**27]** Committee reversed the MEC's decision to suspend Davies and impose restrictions. The Board made the final decision concerning Davies' suspension and restrictions. Furthermore, Plaintiffs do not allege they are prevented from working at Genesis because of the peer review action, but because of Genesis' exclusive contract with A&A. Therefore, the harm Plaintiffs allege they incurred was not proximately caused by the alleged predicate acts of Defendants. *See Bowman, 985 F.2d at 386-87*; *DeWit, 879 F. Supp. at 962*.

Because Defendants were not final decision-makers in the peer review process, whatever scheme, if any, Defendants participated in was never going to be more than part of a peer review process that routinely uses mail and telephones, and such a scheme as pled cannot rise to the level of racketeering activity.

Plaintiffs have not adequately alleged that any defendant conducted the affairs of a RICO enterprise through a pattern of racketeering activity, including predicate acts that caused harm to Plaintiffs. Therefore, the Court grants Defendants' Motions to Dismiss the first cause of action.

B. Sherman Act Violations (Counts II and III)

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[5] ***HN12***[] The HCQIA provides qualified immunity from damages actions for hospitals, doctors and other participants in professional peer review proceedings, if the participants have met certain standards, including affording adequate notice and hearing procedures to the physician under review. *Brown, M.D. v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1333 (10th Cir. 1996)*; *see 42 U.S.C. §§ 11111(a)(1)*, *11112(a) (1994)*.

Plaintiffs allege **[**28]** that Defendants conspired to restrain Plaintiffs' trade and monopolize trade in violation of Sections 1 and 2 of the Sherman Act. Defendants allege that Plaintiffs lack standing to bring these claims and have failed to adequately state the claims for relief in their Corrected Second Amended Complaint. [5]

1. Standing

HN13[] To qualify for standing to maintain a private damages action under federal antitrust laws, a plaintiff must establish the following: (1) the causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; and (6) the **[**29]** risk of duplicative recoveries or complex damage apportionment. *Lovett v. General Motors Corp., 975 F.2d 518, 520 (8th Cir. 1992)* (citing *Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 534-45, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983))*. Some courts have divided these factors into two prongs, requiring a plaintiff to show: (1) the plaintiff suffered antitrust injury; and (2) that he is a proper antitrust plaintiff, i.e., an efficient enforcer of the antitrust laws. *Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1449 (11th Cir. 1991)* (cited on other grounds by *Read, M.D. v. Medical X-Ray Ctr., P.C., 110 F.3d 543, 546* (8th Cir.), *cert. denied*, *U.S.* *, 139 L. Ed. 2d 230, 118 S. Ct. 299 (1997))*; *Baglio v. Baska, 940 F. Supp. 819, 830 (W.D. Penn. 1996)*, *aff'd*, *116 F.3d 467 (3d Cir. 1997)*; *Leak v. Grant Med. Ctr., 893 F. Supp. 757, 762 (S.D. Ohio 1995)*, *aff'd*, *103 F.3d 129 (6th* ***[*1093]*** *Cir. 1996)*, *cert. denied*, *U.S.* *, 138 L. Ed. 2d 175, 117 S. Ct. 2408 (1997)*.

a. Antitrust Injury

HN14[] Antitrust injury is "injury of the type the antitrust laws were intended to prevent **[**30]** and that flows from that which makes defendants' acts unlawful." *NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 103, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; *see* *Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. A private plaintiff can recover on an antitrust claim only where the loss "stems from a competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*.

HN15[] An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services, and not just its own welfare. *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996)* (affirming finding that orthopedic surgeon failed to establish he suffered antitrust injury as result of sham peer review that resulted in restriction of staff privileges; orthopedic services were still readily available to consumers in area, and surgeon could still practice medicine, only his ability to perform spine surgery at one hospital was extinguished).

HN16[] The injury alleged must be palpable and distinct, rather than abstract, conjectural or hypothetical. *Slowiak* ***[**31]*** *v. Land O'Lakes, Inc., 987 F.2d 1293, 1296 (7th Cir. 1993)*; *Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs., 917 F. Supp. 1282, 1301 (N.D. Ill. 1996)* (granting motion to dismiss plaintiff anesthesiologist's Sherman Act, § 1, claim against hospital that allegedly used sham process to select exclusive provider of anesthesiology services and forced plaintiff to surrender staff privileges, where plaintiff stated conspirators intended to affect competition in Chicago and throughout nation and stated competition was restricted in hospital, but failed to assert palpable injury to competition in Chicago market, thus failing to allege antitrust injury; holding one hospital's staffing decision did not give rise to § 1 claim; "Injecting the powerful medicine of the Sherman Act into [plaintiff's] staffing dispute would be like treating a hangnail with amputation of the finger.").

Most courts addressing the issue have held that a mere staffing decision at a single hospital affecting a single practitioner, absent harm to a relevant market, did not violate the Sherman Act, and some of those courts have based their holdings on lack of standing and/or antitrust injury. *Mathews,* ***[**32]*** *87 F.3d at 641*, *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n, 36 F.3d 664, 668 (7th Cir. 1994)* (citing exhaustive list of

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[5] Defendants also assert that Plaintiffs have failed to allege they are entitled to relief under the Clayton Act. Because Plaintiffs could easily remedy this deficiency in an amended complaint, the Court does not analyze the issue.

decisions, commenting that in vast majority of cases, plaintiff physicians were denied relief; dismissing at summary judgment stage for failure to state claims, because plaintiffs failed to establish antitrust injury where anesthetists' contract with hospital was terminated in favor of other anesthetists); *Oksanen v. Page Mem. Hosp., 945 F.2d 696, 709 (4th Cir. 1991)* (en banc) (affirming district court's summary judgment, holding physician whose privileges were revoked did not establish antitrust injury), *cert. denied*, *502 U.S. 1074, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992)*; *Baglio, 940 F. Supp. at 829* (holding termination of doctor's staff privileges and position as director of pathology laboratory, and damage to his reputation did not constitute antitrust injuries, and therefore doctor lacked standing, where doctor's termination did not cause injury to consumers, because laboratory continued to operate under direction of several other pathologists); *Leak, 893 F. Supp. at 763* (holding physician and corporation did not suffer antitrust injury, where they could **[**33]** compete with others offering pain-related medical services at two other area hospitals, even though plaintiffs were foreclosed from offering services to segment of patients whose managed-care plans limited them to defendant hospital, which had entered exclusive contract with another provider of anesthesia services and had denied staff privileges to plaintiffs; noting court would have reached same decision under motion to dismiss as under motion for summary judgment); *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 998, 998 n.7 (N.D. Ga. 1992)* (holding obstetrics physician who lost hospital staff privileges following peer review had **[*1094]** not suffered antitrust injury and therefore lacked standing). [6]

[34]** In Count II, Plaintiffs allege Defendants' acts have harmed competition in the relevant market, which they define as the provision of cardiac anesthesiology services to patients in the Quad Cities area, an area they define as encompassing 23 Iowa and Illinois counties. (Corr. Sec. Am. Compl. at 19, P 87).

Plaintiffs contradict this market definition, however, in their Corrected Second Amended Complaint. Plaintiffs make many more factual allegations concerning anesthesiology or general medical care than about cardiac anesthesiology, and Plaintiffs' factual assertions indicate the relevant market is the provision of anesthesiology services. For example, Plaintiffs make the following statements in their Corrected Second Amended Complaint: "Genesis' scheme to control the delivery of medical care in the Quad Cities, and surrounding areas," (*id.* at 2); "defendants have dictated the flow of anesthesiology referrals by controlling the delivery of anesthesia," (*id.* at 2, P 2); "Davies [and] . . . shareholders of APC, all of whom are medical doctors providing anesthesia services to patients in the Iowa-Illinois Quad Cities, and surrounding areas," (*id.* at 4, P 9); "[Plaintiffs] **[**35]** have provided medical services, including anesthesia services," (*id.* at 7, P 25); "conducting a bidding process to select a single anesthesia provider," (*id.* at 10, P 40); "A&A . . . was offered an exclusive contract to provide anesthesia services at St. Luke's hospital . . . . [which] would have precluded [plaintiffs] from delivering anesthesia services," (*id.* at 10, P 44); "give the exclusive contract to A&A [Genesis'] favored group of anesthesiologists," (*id.* at 11, P 51), "awarded an exclusive contract, to provide anesthesia services at Genesis, to A&A," (*id.* at 12, P 54); "contract . . . deprived consumers of the competition of other anesthesiologists," (*id.* at 12, P 56); "Davies . . . was prevented by this contract from providing anesthesia services at Genesis," (*id.* at 12, P 58); "prevent Dr. Davies from continuing to provide medical care at Genesis," (*id.* at 14, P 66); and, "Davies . . . was permanently prohibited from providing anesthesia services at Genesis," (*id.* at 15, P 69).

Essentially, Plaintiffs allege that they provide anesthesiology services, and that among their consumers are cardiac patients. They do not state that the **[**36]** anesthesiology services they provide cardiac patients differ substantially from general anesthesiology services. Nor do they allege that any other physician anesthesiologists cannot provide the same services they provide to cardiac patients. Accepting the facts stated in the complaint as true, the Court concludes that Plaintiffs' claims appear merely to infer that a segment of Plaintiffs' anesthesiology business has

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[6] Unpublished decisions have reached the same conclusion. *See, e.g.,* ***Patel v. Scotland Mem. Hosp., 91 F.3d 132*** (unpublished table decision), 1996 WL 383920, at *4 (4th Cir. 1996) (dismissing for failure to state Sherman Act claim, where nurse anesthetist failed to adequately allege facts necessary to demonstrate antitrust injury; complaint focused on injuries anesthetist incurred, not those the competitive market incurred; stating anesthetist alleged only staffing decision and personal economic injury); *Huhta v. Children's Hosp. of Philadelphia, 1994 U.S. Dist. LEXIS 7327*, No. Civ. A. 93-2765, 1994 WL 245454, at *2 (E.D. Pa. May 31, 1994) (holding pediatric cardiologist's loss of referrals and lost revenue as result of hospital's bar to him using pediatric cardiology equipment and facilities was not antitrust injury; "The harm alleged in the complaint is really only harm to the individual doctor, and not to competition within the marketplace"), *order aff'd*, ***52 F.3d 315 (3d Cir. 1995)***.

been closed to them through the exclusive contract and Davies' loss of staff privileges. *See Leak, 893 F. Supp. at 763*.

Plaintiffs rely on *Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 875 (3d Cir. 1995)*, for the proposition that a physician's allegation that he has been excluded from the relevant market and that such exclusion constitutes an unreasonable restraint on trade constitutes a sufficient allegation of antitrust injury. *Brader*, however, unlike this case, concerned a hospital's suspension of a physician, through use of unfair proceedings and for no reasonable basis related to performance reasons, and the hospital's dissemination of a report about the doctor's suspension, which allegedly prevented the doctor from obtaining another position and caused **[**37]** a reduction in the provision of medical services in the Pittsburgh market. *Id. at 871-72*.

[*1095] Here, Plaintiffs have pleaded no facts from which a reasonable inference can be drawn that Defendants made a concerted effort to keep Plaintiffs from practicing in the Quad Cities area or elsewhere. In fact, Plaintiffs' factual pleadings belie such an allegation. Plaintiffs asserted that Davies continued to work at Genesis for a period after the exclusive contract was awarded to A&A and after the peer review. A reasonable inference can be drawn that APC will once again have the opportunity to bid on the exclusive contract when it is open for renewal. Furthermore, as noted previously, the hospital's Judicial Review Committee reversed the MEC's decision to suspend Davies and impose restrictions, and the Board made the final decision concerning Davies' suspension and restrictions. Plaintiffs do not allege they are prevented from working at Genesis because of the peer review action, and Davies does not allege why he was ultimately foreclosed from practicing at Genesis in February 1997.

Although Plaintiffs' assertions nominally regard prices and competition, the type of injury covered under antitrust **[**38]** laws, Plaintiffs have not alleged any palpable change in the market. ***HN17***[] The mere allegation that prices have or will increase in the future is insufficient for antitrust injury; a plaintiff must allege that prices will increase above competitive levels. *Robles, 785 F. Supp. at 998, 998 n.7*. Plaintiffs claimed that doctors left APC to join A&A, which means patients now have more choice concerning which anesthesiologist to use, and which means Genesis is a more competitive hospital with the addition of new anesthesiologists. *Id. at 998*.

The relevant markets possibly affected by the exclusive contract granted to A&A were (1) the consumers of anesthesiology services, and (2) the providers of anesthesiology services. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 7, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*; *Balaklaw v. Lovell, 14 F.3d 793, 798 (2d Cir. 1994)*. From the consumers' viewpoint, "What occurred after the implementation of the [exclusive] contract . . . was only a reshuffling of competitors." *See Balaklaw, 14 F.3d at 798* (quoting *Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1392 (10th Cir. 1992)*). In both *Balaklaw* and *Coffey*, as here, the **[**39]** plaintiff doctor or group had a de facto exclusive arrangement with a hospital to provide certain medical services, but was replaced when the hospital entered into an exclusive contract with another provider. *See Balaklaw, 14 F.3d at 798 n.10*; *Coffey, 955 F.2d at 1390*. The same situation has occurred here.

From the providers' viewpoint, the Court notes Plaintiffs stated that competition for the exclusive contract regarded all Genesis' anesthesiology services, not just services for cardiac patients. Genesis solicited proposals from several anesthesiologists. Nothing in the Corrected Second Amended Complaint identified any competitors for Plaintiffs in the market for cardiac anesthesiology. The only competitors mentioned were those for the provision of all anesthesiology services at Genesis. Plaintiffs have not asserted any facts tangibly indicating that either the anesthesiology or asserted cardiac anesthesiology market has been hampered by the exclusive contract.

HN18[] In assessing the sufficiency of Plaintiff's claim, the Court cannot ignore commercial realities. *See United States v. Grinnell Corp., 384 U.S. 563, 572-73, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *Balaklaw, **[**40]** 14 F.3d at 799*; *Oksanen, 945 F.2d at 709* ("The relevant market definition must encompass the realities of competition."). Within the Quad Cities and the surrounding 23-county area, several cities have hospitals, and a few miles from the edges of the area defined by Plaintiffs, large hospitals are found in several cities, such as Iowa City, with the University of Iowa Hospital and Clinics, and including Chicago, Rockford, Peoria, and Springfield, Illinois. (*See* Appendix A.) Plaintiffs do not allege any facts suggesting the contract or staffing decision caused them, or other anesthesiologists, to be excluded from, or limited in, the market for anesthesiology services. *See* *Balaklaw, 14 F.3d at 799*. It therefore appears extremely unlikely that the Sherman Act prohibits Defendants' conduct.

The Court recognizes that under certain circumstances, a staffing decision can conceivably support an antitrust claim. *Cf.* *Islami v. Covenant Med. Ctr., Inc., 822 F. Supp. 1361, 1387 (N.D. Iowa 1992)* (denying motion for summary judgment on basis of injury to **[*1096]** relevant market, where geographic market was in dispute, and evidence of injury to competition existed in form of one doctor's **[**41]** monopoly on thoracic surgeries at hospital, and of radiologists' possible monopoly on testing at lab).

In this case, however, considering all the facts stated in the Corrected Second Amended Complaint as true, taking into account the contradictions in the complaint regarding the nature of the market, and absent factual allegations raising a reasonable inference of injury to competition or of a causal connection between an alleged antitrust violation and harm to Plaintiffs, the Court holds Plaintiffs have alleged injury only to themselves and thus have not alleged the antitrust injury essential to their claim under ***antitrust law***. *Cf.* *BCB Anesthesia, 36 F.3d at 669* (holding that before court engaged "in the micromanagement of the staffing arrangements . . . under the aegis of the antitrust laws," court needed "better reasons than the plaintiffs have given."). Plaintiffs, therefore, have not established antitrust standing, and the Court need not address the remaining factors regarding antitrust standing. *See* *Lovett, 975 F.2d at 520-21*.

Even if Plaintiffs had adequately pleaded antitrust injury, the Court holds they have not satisfied the second prong of that antitrust standing **[**42]** test: Plaintiffs have not shown they are the proper antitrust plaintiffs.

Other courts have determined that physicians challenging termination of staff privileges at a hospital are not appropriate plaintiffs to enforce antitrust laws. *See* *Todorov, 921 F.2d at 1455* (holding doctor's interests were not aligned with patients' interests, where doctor would benefit from radiologists' inflated prices; patients, their insurers, or government were interested in ensuring consumers paid competitive price, and they could bring antitrust action); *Baglio, 940 F. Supp. at 830* (holding even if doctor had established antitrust injury, he was not appropriate plaintiff to represent interests of those who might use pathology lab; patients and larger payors, who would be directly injured by alleged antitrust violations, must bring action); *Leak, 893 F. Supp. at 764* (noting existence of "at least two more easily imagined efficient enforcers": patients and the government).

Here, Plaintiffs might benefit if A&A charged patients inflated prices on procedures both perform, because consumers would have an added incentive to seek these anesthesiology services from Plaintiffs. Thus, Plaintiffs would **[**43]** not be the appropriate parties to raise this issue, because they would not be directly injured by the prices charged by A&A.

Because Plaintiffs have not shown they suffered antitrust injury and that they are proper antitrust plaintiffs, the Court grants Defendants' Motions to Dismiss the second and third causes of action.

Because Plaintiffs have not pleaded an antitrust injury, the Court need not address the adequacy of Plaintiffs' pleadings regarding the statement of their claims for relief under *Sections 1* and *2*. *See* *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690*; *Midwest Communications, Inc. v. Minnesota Twins, Inc., 779 F.2d 444, 450 (8th Cir. 1985)* (where plaintiff fails to establish threshold issue of antitrust injury, it lacks standing to sue under antitrust laws and court need not reach merits of antitrust claims), *cert. denied*, *476 U.S. 1163, 90 L. Ed. 2d 730, 106 S. Ct. 2289 (1986)*. Nevertheless, the Court analyzes the balance of the grounds for the Motions to Dismiss the Sherman Act claims, because of the issues' importance and for the sake of efficiency should this case be considered on appeal.

2. Section 1 Claim (Count II)

Defendants seek to dismiss Count II of Plaintiffs' **[**44]** complaint for failing to state a claim under *Section 1* of the Sherman Act.

HN19[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." *15 U.S.C.A. § 1*. In passing the Sherman Act, Congress intended to outlaw only unreasonable restraints. *State Oil Co. v. Khan*, U.S. , , *139 L. Ed. 2d 199, 118 S. Ct. 275, 279 (1997)*.

Plaintiffs claim that by awarding an exclusive contract and conducting a fraudulent **[*1097]** peer review, Defendants have adversely affected the provision of anesthesiology services to cardiac patients and restrained Plaintiffs' business.

HN20[] An alleged trade restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held per se unreasonable, or because it violates the rule of reason, under which the "test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Flegel v. Christian Hosp. Northeast-Northwest, 4 F.3d 682, 686 (8th Cir. 1993)* **[**45]** (quoting *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 457-58, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986))*. A plaintiff need not prove the anticompetitive effects of a restraint within a class subject to per se analysis. *Flegel, 4 F.3d at 686*; *cf.* *Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 210, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)* (cited in *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 114 L. Ed. 2d 366, 111 S. Ct. 1842 (1991))*.

Most antitrust claims are analyzed under the rule of reason. *Kahn*, U.S. at , 118 S. Ct. at 279. Federal courts generally examine the denial or revocation of hospital privileges under the rule of reason. *Id.* (citations omitted); *Lie v. St. Joseph Hosp. of Mount Clemens, 964 F.2d 567, 570 (6th Cir. 1992)*.

Plaintiffs do not assert, and the Court does not find, that Plaintiffs' claims fit within a class of restraints that have been held to be per se unreasonable. The Court therefore will analyze Plaintiffs' *Section 1* claim under the rule of reason. ***HN21***[] To adequately allege the illegality of a restraint of trade under the rule of reason, a complaint must define a relevant market, and refer to genuine market-wide **[**46]** anticompetitive effects, actual or probable. *Flegel, 4 F.3d at 688*; *see also* *Double D Spotting Service, Inc.v. Supervalu, Inc., 136 F.3d 554, 561, 1998 U.S. App. LEXIS 1820*, No. 97-1456, slip op. at 4 (8th Cir. Feb. 11, 1998) (dismissing complaint for failure to plead valid relevant market).

Because Plaintiffs have not asserted actual detrimental effects on competition, [7] the Court must examine the claims that Defendants have market power. *Flegel, 4 F.3d at 688*; *accord, Double D Spotting Service*, No. 97-1456, slip op. at 4, 7. ***HN22***[] To establish a defendant has market power, a plaintiff must identify the relevant market and the effect on that market of the defendant's alleged acts in restraint of trade. *Flegel, 4 F.3d at 688*; *Princess House, Inc. v. Lindsey, 918 F. Supp. 1356, 1370 (W.D. Mo. 1994)*. In defining a relevant market, a plaintiff must adequately define both a product and geographic market. *United States v. Mercy Health Servs., 107 F.3d 632, 634 n.3 (8th Cir. 1997)*; *FTC v. Freeman Hospital, 69 F.3d 260, 268 (8th Cir. 1995)*; *Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994)*, *cert. denied*, *513 U.S. 1150, 130 L. Ed. 2d 1068, 115 S. Ct. 1100 (1995)*; *Ryko Manufacturing Co. v. Eden Services, **[**47]** 823 F.2d 1215, 1233 (8th Cir. 1987)* (stating plaintiff attacking vertical nonprice restraint must prove defendants' substantial market power in relevant market), *cert. denied*, *484 U.S. 1026, 98 L. Ed. 2d 763, 108 S. Ct. 751 (1988)*.

HN23[] "The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's [Rule] 12(b)(6) motion." *Double D Spotting Service*, No. 97-1456, slip op. at 3-4 (quotation omitted).

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[7] Plaintiffs asserted A&A raised prices, but do not specify for which services prices were raised, or that the prices were raised higher than to a competitive level.

As discussed above, Plaintiffs have not adequately pled a causal connection between harm to Plaintiffs and any alleged concerted action by Defendants in violation of the Sherman Act.

The Court recognizes that to injure or destroy one or two competitors in a market through unfair competition will not, if the market has many competitors, substantially **[**48]** affect consumers or anyone else besides the competitors injured. *See* *Sutliff, Inc. v. Donovan Co., Inc., 727 F.2d 648, 655 (7th Cir. 1984)*. ***HN24***[] Mere unfair competition, without more, does not violate antitrust laws. *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*.

Similarly, ***HN25***[] a complaint that "does no more than state plaintiff's commercial disappointment" **[*1098]** at losing a segment of business is insufficient as a matter of law to rise to the level of an antitrust violation within a relevant market. *Double D Spotting Service*, No. 97-1456, slip op. at 9 (affirming district court's dismissal of complaint, where complaint did no more than state plaintiff's disappointment at not receiving exclusive contract at one warehouse). "Hospitals are not public utilities, required to grant staff privileges to anyone with a medical license." *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1995)*, *cert. denied*, *516 U.S. 1184, 116 S. Ct. 1288, 134 L. Ed. 2d 233 (1996)*.

a. Product Market

HN26[] Products are in the same market when they are "reasonably interchangeable" for the same uses, thus **[**49]** exhibiting a high "cross-elasticity of demand" from buyers. *Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1153 (W.D. Ark. 1995)*; *see* *United States v. Arnold Schwinn & Co., 388 U.S. 365, 381, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*; *United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 380, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. A high cross-elasticity of supply, i.e., substitution by sellers, must also be considered in determining a relevant product market. *Blue Cross, 65 F.3d at 1411* (holding definition of submarkets of specific, very narrowly defined medical procedures was unrelated to conditions of supply, where many physicians performed or could perform more than one procedure, and therefore were part of the market if not active in it; holding health maintenance organizations did not constitute market separate from other contractual forms in which many of same doctors sold their services); *see* *General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 805 (8th Cir. 1987)*, *cert. denied*, *506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *cf.* *Lee v. Life Ins. Co. of North America, 23 F.3d 14, 17 (1st Cir. 1994)* (affirming dismissal of *§ 1* claim; appellants **[**50]** could assert no colorable claim that university had appreciable economic power in market for university education or market for health care services, where university competed for students on regional and national level with several universities and colleges, and although university was "unique" in colloquial sense, appellants could not claim other institutions did not or could not provide functionally similar educational offerings); *Midwest Radio Co. v. Forum Publishing Co., 942 F.2d 1294, 1297 (8th Cir. 1991)* (holding proposed definition of relevant product market for mass media advertising was too narrow as a matter of law).

HN27[] A court may determine the boundaries of an antitrust market by analyzing such indicia as industry or public recognition of the market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers or prices, sensitivity to price changes, and specialized vendors. *Brown Shoe, 370 U.S. at 325*; *Community Publishers, 892 F. Supp. at 1153*.

HN28[] Market definition is not determined by formal labels, but rather takes into account "the realities of competition." *Weiss v. York Hosp., 745 F.2d* ***[**51]*** *786, 826 (3d Cir. 1984)*, *cert. denied*, *470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985)*; *accord*, *Langenderfer v. S.E. Johnson Co., 917 F.2d 1413, 1421 (6th Cir. 1991)* (stating market must correspond to commercial realities of industry; following *Brown Shoe, 370 U.S. at 336-37*). Determination of the competitive market depends on how different from one another the offered products are in character or use. *Du Pont, 351 U.S. at 393*. For example, differences exist in the formulas for soft drinks, but each one is not an illegal monopoly. *Id.; see* *Times-Picayune Publ. Co. v. United States, 345 U.S. 594, 613, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)* (holding readership "bought" by advertisers in morning newspaper was same "product" sold by evening newspaper, where nothing suggested advertisers viewed city's morning or evening newspaper readers as other than fungible customer potential).

HN29[] The Sherman Act does not require that products be fungible to be considered in the relevant market. *Du Pont, 351 U.S. at 394*. "In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control." *Id. at 395*.

Here, Plaintiffs allege **[**52]** the relevant market is cardiac anesthesiology services, a submarket of anesthesiology services. As **[*1099]** discussed above, Plaintiffs contradict this allegation through their many factual assertions regarding general medical care and anesthesiology services. Furthermore, Plaintiffs make no allegations distinguishing the cardiac anesthesiology market from the anesthesiology market in terms of being recognized as a separate economic entity by the industry or public, having peculiar characteristics and uses, requiring unique facilities, featuring distinct prices or sensitivity to price changes, and requiring specialized training. *See Brown Shoe, 370 U.S. at 325*.

Distinct customers, specifically those patients requiring invasive cardiac surgery, are the only indicia that can be inferred from the Corrected Second Amended Complaint as supporting Plaintiffs' narrow product market definition. However, Plaintiffs make no allegations that physician anesthesiologists who offer cardiac anesthesiology services at Genesis are not interchangeable with other physician anesthesiologists, and thus that there are no comparable alternatives available and no cross-elasticity of demand between the services **[**53]** offered by anesthesiologists who provide cardiac anesthesiology and services offered by substitutes for these physicians. *See Id.* Plaintiffs fail to explain how cardiac anesthesiology services are unique and the reasons they have no substitute. The realities of competition in this case are that the cardiac patients could easily have switched from the Plaintiffs to other anesthesiologists, which many presumably did when Genesis chose a new provider group, and thus a high elasticity of demand exists.

Furthermore, a high elasticity of supply exists. The only factual information given relates to Genesis' use of, and staffing patterns for, anesthesiologists. Plaintiffs state that when Genesis sought bids for its exclusive contract for anesthesiology services, it sent information to all anesthesiologists with staff privileges. Plaintiffs do not contend that A&A, the contract winners, are specialists in cardiac anesthesiology. The facts pled imply that other anesthesiologists can supply anesthesiology to cardiac patients.

Because of the length and complexity of cardiac surgery, providing anesthetics during such surgery is likely to require the use of more time and experience and of **[**54]** increased anesthetics than are required during many other types of surgery. This additional input, however, is not enough to carve out a separate market for the provision of anesthetics during cardiac surgery from the market of anesthesiology services; physicians commonly expend more time and skill during certain procedures as compared to others. *See Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1471 (9th Cir. 1985)* (holding nurse anesthetists and M.D. anesthesiologists competed in same market even though nurse anesthetists required "input" of physician's supervision, where supervision was easily obtainable and common practice in medical profession), *cert. denied*, *502 U.S. 994, 116 L. Ed. 2d 639, 112 S. Ct. 617 (1991)*.

Davies cannot make a colorable claim that other physician anesthesiologists do not or cannot provide anesthesiology for cardiac surgery. *Cf. Blue Cross, 65 F.3d at 1411*; *Lee, 23 F.3d at 17*. Davies' narrow definition of a submarket of cardiac anesthesiology services thus appears unrelated to conditions of supply and demand and fails to take into account the economic realities of the marketplace.

Absent the existence of any other of the specific factors **[**55]** listed in *Brown Shoe*, and considering the contradictory assertions in the Corrected Second Amended Complaint, the Court holds that Plaintiffs' claim of a narrow market for cardiac anesthesiology is insufficient as a matter of law to establish the relevant product market. Plaintiffs therefore cannot identify the effect on the relevant market of Defendants' alleged restraint of trade. *See Flegel, 4 F.3d at 688*.

b. Geographic Market and Market Power

HN30[] The geographic market encompasses the geographic area to which consumers can practically turn for alternative sources of the product and in which antitrust defendants face competition. *Morgenstern, 29 F.3d at 1295* (citing *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 331-32, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961))*.

The *Morgenstern* court recognized the importance of distance and convenience in determining the relevant geographic market. *Morgenstern, 29 F.3d at 1297* (holding as a matter of law that facts did not support proposed relevant market of adult cardiac surgery patients to include Lincoln, Nebraska, and 26 surrounding Nebraska counties extending over 200 miles beyond **[*1100]** Lincoln in certain directions, **[**56]** while excluding heart programs in Omaha, to which Lincoln residents needed to travel only 58 miles by main highway, and programs in other regional and national heart programs).

HN31[] A geographic market is determined by inquiring into the commercial realities faced by consumers. *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 452-56, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*; *Freeman Hospital, 69 F.3d at 270* (holding plaintiff failed to meet burden of establishing relevant market, where expert's analysis based on zip code data gave "a static, rather than a dynamic, picture of that acute care market," by addressing only the question of where patients currently went, rather than where they could practicably go for services); *Bathke v. Casey's General Stores, 64 F.3d 340, 345 (8th Cir. 1995)* (affirming district court's entry of summary judgment against plaintiffs, where gasoline retailers in 67 small Iowa towns sued multi-state retailer of gasoline for alleged predatory pricing and tried to establish each small town as separate geographic market for gasoline, but failed to show where consumers could practicably travel to avoid buying gas at a Casey's store); **[**57]** *United States v. Mercy Health Servs., 902 F. Supp. 968, 981 (N.D.Iowa 1995)*, *vacated as moot*, *107 F.3d 632 (8th Cir. 1997)* (holding relevant geographic market was not county in which hospitals were located and half-circle within 15-mile radius extending from county's edge; significant number of Dubuque, Iowa, residents used University of Iowa Hospitals and Clinics in Iowa City, a 90-mile drive, due to factors including quality and price concerns).

The market for a hospital's specialized medical services may encompass a broader geographic area than the market for its general medical services. *Freeman Hospital, 69 F.3d at 271* (noting that as patients came to three Joplin, Missouri, hospitals to receive specialized, sophisticated services, hospitals in larger cities in four-state area, such as Springfield and Kansas City, Missouri, or Tulsa, Oklahoma, might become viable competitive alternatives to Joplin hospitals).

In the instant case, Plaintiffs' allegations do not address the critical question of where consumers of cardiac anesthesiology services could reasonably turn for alternative care.

The Corrected Second Amended Complaint states Genesis is the only hospital in **[**58]** the Quad Cities and surrounding area that provides invasive cardiology and cardiac surgery care. Plaintiffs describe the surrounding area as comprising 23 counties, but do not identify which counties are in which states. A map shows the following listed counties are in Iowa: Cedar, Clinton, Jackson, Jones, Louisa, Muscatine, and Scott, and the following counties are in Illinois: Carroll, Bureau, Hancock, Henderson, Knox, Marshall, McDonough, Mercer, Ogle, Putnam, Rock Island, Stark, Warren, and Whiteside. The Corrected Second Amended Complaint lists two counties, Henry and Lee, that could be in either Iowa or Illinois. The area stretches approximately 200 miles north to south in Illinois, and approximately 100 miles north to south in Iowa. The area extends in some locations to approximately 100 miles wide.

In Iowa, parts of Louisa, Muscatine, Cedar, and Jones counties are closer to the University of Iowa Hospital and Clinics (UIHC) in Iowa City, Iowa, than to the Quad Cities. (*See* Appendix A.) Davenport is approximately 56 miles from Iowa City. UIHC provides surgical services and is easily accessible to many residents of these counties by interstate and state highways. [8] Similarly, **[**59]** in Illinois, cardiac services and surgery are easily accessible by

[8] The Court cannot ignore the commercial reality, well known in Iowa, that UIHC is a major tertiary care center, any more than it could ignore in an antitrust case involving proposed markets for county fairs the existence of the Iowa State Fair in Des Moines.

As noted in another case, "[A] significant number of Dubuque residents use the University of Iowa Hospitals and Clinics . . . a ninety mile drive, due to quality concerns." *Mercy Health Servs., 902 F. Supp. at 982*. Therefore, it is reasonable to assume that a significant number of Quad Cities residents use the UIHC, which for them is approximately a 56-mile drive. Not to consider the impact of UIHC on this market would be similar to ignoring an elephant in the room.

interstate and state highways to many residents of **[*1101]** counties in the designated geographic market. Reviewing the areas identified by Plaintiffs as relevant, it appears that portions of McDonough and Hancock Counties are closer to Springfield, the location for Southern Illinois University's medical school and hospital, than to the Quad Cities. Areas of Ogle and Lee Counties are closer to Chicago, home to several medical schools, hospitals and medical centers, than to the Quad Cities. Ogle County abuts the city of Rockford (population approximately 139,426), and portions of Bureau, Marshall, Stark, and Knox counties are closer to Peoria (population approximately 111,504) than to the Quad Cities. Considering these populations, it would be unreasonable to infer residents of the Quad Cities area could not practicably turn to hospitals in Rockford or Peoria for cardiac surgery.

[60]** A proper market definition can most often be determined only after a factual inquiry into the commercial realities facing consumers. *Double D Spotting Service*, No. 97-1456, slip op. at 8. "This general rule, however, does not amount to a per se prohibition against dismissal of antitrust claims for failure to plead a relevant market under *Fed.R.Civ.P. 12(b)(6)*." *Id.* (internal quotations omitted).

In assessing the sufficiency of Plaintiff's claim under *Fed.R.Civ.P. 12(b)(6)*, the Court cannot ignore blatant geographic and commercial realities referenced by the pleadings. As a matter of law, Plaintiffs' stated geographic market is too narrow to support the claimed antitrust violation. *See Double D Spotting Service*, No. 97-1456, slip op. at 8 (dismissing antitrust claim on grounds geographic market alleged to be one Supervalu warehouse in suburb was too narrow to support claim, stating, "the market for [truck] unloading services would seem to be more properly defined as including all warehouses within, at least, the entire . . . metropolitan area, if not an even larger area.") Facts in the Corrected Second Amended Complaint do not adequately identify a relevant geographic **[**61]** market, and therefore Plaintiffs cannot establish market power by identifying the effect on the relevant market of Defendants' alleged restraint of trade. If not, then injuring Plaintiffs might have no effect on the market as distinct from the harm to Plaintiffs.

The Court holds the factual allegations in Plaintiffs' Corrected Second Amended Complaint do not adequately plead the existence of a relevant product and geographic market and therefore do not state a Section I antitrust claim. The Court grants Defendants' Motions to Dismiss the second cause of action.

3. Section 2 Claim (Count III)

HN32[] *Section 2* provides that, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fines not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." *15 U.S.C.A. § 2*.

Plaintiffs allege Defendants violated *Section 2* by monopolizing, attempting to monopolize, **[**62]** and forming a conspiracy to monopolize the market for cardiac anesthesiology.

HN33[] To avoid dismissal of its complaint, a plaintiff asserting a claim under *Section 2* must allege a relevant product and geographic market. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)* (attempt to monopolize); *Double D Spotting Service*, No. 97-1456, slip op. at 7 (same); *Morgenstern, 29 F.3d at 1295-96* (monopolize); *Alexander v. National Farmers Org., 687 F.2d 1173, 1182 (8th Cir. 1982)* (conspiracy) [9], *cert. denied*, *461 U.S. 937, 77 L. Ed. 2d 313, 103 S. Ct. 2108, 461 U.S. 938, 77 L. Ed. 2d 314, 103*

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[9] ***HN34***[] The Eighth Circuit does not require as rigorous a showing for the relevant market in the context of a conspiracy claim as for a showing for the relevant market for other *Section 2* claims. *See* *Alexander, 687 F.2d at 1182* (holding civil conspiracy claim, standing alone, requires at least minimal showing of product and geographic context to ensure claim is not based on some abstract showing of unlawful intent). Even applying a less rigorous standard than for Plaintiffs' other *Section 2* claims, the Court holds that for the reasons outlined above, Plaintiffs have not adequately pled the showing of a relevant market required for a *Section 2* conspiracy claim. To hold otherwise would permit a fact finder to infer a conspiracy where such an inference is

S. Ct. 2110 **[*1102]** *and 461 U.S. 939 (1983)*; *accord* *TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1028* (10th Cir.), *cert. denied*, *506 U.S. 999, 121 L. Ed. 2d 537, 113 S. Ct. 601 (1994)* (affirming dismissal of amended complaint because plaintiff "did not allege a relevant product market which [defendant] was capable of monopolizing, attempting to, or conspiring to monopolize"); *B.V. Optische Industrie de Oude Delft, 909 F. Supp. 162 (S.D.N.Y. 1995)* (dismissing *§ 2* attempted monopoly claim, where plaintiff failed to adequately show relevant product market was chest **[**63]** equalization radiography and that no other persons besides parties had capacity to provide radiography equipment in United States; plaintiff did not refer to any reasonably interchangeable alternatives and did not explain why market was defined in such narrow terms).

[64]** ***HN35***[] An exclusive provider contract, without more, does not violate *Section 2*. *Vakharia, 917 F. Supp. at 1302* (noting Seventh Circuit had long since determined that a single hospital's staffing decision did not give rise to *§ 2* claim).

For the reasons discussed above, Plaintiffs have not adequately pled a relevant product or geographic market. Therefore, the Court holds that Plaintiffs' complaint does not state a *Section 2* antitrust claim. The Court grants Defendants' Motions to Dismiss the third cause of action.

C. Title VII (Count IV)

Plaintiffs assert A&A discriminated against Davies in employment because of his national origin. He was born and educated in South Wales.

Defendant A&A argues, and Plaintiffs admit, that Plaintiffs' complaint does not properly identify A&A as an employer as defined in *42 U.S.C. § 2000e(b)*, which is required for federal court jurisdiction. Specifically, Plaintiffs do not claim that A&A ***HN36***[] "has fifteen or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *42 U.S.C. § 2000e(b)*. [12]

[65]** ***HN37***[] The Court is limited to a review of the pleadings under a *Fed.R.Civ.P. 12(b)(6)* motion to dismiss. Because Plaintiffs have not pled any facts identifying A&A as an employer as defined in *42 U.S.C. § 2000e(b)*, including whether A&A has fifteen or more employees, the Court grants A&A's Motion to Dismiss this claim.

D. Supplemental State Claims (Counts V to IX)

Having granted Defendants' RICO, Sherman Act, and Title VII claims, the Court turns to the remaining supplemental state claims in Counts V to IX. Of these, Defendants moved to dismiss Count V, Iowa Antitrust laws, and Count VII, defamation.

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implausible. *Cf.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (analyzing market in context of whether alleged conspirators had plausible chance of achieving monopoly in market, and therefore motive for conspiring; stating courts should not permit fact finders to infer conspiracies when such inferences are implausible, because otherwise procompetitive conduct could be deterred).

[12] The Court notes that several courts have determined that shareholders in professional corporations were not "employees" for purposes of determining whether a corporation had the required number of employees to qualify as a "employer" under Title VII. *See* *Devine v. Stone, Leyton & Gershman, 100 F.3d 78, 82 (8th Cir. 1996)*, *cert. denied*, ***137 L. Ed. 2d 821, 117 S. Ct. 1694 (1997)*** (holding attorney shareholder-directors of professional corporation were not employees; adopting "form over substance" test); ***Goudeau v. Dental Health Servs., Inc., 901 F. Supp. 1139, 1147 (M.D. La. 1995)*** (holding dentist shareholders in professional corporation were not employees; where management, ownership, and control of corporation resembled that of partnership). However, because this is raised as a motion to dismiss, the Court makes no findings as to the number of employees A&A has.

1. Iowa Antitrust Laws (Count V)

Plaintiffs brought their state antitrust claim under ***HN38***[] *Iowa Code § 553.5*, which prohibits monopoly and the attempt to monopolize: "A person shall not attempt to establish or establish, maintain, or sue a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing, or maintaining prices." [13] *Iowa Code § 553.5* (1996).

[66] [*1103]** Defendants rely on *Iowa Code § 553.2* for the proposition that Plaintiffs' Iowa antitrust claims should be dismissed for the same reasons their federal antitrust claims are dismissed. Plaintiffs counter that the Corrected Second Amended Complaint states a valid cause of action under Iowa's Antitrust Laws.

HN40[] *Iowa Code § 553.2* provides as follows:

> This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purposes as this chapter. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.

Iowa Code § 553.2.

HN41[] When interpreting Iowa antitrust statutes, Iowa courts are required by *Section 553.2* to give considerable weight to federal cases construing similar sections of the Sherman Act. *Neyens v. Roth, 326 N.W.2d 294, 297-98 (Iowa 1982)* (holding district court erred in concluding § 553.6(4)'s exemption applied to defendants; stating reasoning of United States Supreme Court **[**67]** case, filed after district court's ruling, required reflection of defendants' argument, even though federal statute regarding exemption for antitrust liability had different rationale than § 553.6(4)'s rationale); *accord* *Federal Land Bank of Omaha v. Tiffany, 529 N.W.2d 294, 296 (Iowa 1995)* (holding, because federal case law had held farm credit banks were not subject to federal ***antitrust law***, such banks were exempt under Iowa ***antitrust law***), *cert. denied*, *516 U.S. 1043, 116 S. Ct. 700, 133 L. Ed. 2d 657 (1996)*; *Northwestern Bell Tel. Co. v. Iowa Utils. Bd., 477 N.W.2d 678, 684-86 (Iowa 1991)*; *State v. Cedar Rapids Bd. of Realtors, 300 N.W.2d 127 (Iowa 1981)* (applying rule of reason from federal antitrust cases).

Section 553.5's prohibition against attempts to monopolize and monopolization closely resemble the Sherman Act, *Section 2*'s, prohibition against attempts to monopolize and monopolization. [14] *See Double D Spotting Service*, No. 97-1456, slip op. at 9.

[68]** Because Plaintiffs' claims of attempt to monopolize and monopolization are dismissed under *Section 2* of the Sherman Act, which is similar to *Section 553.5*, and because ***HN43***[] *Section 553.2* requires a "uniform application of state and federal laws prohibiting restraints of economic activity and monopolistic practices," the Court holds Iowa courts would interpret *Section 553.5* to require dismissal of Count V.

Therefore, the Court grants Defendants' Motion to Dismiss Count V for the reasons discussed regarding dismissal of Count III.

2. Counts VI to IX

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[13] ***HN39***[] "Relevant market" is defined as "the geographical area of actual or potential competition in a line of commerce, all or any part of which is within this state." *Iowa Code § 553.3(6)*.

[14] ***HN42***[] The Sherman Act, *Section 2*'s, prohibition against conspiracy to monopolize has a counterpart in *Iowa Code § 553.4*, which also prohibits the restraint of trade: "A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market." *Iowa Code § 553.4*.

Defendants did not challenge Count VI (intentional interference with contractual relations); Count VIII (intentional infliction of emotional distress), or Count IX (breach of contract). Defendants sought dismissal of Count VII (defamation).

Pursuant to *28 U.S.C. § 1367(c)(3)*, the Court declines to exercise jurisdiction over the remaining state law claims. *See* *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*; *Pioneer Hi-Bred Internat'l v. Holden Foundation Seeds, Inc., 35 F.3d 1226, 1242 (8th Cir. 1994)*; *Moebus v. Ob-Gyn Assocs., Inc., 937 F. Supp. 867, 870 (E.D. Mo. 1996)*. The **[**69]** Court therefore will dismiss the remaining state law claims without prejudice. The Court anticipates that should Plaintiffs replead their defamation claim in state court, they will take into account the challenges to the claim Defendants raised here.

V. Conclusion.

Because Plaintiffs have not pled the conduct of an enterprise, a pattern of racketeering activity, or probable cause under RICO, the Court grants Defendants' Motions to Dismiss **[*1104]** Count I. Because Plaintiffs lack federal antitrust standing, and have failed to state a claim for violation of *Sections 1* and *2* of the Sherman Act, the Court grants Defendants' Motions to Dismiss Counts II and III. Because Plaintiffs have not identified Defendant A&A as an employer as defined in *42 U.S.C. § 2000e(b)*, the Court grants Defendant A&A's Motion to Dismiss Count IV. Giving considerable weight to federal cases construing sections of the Sherman Act that are similar to *Iowa Code § 553.5*, the Court grants Defendants' Motions to Dismiss Count V.

The Court dismisses the remaining state law claims, Counts VI through IX, without prejudice to Plaintiffs' right to assert their state law claims in state court. [15]

[70]** The Motions to dismiss (Clerk's Nos. 9, 11, 30, and 31) are granted, subject to Plaintiffs' right to assert their state law claims in state court.

IT IS SO ORDERED.

Dated this 12th day of February, 1998.

CELESTE F. BREMER

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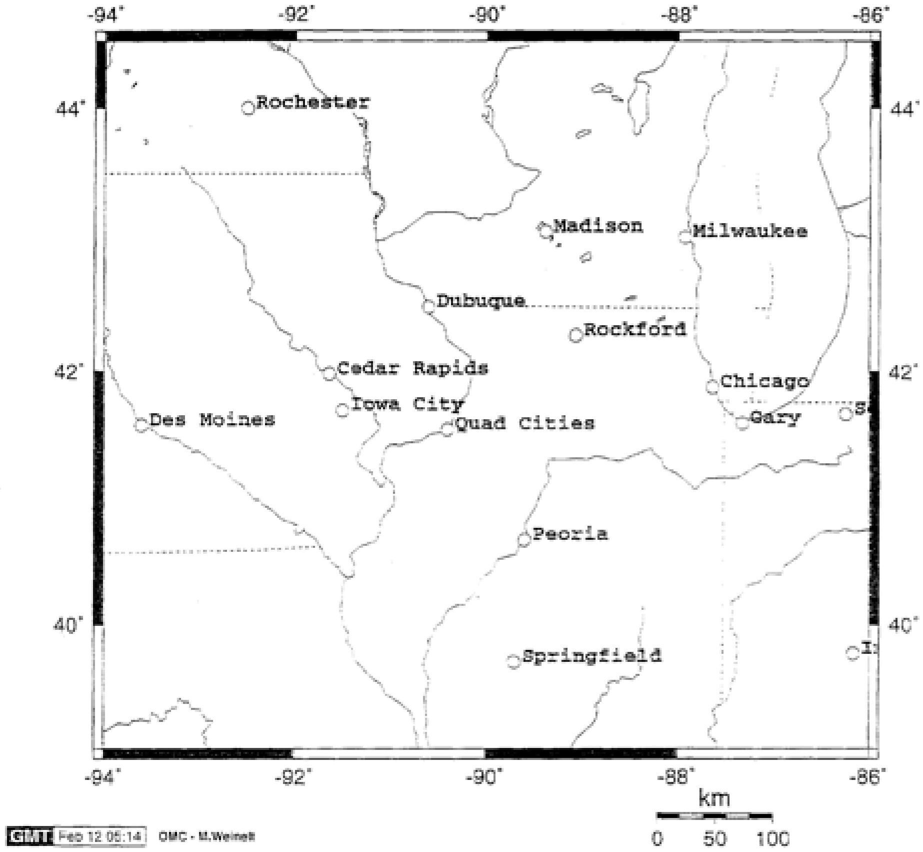
[15] In their brief in resistance to Defendants' Motions to Dismiss, Plaintiffs requested leave to amend the Second Corrected Amended Complaint if the Court granted Defendants' motions. ***HN44***[] *Rule 15(a) of the Federal Rules of Civil Procedure* states that leave to amend "shall be given freely when justice so requires." *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)*; *see* *In re NationsMart Corp. Securities Litigation v. Thaman, 130 F.3d 309, 322 (8th Cir. 1997)*. Permission to amend may, however, be denied where amendment would be futile. *Taylor v. United States, 106 F.3d 833, 838 (8th Cir. 1997)*.

Plaintiffs have not submitted a proposed amendment. Although approximately five months have passed since Defendants filed their motions to dismiss, Plaintiffs have made no attempt to remedy the defects in the Second Corrected Amended Complaint identified by Defendants. Plaintiffs have already amended their complaint twice, the second time in response to Defendants' first round of motions to dismiss. Nothing in Plaintiffs' brief in support of their resistance to the motions to dismiss indicates what a third amended complaint would have contained. "***HN45***[] Absent some indication as to what might be added to the complaint to make it viable, the appellant is not entitled to leave to amend." *Wolgin v. Simon, 722 F.2d 389, 395 (8th Cir. 1983)* (affirming district court's denial of leave to amend, where in brief in opposition to motion to dismiss, plaintiff requested leave to amend complaint, but did not submit proposed amendment; court could not rule on question of amendment, and granting leave to amend would have been inappropriate); *accord* *Clayton v. White Hall School District, 778 F.2d 457, 460 (8th Cir. 1985)*; *cf.* *Oliver v. Resolution Trust Corp., 955 F.2d 583, 584 (8th Cir. 1992)*.

For these reasons, and because the contradictions between the facts pled and the claims asserted persuade the Court that any attempt to amend would be futile, the Court denies Plaintiffs' request to amend their complaint for a third time. *See* ***Patel, 91 F.3d 132, 1996 WL 383920***, at *4.

CHIEF UNITED STATES MAGISTRATE JUDGE

[*1105] Appendix A



Appendix A

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United States v. Rochester Gas & Elec. Corp.

United States District Court for the Western District of New York

February 17, 1998, Decided ; February 17, 1998, Filed

97-CV-6294T

Reporter

4 F. Supp. 2d 172 *; 1998 U.S. Dist. LEXIS 3417 **; 1998-1 Trade Cas. (CCH) P72,070

UNITED STATES OF AMERICA, Plaintiff, v. ROCHESTER GAS AND ELECTRIC CORPORATION, Defendant.

Disposition: **[**1]** Both parties' motions for summary judgment denied. Plaintiff's motion to strike denied.

Core Terms

electricity, competitor, cogeneration, anticompetitive, compete, summary judgment, customers, antitrust liability, consumers, energy, discounted rate, immune, rates, anti trust law, state action doctrine, plant, summary judgment motion, Sherman Act, discounting, contends, argues, utility company, matter of law, authorize, negotiate, grounds, costs

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[ ] **Supporting Materials, Discovery Materials**

Fed. R. Civ. P. Rule 56(c) provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When considering a motion for summary judgment, all inferences and ambiguities must be resolved in favor of the party against whom summary judgment is sought. If, after considering the evidence in the light most favorable to the nonmoving party, the court finds that no rational jury could find in favor of that party, a grant of summary judgment is appropriate.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2[] **Parker State Action Doctrine, Local Governments & Private Parties**

The United States Supreme Court has held that private companies can be held immune from liability under federal ***antitrust law*** if their allegedly anticompetitive conduct was authorized and regulated by the state. The conduct is exempt under the state action defense if two requirements are met. First, the state has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the state provides active supervision of anticompetitive conduct undertaken by private actors.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Utility Companies > Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

HN3[] **Energy & Utilities, Utility Companies**

While it is true that under New York law a utility company may negotiate discounted rates with certain qualified consumers, and that discounting rates is carefully supervised by the New York Public Service Commission to prevent abuse of such a practice, New York law does not authorize utility companies to offer discounted rates to potential competitors for the purpose of preventing those potential competitors from becoming actual competitors.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

HN4[] **Antitrust & Trade Law, Exemptions & Immunities**

A contract between non-competitors to not compete does not violate the antitrust laws.

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For ROCHESTER GAS & ELECTRIC CORP., defendant: John Stuart Smith, Esq., David M. Schraver, Esq., Flor M. Colon, Esq., Nixon, Hargrave, Devans & Doyle LLP, Rochester, NY.

For NEW YORK STATE, amicus: Rene Davison, Esq., Office of the New York State Attorney General, New York State Department of Law, Rochester, NY. Richard L. Schwartz, Esq., Office of the Attorney General, Antitrust Bureau, New York, NY.

Judges: MICHAEL A. TELESCA, United States District Judge.

Opinion by: MICHAEL A. TELESCA

Opinion

[*173] DECISION and ORDER

INTRODUCTION

Plaintiff the United States of America brings this action against defendant Rochester Gas and Electric Corporation, ("RG&E"), pursuant to *Section 1* of the Sherman Act, codified at *15 U.S.C. § 1*, alleging that RG&E has engaged in anticompetitive acts. Specifically, plaintiff alleges that RG&E illegally engaged in anticompetitive activities by entering into a contract with **[**2]** the University of Rochester, ("University" or "U of R") whereby, *inter alia,* RG&E promised to provide electricity to the U of R at reduced rates in return for, *inter alia,* the University's promise not to compete against RG&E in the sale of electricity to consumers. Complaint at P 15. According to the United States, RG&E entered into its agreement with the U of R for the purpose of preventing the University from constructing a competing power producing facility. The United States alleges that as a result of the agreement between the U of R and RG&E, the University discontinued its plans to produce a power generating facility, thereby preventing a potential competitor from entering the market. The Government contends that RG&E's actions in preventing a potential competitor from entering the market were harmful to consumers in that RG&E denied consumers an alternative source from which to buy electricity, and increased costs for other RG&E customers who were required to pay more for electricity to offset the discounts that were given to the U of R.

Defendant RG&E moves pursuant to *Rule 56 of the Federal Rules of Civil Procedure* for summary judgment on grounds that it is immune **[**3]** from antitrust liability under the state action doctrine, and in the alternative, that it has not engaged in any anticompetitive behavior. The United States cross-moves for summary judgment claiming that RG&E is subject to antitrust liability, and that as a matter of law, defendant engaged in anticompetitive activity prohibited by the Sherman Act. Plaintiff also moves to strike portions of an affidavit submitted in support of defendant's motion for summary judgment.

The New York State Attorney General's office submits an amicus curiae brief contending that RG&E should not be immune from antitrust liability under the state action doctrine.

BACKGROUND

The following facts are uncontested except where noted. Sometime in the late 1980's or early 1990's, in an effort to reduce energy costs, the University of Rochester began to consider generating its own power using a "cogeneration" facility. A cogeneration facility is a powerplant that burns fuel to produce two types of energy: electricity and steam. The U of R used electricity throughout its campus, and used steam to heat and cool its buildings.

In early 1993, University President Dennis O'Brien convened a special task group to **[**4]** study the feasibility of constructing and operating a cogeneration facility. After months of study, the task group determined that a cogeneration facility would be a viable source of energy for the University. The group concluded that a 23 megawatt plant would be required, and that the cost of such a plant **[*174]** would be approximately $ 36 million. The task group determined that because the plant would generate more electricity than required by the University, approximately one-third of the electricity produced could be sold. According to the United States, the U of R considered selling this electricity to other consumers, including the Rochester Institute of Technology. RG&E contends that the University planed to sell the electricity back to RG&E.

On July 20, 1993, the Executive Committee of the Board of Trustees of the University of Rochester voted to authorize officers of the University to proceed with development of a 23 megawatt cogeneration facility, and allocated $ 1.3 million to initiate that development. Soon thereafter, RG&E approached the University with a proposal to sell electricity to the University at a discounted rate, and to provide other financial incentives that would **[**5]** negate any savings that would have been realized through the school's production of its own steam and electricity. The University negotiated the proposal with RG&E, and on October 27, 1993, the parties entered into a "Memorandum of Understanding," ("MOU"), which served as the basis for a contract which followed. The MOU explicitly acknowledged that the University had alternative sources of energy that might be available to it including "the installation of a cogeneration power plant . . . ." Given those circumstances, the parties agreed that, *inter alia:* (1) the University would remain an RG&E customer until December 31, 2000; (2) the University would pay a specified discounted rate for electricity; (3) RG&E would make yearly grants to the University of at least $ 163,000 to be used by the school to pay for energy efficiency projects; (4) RG&E would continue to make yearly research and development grants to the University averaging $ 400,000 per year; (5) the University would enter into an contract with an RG&E sponsored contractor under which RG&E would fund energy efficiency projects recommended by the contractor; and, (6) the University would be allowed to continue to study **[**6]** alternative sources of energy, but the studies would be "confined to the service of the University's own needs." *See* Memorandum of Understanding, Attached as Exhibit 4 to Plaintiff's Statement of Uncontested Facts.

Based on the MOU, RG&E and the University entered into an Individual Service Agreement, ("ISA"), on March 31, 1994. Under the ISA, the University agreed to remain a customer of RG&E until December 31, 2000. Additionally, in return for: (1) reduced rates on electricity service; (2) an "inducement" payment to induce the University to forego other electric supply options; (3) payments to the University for implementing energy-saving projects; and (4) payments to the University for entering into a contract with an energy service company and implementing energy-saving projects recommended by the company, (guaranteed to be at least $ 1,743,000), the University agreed, during the term of the agreement, "not to solicit or join with other customers of RG&E to participate in any plan designed to provide them with electric power and/or thermal energy from any source other than RG&E." *See* Individual Service Agreement, attached as Exhibit 5 to Plaintiff's Statement of Uncontested **[**7]** Facts at P 6.3.

DISCUSSION

I. *Motions for Summary Judgment*

HN1[] *Rule 56(c) of the Federal Rules of Civil Procedure* provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." When considering a motion for summary judgment, all inferences and ambiguities must be resolved in favor of the party against whom summary judgment is sought. *Gallo v. Prudential Residential Services, 22 F.3d 1219, 1223 (2d Circ. 1994)*. If, after considering the evidence in the light most favorable to the nonmoving party, the court finds that no rational jury could find in favor of that party, a grant of summary judgment is appropriate. *Id. at 1224*.

Defendant moves for summary judgment on two grounds. First, defendant claims that it is immune from antitrust liability under **[*175]** the state action doctrine, and therefore is entitled to judgment as a matter of law. Second, RG&E argues that even if it is not immune from antitrust liability, it can not be held **[**8]** liable under the Sherman Act because its actions did not violate ***antitrust law***. The Government moves for summary judgment on grounds that the contract between RG&E and the U of R is a *per se* violation of the Sherman Act, in that it restrains trade by preventing a potential competitor from entering the market.

II. *Defendant's Motion*

A. *State Action Doctrine.*

Defendant argues that it is immune from antitrust liability under the state action doctrine as first espoused by the Supreme Court in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, and as interpreted in *Southern Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*. In *Southern,* ***HN2***[] the Supreme Court held that private companies could be held immune from liability under federal ***antitrust law*** if their allegedly anticompetitive conduct was authorized and regulated by the State. The Court held that:

> Conduct is exempt under the state action defense if two requirements are met. First, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive **[**9]** conduct undertaken by private actors.

Southern, 471 U.S. at 56, 57. According to RG&E, because utility companies are authorized by New York State law to negotiate discounted rates with customers who are capable of obtaining electricity from other sources, (including other suppliers or self-generation), and because the discounting of rates is closely supervised by the New York Public Service Commission, RG&E should be held immune from antitrust liability under the state action doctrine. Plaintiff, and the New York State Attorney General, who appears as an *amicus curiae,* oppose defendant's contention that it is immune from antitrust liability under the state action doctrine.

HN3[] While it is true that under New York law a utility company may negotiate discounted rates with certain qualified consumers, and that discounting rates is carefully supervised by the New York Public Service Commission to prevent abuse of such a practice, New York law does not authorize utility companies to offer discounted rates to potential competitors for the purpose of preventing those potential competitors from becoming actual competitors. Thus, while RG&E may be correct in arguing that the discounting **[**10]** of electricity rates under New York law does not violate federal antitrust laws, that conclusion does not end the inquiry. The United States contends that RG&E went too far in negotiating the discounted rate by imposing a condition in the agreement the provision that the University not compete with RG&E, nor solicit or join with RG&E customers to generate electricity. It is that aspect of the agreement that the United States claims is violative of federal ***antitrust law***.

I find nothing in the New York Public Service Law or its legislative history supporting RG&E's contention that it is authorized under that law to impose anti-competitive conditions on potential competitors in return for discounted utility rates. *New York Public Service Law § 66(12-b)(a)* provides that the Public Service Commission may authorize reduced "incentive" rates that utilities may offer to customers "in order to prevent loss of such customers . . . ." *N.Y. Pub. Serv. Law § 66(12-b)(a)* (McKinney, 1989) The legislative history of this Section indicates that the New York legislature was concerned with the loss of business and industry in New York State, and the "severe economic hardship and dislocation" that **[**11]** occurred as a result of that loss. 1983 N.Y. Laws 626. The legislature "determined that the cost of utility services can be a significant factor in retaining and attracting healthy businesses and employment opportunities . . . ." 1983 N.Y. Laws 626. Accordingly, the legislature authorized the Public Service Commission to identify areas in New York where "reduced economic activity, unemployment and underutilization of utility facilities justifies the approval of reduced incentive rates for utility services . . . ." *N.Y. Pub. Serv. Law § 66(12-b)(a)* (McKinney, **[*176]** 1989). Based on the language of the statute, and the legislative history, it is clear that New York Law does not expressly authorize utility companies to offer discounted rates to consumers who are also potential competitors for the purpose of inducing them not to compete against the utility.

RG&E contends, however, that the contract with the University prohibiting competition was a foreseeable result of the State's policy of allowing discounted rates, and accordingly, it is implicitly authorized under the Public Service Law. *See* *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032, 1043 (2nd Cir.* ***[**12]*** *1986)* (anticompetitive activities that are a foreseeable consequence of state delegation satisfy the *Southern* requirement that the state articulate a clear and affirmative policy to allow anti-competitive conduct). According to RG&E, such a contract was foreseeable because, "if the University were permitted to participate in a plan [to purchase electricity from an alternative source] with other RG&E customers that would result in the loss of those other customers, the goal of the flexible rate tariff [maintaining the utilities' full system capacity] would have been thwarted." Memorandum of Law in Support of Motion for Summary Judgment at p. 16.

I find that the New York Public Service Law does not permit a utility to offer discounts to a potential competitor in return for that competitor's promise not to compete. Despite RG&E's contention that the goal of the State's policy is to maintain full capacity of utilities, I find that the goal of the State's policy of offering lower utility rates is to reduce utility costs and retain or attract businesses based on those lower utility costs. Competition from "cogenerators" in the sale of electricity is consistent with that goal: it **[**13]** lowers the utility costs of the cogenerator, and keeps the cogenerator in the area. Moreover, because cogenerators are in most cases exempt from the State rate regulations imposed on utility companies, cogenerators may under certain circumstances, sell their excess electricity directly to consumers at a reduced rate, thus giving consumers a choice between electric providers. Accordingly, I find that the State's policy of allowing discounted rates does not implicitly authorize anticompetitive actions on the part of Utilities seeking to prevent potential competitors from entering the market.

Finally, RG&E argues that its contract, and the allegedly anticompetitive provisions contained therein, are authorized under State law on grounds that the Public Service Commission has rigorously reviewed the contract, and has found it to be not only acceptable under New York State Law, but a model for agreements offering rate reductions. The Public Service Commission, however, is not charged with enforcing federal ***antitrust law***, and did not review the contract to determine whether or not it violates that law. The fact that the New York Public Service Commission has approved the contract at issue **[**14]** does not mean that the State has authorized, and shielded from federal law, allegedly anticompetitive behavior. I thus deny defendant's motion for summary judgment on grounds that it is immune from antitrust liability.

B. *Alleged Antitrust Activity.*

Defendant argues in the alternative that even if it is not shielded from antitrust liability, the conduct it engaged in was not anticompetitive as a matter of law and it is entitled to summary judgment. RG&E makes two arguments in support of this claim. First, it contends that because the University was neither a competitor, nor a potential competitor in the electricity market, an agreement between the two not to compete can not violate the Sherman Act. *See TV Communications Network, Inc. v. ESPN, Inc., 767 F. Supp. 1062, 1075 (D. Col. 1991)* (agreement between non-competitors does not violate *§ 1* of the Sherman Act); *aff'd 964 F.2d 1022 (10th Cir 1992)*; *cert. denied, 506 U.S. 999 (1992)*. Second, RG&E argues that the Government's claims against RG&E are based on unwarranted speculation about the University's ability to become a *bona fide* competitor. I find that a question of fact exists as to whether or not the University **[**15]** intended to compete against RG&E, and therefore, deny defendant's motion for summary judgment.

[*177] In support of its argument that the University did not intend to compete with RG&E, defendant submits an affidavit from Richard W. Greene, ("Greene"), Executive Vice President and Treasurer of the University of Rochester. Greene states that at the time the University negotiated the contract with RG&E, it had no intention to sell energy to RG&E customers. Greene affidavit at P 17. However, Green also admitted that the University considered competing directly with RG&E by selling output from the proposed cogeneration plant, but that "to the best of [his] knowledge," no plan to sell electricity to other facilities was adopted. Greene affidavit at P 15. Additionally, William Daigneau, ("Daigneau"), who at the relevant time was the Director of University Facilities, stated that the University had considered building "a [cogeneration] plant that would be located on our south campus that would provide much more power than what we could consume individually . . . which could be wheeled or perhaps used by other institutions." Deposition of William A. Daigneau at pp 35-6. Additionally, Daigneau **[**16]** could not recall whether or not the University engaged in discussions with other institutions regarding the possibility of building a cogeneration plant. It is thus uncontroverted that at least at some point during the University's planning, it considered becoming a competitor of RG&E. Greene's contention that to the "best of his knowledge" the University never seriously pursued selling to outside sources, and Daigneau's failure to recall whether discussions took place with potential consumers of University-supplied power at least makes it unclear whether or not the University was a potential competitor. Thus, the important question of whether or not the U of R was a potential competitor of the University is a question of fact for the trier of fact.

Next, RG&E argues that the Government's characterization of the U of R as a potential competitor of RG&E is too attenuated, and therefore, its theory of recovery against RG&E is too speculative to go forward. According to RG&E, even if the University had intended to compete with RG&E, actually doing so was fraught with legal and regulatory obstacles that could have prevented it from entering the market despite its intent to do so. For **[**17]** example, RG&E points out that if the U or R had attempted to sell electric power, it would have had to first obtain approval from the Public Service Commission, and then it would have been subject to the Commission's regulatory control, (unless it came under a narrow exception applicable to certain cogeneration facilities). Also, if the University were to sell electricity to the Rochester Institute of Technology, it would have had to apply for and have had approved franchises from the City of Rochester and the towns of Brighton and Henrietta to deliver the electricity. RG&E claims that because the Government has failed to demonstrate that the University could have actually competed with it, the plaintiff's claim is too speculative, and must be dismissed.

I find that while the Government's theory that the University intended to compete with RG&E is based on some speculation, the question of whether or not the University actually intended to compete with RG&E is a question of fact, that must be resolved by a trier of fact and summary judgment must be denied.

III. *Plaintiff's Motion for Summary Judgment.* Plaintiff asserts that the agreement between the defendant and the University **[**18]** not to compete is a *per se* violation of ***antitrust law***. However, ***HN4***[] a contract between non-competitors to not compete does not violate the antitrust laws. *TV Communications Network, Inc., 767 F. Supp. at 1075*; *cert. denied, 506 U.S. 999 (1992)*. Because there is a question of fact as to whether or not the University was a potential competitor of RG&E, I cannot hold that as a matter of law this agreement is evidence of a *per se* violation of the antitrust laws and, therefore, plaintiff's motion for summary judgment is also denied.

IV. *Plaintiff's Motion to Strike.*

Plaintiff moves to strike portions of an affidavit of Thomas Fogg, Manager of Regulatory Affairs for RG&E during the relevant time period, as not based on personal **[*178]** knowledge, and because they contain legal arguments. I deny plaintiff's motion to strike.

CONCLUSION

Because a material, triable issue of fact exists as to whether or not the University of Rochester was a *bona fide* potential competitor of the defendant, I deny both parties' motions for summary judgment. Additionally, I deny plaintiff's motion to strike. This case will proceed to a bench trial on April 27, 1998 at 9:00 a.m. Pretrial submissions **[**19]** shall be submitted to the Court no later than April 22, 1998 by 12:00 p.m.

ALL OF THE ABOVE IS SO ORDERED.

MICHAEL A. TELESCA

United States District Judge

Dated: Rochester, New York

February 17, 1998

End of Document

All Care Nursing Serv. v. High Tech Staffing Servs.

United States Court of Appeals for the Eleventh Circuit

February 18, 1998, Decided

Nos. 95-4714, 95-5218.

Reporter

135 F.3d 740 *; 1998 U.S. App. LEXIS 2637 **; 1998-1 Trade Cas. (CCH) P72,062; 11 Fla. L. Weekly Fed. C 1092

ALL CARE NURSING SERVICE, INC., Benson Health Care Services, Inc., et. al., Plaintiffs-Appellees, v. HIGH TECH STAFFING SERVICES, INC., Defendant-Appellant. ALL CARE NURSING SERVICE, INC., Plaintiff-Appellant, A Complete Health Service, Inc., Quality Professional Nursing, Inc., et al., Plaintiffs-Appellants, Julie Monahan, Counter-Defendant-Appellant, v. BETHESDA MEMORIAL HOSPITAL, INC., NME Hospitals, Inc., et. al., Defendants-Appellees, High Tech Staffing Services, Inc., Defendant-Appellant-Cross-Appellee.

Subsequent History: As Amended.

Certiorari Denied March 22, 1999, Reported at: *1999 U.S. LEXIS 1892*.

Prior History: **[**1]** Appeals from the United States District Court for the Southern District of Florida. (No. 88-8568-CIV-JCP). James C. Paine, Judge.

Disposition: AFFIRMED.

Core Terms

agencies, nurses, prices, Plaintiffs-appellants, rule of reason, price fixing, group boycott, anticompetitive, antitrust, relevant market, bid, contracts, temporary, preferred provider, market power, per se rule, violations, nursing services, anti trust law, Sherman Act, economic-loss, practices, cases

LexisNexis® Headnotes

Family Law > Family Relationships & Torts > General Overview

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

HN1[] **Family Law, Family Relationships & Torts**

Parties to a contract can seek tort damages only if conduct occurs that establishes a tort distinguishable from or independent of the breach of contractThe rule is based upon the idea that contract principles are more appropriate than tort principles for resolving economic loss claims.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

HN2[] Private Actions, Racketeer Influenced & Corrupt Organizations

Florida's economic-loss rule does not bar a plaintiff from bringing a federal RICO action where a breach of contract claim also exists many RICO cases involve contract disputes.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN3[] Private Actions, Racketeer Influenced & Corrupt Organizations

Reliance is only an element of a Racketeer Influenced & Corrupt Organizations (RICO) claim to the extent that a RICO plaintiff must prove he was injured by reason of the RICO defendant's deception and fraud.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

See *15 U.S.C.S. §§ 1*, *2*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] Antitrust & Trade Law, Sherman Act

Federal and Florida antitrust laws are analyzed under the same rules and case law. *Fla. Stat. ch. 542.32*. "It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."; The Florida legislature has, in effect, adopted as the law of Florida the body of ***antitrust law*** developed by the federal courts under the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A restraint may be violative of the Sherman Act because it is solely a naked restraint of trade so offensive to competition as to be unreasonable per se, or because it runs afoul of the more detailed rule of reason inquiry.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A rule of reason is generally applied to determine what acts are permissible. Thus, a presumption exists that the circumstances of a case will be looked at in the light of the rule of reason standard and will not be deemed per se unreasonable. But, there are no bright lines. The decision to apply the per se rule instead of the rule of reason turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output or instead one designed to increase economic efficiency and render markets more, rather than less, competitive. Considerable inquiry into the market conditions and market power of the defendant is often necessary before conduct can be presumed to be anticompetitive.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

That price fixing is equally violative of antitrust laws whether it is done by buyers or sellers is undisputed. And, it is no excuse that the price fixed is reasonable. But whether the per se rule should apply is not a question simply of determining whether two or more potential competitors have literally fixed a price.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN9[] Regulated Practices, Price Fixing & Restraints of Trade

That price-fixing includes more than the mere establishment of uniform prices is clearly evident. Prices are fixed if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform. They are fixed because they are agreed upon.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN10[] Regulated Practices, Price Fixing & Restraints of Trade

Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN11[] Cartels & Horizontal Restraints, Price Fixing

In the context of a blatant agreement to fix prices, it makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

HN12[] **Practices Governed by Per Se Rule, Boycotts**

Not all concerted refusals to deal are predominantly anticompetitive. In cases of group boycotts where the per se rule has been applied, the boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market. Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that the conduct is virtually always likely to have an anticompetitive effect is not warranted.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule of reason requires the factfinder to weigh all of the circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The rule of reason should be applied to practices designed to increase economic efficiency or render markets more, rather than less, competitive. To satisfy the rule of reason, the plaintiff must prove that the conduct had an adverse effect on competition.

Counsel: ATTORNEY(S) FOR APPELLANT(S) (94-4313), 94-4714): Keith Chasin, Miami, FL.

ATTORNEY(S) FOR APPELLEE(S) (94-4313): Donald B. Harden, Atlanta, GA. Charles Simon Caulkins, Ft. Lauderdale, FL. Burton F. Dodd, Fisher and Phillips, Joseph M. English, Atlanta, GA.

ATTORNEY(S) FOR APPELLEE(S) (94-4714): Charles Simon Caulkins, Ft. Lauderdale, FL. Burton F. Dodd, Fisher and Phillips, Joseph M. English, Atlanta, GA.

Judges: Before EDMONDSON and BARKETT, Circuit Judges, and WELLFORD, [*] Senior Circuit Judge. WELLFORD, Senior Circuit Judge, concurring.

Opinion by: EDMONDSON

Opinion

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[*] Honorable Harry W. Wellford, Senior U.S. Circuit Judge Sixth Circuit, sitting by designation.

[*743] EDMONDSON, Circuit Judge:

Two separate actions (with different plaintiffs) against the same defendants for alleged antitrust violations have been consolidated and are treated as one appeal. Plaintiffs appeal a jury verdict for defendants on antitrust claims. They also appeal the jury verdict against them on counterclaims for state and federal RICO violations. Many **[**2]** issues were raised on appeal. But we conclude that most of the challenges obviously lack merit, and we do not discuss them in this opinion. We do discuss a couple of issues in some detail, and we affirm the district courts' judgments.

Background

Beginning in the mid-1980's the United States experienced a severe nursing shortage. Southern Florida was hit especially hard due to its increased demand for nurses in winter months to accommodate the high influx of people to the area at that time of year. This shortage, along with other market considerations, caused an increase in prices for nursing services and a difficulty in staffing hospitals (and other facilities) with sufficiently licensed nurses. [1]

Hospitals use full or part-time hospital nurses, contract nurses (nurses hired for a specified period of time), travel nurses (contract **[**3]** nurses hired from different areas of the country), and temporary nurses (nurses employed by agencies and hired by hospitals for a shift at a time). [2] Temporary nursing agencies send their nurses to hospitals, nursing homes, clinics, doctors' offices, and patients' homes. They have the choice to provide services for any facility or person in need of such care. They are not limited to providing nurses to hospitals.

During the pertinent period, hospitals were faced with quality concerns, as well as rising prices. No efficient means existed to share information with other hospitals about agency nurses. This lack of information resulted in problems with some agencies, including plaintiff-appellant All Care Nursing Services, Inc. ("All Care"). [3] These problems included "phantom booking"--where a hospital requests a specific nurse with whom it has dealt in the past, only to be sent a different nurse; "blind booking"--where **[**4]** a hospital sets up to receive the services of a nurse from an agency only to have the agency cancel at the last minute; fraudulent billing--billing hospitals for services of an RN when actually a less qualified LPN or CNA performed the services; cheating on certification exams; and altering certification documents.

[*744] In response to the problems the South Florida Hospital Association ("SFHA") approached hospitals in Palm Beach County about a potential purchasing arrangement. In 1988, twelve (12) Palm Beach County hospitals set up an arrangement whereby they would solicit bids from temporary nursing agencies and would then select agencies to be preferred providers of such services, the Preferred Provider Program ("PPP"). The selection of the preferred agencies was to be made based upon competence, services provided, quality, and bid price. Under this joint-buying arrangement all the **[**5]** participating hospitals agreed to seek first nurses from preferred providers before going to nonpreferred agencies for nurses on each occasion.

All agencies were invited, either by letter or by advertisement in the Palm Beach newspaper (*Palm Beach Post*), to participate in the bidding. Sixteen (16) agencies presented bids and eight (8) were selected as preferred. [4]

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[1] Nurse qualifications fall into at least three different licensing categories: Registered Nurse (RN), Licensed Practical Nurse (LPN), and Certified Nursing Assistant (CNA).

[2] These temporary nursing agencies are also providers of travel and contract nurses to hospitals.

[3] The problems described formed the basis of the counterclaim against All Care and Monahan for federal and state RICO violations.

[4] Some of the appellant agencies participated in the bidding process, others did not. Following the submission of the initial bids four (4) agencies were eliminated based on their bid prices, which in some instances were 50% higher than other agencies' bids. The remaining twelve (12) rebid and were considered using the established criteria. Which agencies actually resubmitted bids is

In November 1988, the PPP began operation. Each hospital entered into **[**6]** individual contracts with each of the preferred agencies. All the agencies selected as preferred providers were required to agree to things like treating their nurses as employees by providing workers' compensation, paying taxes, and providing necessary insurance. Before the PPP, agencies had treated their nurses as independent contractors, not employees; and the higher costs associated with unprotected workers were borne by the hospitals. [5]

The preferred agencies did not contract with the hospitals at the same prices, but instead at the prices that each particular agency had bid. Agencies were also required to agree in the contracts not to change their prices for one year--the length of each contract--and, thus, were somewhat tied into their bid prices. **[**7]** But to allow for shifts due to market changes, each agency could terminate its contract with a particular hospital upon 30 days notice (the "escape clause").

After the creation of the PPP, plaintiffs-appellants filed suit against the participating hospitals, preferred agencies, and the SFHA [6] **[**8]** alleging antitrust violations under *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and under *Florida Statutes §§ 542.18* and *542.19*. Defendants then filed a counterclaim against All Care, and its operator Monahan, for violations of federal and state RICO statutes by billing fraudulently, aiding cheating on certification exams, and aiding persons to obtain false certification. [7]

Awaiting trial, plaintiffs-appellants sought and received a preliminary injunction, which halted implementation of the PPP. That preliminary injunction, however, was vacated by this court because of the district court's failure to hold the necessary evidentiary hearing. *All* *Care Nursing Serv., Inc. v. Bethesda Memorial Hosp., Inc., 887 F.2d 1535 (11th Cir.1989)*. The request for an injunction was never reinstated.

After a four-week jury trial, a verdict was entered in favor of defendants on all relevant claims. Plaintiffs filed motions for new trial, for judgment as a matter of law, and for amendment of the pleadings to conform with **[*745]** the evidence. All these motions were denied by the district court; and we now affirm those denials. [8] Plaintiffs-appellants also appeal the antitrust and RICO counterclaim verdicts against them; but we affirm those judgments, too.

[9]** *Discussion*

I. Federal and State RICO Claims

Plaintiffs-appellants All Care and Monahan argue that the Florida and Federal RICO claims against them are barred by the economic-loss rule. That rule provides that "***HN1***[] parties to a contract can only seek tort damages if conduct occurs that establishes a tort distinguishable from or independent of [the] breach of contract." *Jones v. Childers, 18 F.3d 899, 904 (11th Cir.1994)* (citations and quotations omitted). The rule is based upon the idea that

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unclear. But, all of the accepted agencies bid prices higher than the price ranges suggested by the SFHA in its invitation to bid. None of the appellants was selected as preferred providers.

5 The hospitals felt the need to place some of the financial burden on the agencies because after the bidding, agency services were actually costing more than before the PPP. These contract provisions were a way to shift some of the cost back to the agencies.

6 Plaintiffs-appellants include: All Care Nursing Services, Inc.; A Complete Health Care Services, Inc.; Benson's Health Care Services, Inc.; Critical Health Care, Inc.; Quality Professional Nursing of Florida, Inc.; and P.D.Q. Nurse, Inc.

Defendants-appellees include the SFHA, twelve (12) Palm Beach County hospitals, and four (4) remaining agency defendants (four (4) agencies settled with plaintiffs before final disposition in the district court).

7 Claims of fraud, civil theft, and false representation against All Care and Monahan were dismissed before trial.

8 Also affirmed is the district court's decision in the bench trial of Defendant High Tech's Lanham Act counterclaim.

"contract principles are more appropriate than tort principles for resolving economic loss claims." Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 901 (Fla.1987).

Neither All Care nor Monahan can use the economic-loss rule to escape liability under the federal RICO statutes. [9] We have already ruled that **HN2**[] Florida's economic-loss rule does not bar a plaintiff from "bringing a [federal] RICO action where a breach of contract claim also exists .... many RICO cases involve contract disputes." Arabian American Oil Co. v. Scarfone, 939 F.2d 1472, 1478 (11th Cir.1991).

[10]** About the state RICO claims, Florida's RICO statutes have consistently been interpreted using federal RICO claims cases. No reason has been presented to us to justify applying the economic-loss rule differently to RICO claims made under state and federal RICO statutes. [10] Thus, the economic-loss rule does not bar these claims.

II. Antitrust Claims

Plaintiffs-appellants argue that the formation and operation of the Palm Beach County PPP is a violation **[**11]** of the antitrust laws of the Sherman Act and Florida Statutes §§ 542.18 and 542.19, [11] prohibiting restraints on trade. **HN4**[] The Sherman Act, in relevant part, sets out these rules:

> Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal....
>
> **[*746]** Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire ... to monopolize ... shall be deemed guilty of a felony.

15 U.S.C. § 1; 15 U.S.C. § 2.

[12]** Despite the expansive language of the statute, the Supreme Court has interpreted this statute to prohibit only "unreasonable" restraints on trade. **HN6**[] "A restraint may be violative of the Sherman Act because it is solely a naked restraint of trade so offensive to competition as to be unreasonable per se, or because it runs afoul

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[9] Defendants argue that Monahan cannot be afforded the benefit of the economic-loss rule because she, individually, entered into no contract with the defendant hospitals: she lacked privity of contract. All contracts were between her agency, All Care, and the hospitals. Because we conclude that the economic-loss rule does not bar RICO claims, state or federal, we need not decide this question. But, the Florida Supreme Court has held, at least under one set of facts, that privity is not required for the economic-loss rule to apply. *See* Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla.1993); *see also* Hoseline, Inc. v. U.S.A. Diversified Products, Inc., 40 F.3d 1198, 1200 (11th Cir.1994) (where this court applied *Casa Clara* to make "meritless" a claim that the rule does not bar tort claims between parties who lack contractual privity).

[10] Plaintiffs-appellants also challenged the RICO counterclaims on another ground: that reliance on the alleged misrepresentations made by All Care and Monahan was not proved by defendants. **HN3**[] Reliance is only an element of a RICO claim to the extent that a RICO plaintiff must prove he was injured by reason of the RICO defendant's deception and fraud. Pelletier v. Zweifel, 921 F.2d 1465, 1499 (11th Cir.1991). But, no argument is made by the plaintiffs-appellants that injury was inadequately shown. So, lack of reliance does not require reversal on this claim.

[11] **HN5**[] Federal and Florida antitrust laws are analyzed under the same rules and case law. Fla. Stat. § 542.32 ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."); *see also* St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028, 1032 (Fla.Dist.Ct.App.1984) ("The Florida legislature has, in effect, adopted as the law of Florida the body of ***antitrust law*** developed by the federal courts under the Sherman Act."); Fla. Stat. §§ 542.16 (Florida antitrust laws complement federal antitrust laws), 542.18 (analogous to § 1 of the Sherman Act). So, for purposes of this opinion discussion of the law under the Sherman Act is equally applicable to the plaintiffs-appellants' state antitrust claims.

of the more detailed rule of reason inquiry." Retina Assocs., P.A. v. Southern Baptist Hosp. of Florida, Inc., 105 F.3d 1376, 1380 (11th Cir.1997).

Some acts have been said to be so facially anticompetitive that by their very nature they are deemed unreasonable and, thus, per se violative of antitrust laws. These "practices are "so plainly anticompetitive,' and so often "lack … any redeeming virtue,' that they are conclusively presumed illegal without further examination under the rule of reason…." Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 7-8, 99 S. Ct. 1551, 1556, 60 L. Ed. 2d 1 (1979) (internal citations omitted) ("*BMI* "). Price fixing, horizontal market divisions, tying arrangements, and group boycotts have emerged as practices that are generally illegal per se. *See* National Bancard Corp. (NaBanco) v. VISA **[**13]** U.S.A., Inc., 779 F.2d 592, 598 (11th Cir.1986) (citing United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 [1960]); State Oil Co. v. Khan, U.S. , 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997); International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947); Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941).

"But easy labels do not always supply ready answers." *BMI,* 441 U.S. at 8, 99 S. Ct. at 1556. Since the emergence of these per se categories, we have stressed that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same--whether or not the challenged restraint enhances competition." National Bancard Corp., 779 F.2d at 598 (citation and quotation omitted). The Supreme Court, as well, has refused to force various practices into "pigeonholes and [to invoke] the per se rule." FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 2018, 90 L. Ed. 2d 445 (1986).

HN7[] A "rule of reason" is generally applied to determine what acts are permissible. **[**14]** Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60, 31 S. Ct. 502, 515-16, 55 L. Ed. 619 (1911). Thus, a presumption exists that the circumstances of a case will be looked at in the light of the rule of reason standard and will not be deemed per se unreasonable. Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 726, 108 S. Ct. 1515, 1518-19, 1520-21, 99 L. Ed. 2d 808 (1988). But, there are no bright lines. "The decision to apply the per se rule [instead of the rule of reason] turns on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output … or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive.' " Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289-90, 105 S. Ct. 2613, 2617, 86 L. Ed. 2d 202 (1985).

In *Northwest,* the Supreme Court observed that what activities might fall into a per se category is "far from certain." Id. at 294, 105 S. Ct. at 2619. Considerable inquiry into the market conditions and market power of the defendant is often necessary **[**15]** before conduct can be presumed to be anticompetitive. Id. at 296, 105 S. Ct. at 2620-21 (addressing group boycotts).

Plaintiffs-appellants claim that the PPP's arrangement is per se illegal as both price fixing and as a group boycott. Thus, plaintiffs-appellants have the burden to make a threshold showing that the PPP falls into one of these forbidden categories. *See* Id. at 298, 105 S. Ct. at 2621. In this case, plaintiffs-appellants allege that, because price bids were a consideration in determining which temporary nurse agencies would become preferred providers, this conduct falls into the forbidden category of price fixing. They also claim that the exclusion of the nonpreferred **[*747]** agencies from the PPP amounts to a group boycott.

The decision whether the PPP established by defendants-appellees amounts to either a price fix or a group boycott, deserving of per se treatment, determines the antitrust issue on appeal. [12]

[16]** *A. Per se Violations*

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[12] If we decide the PPP is deserving of per se treatment the case ends; plaintiffs-appellants must win. But if we decide that conduct such as the establishment of the PPP does not rise to the level of anti-competitiveness necessary to hold it per se illegal, the rule of reason applies; and we will defer to the determination of the jury--that plaintiffs-appellants failed to establish the relevant market in which to judge the PPP's reasonableness.

1. Price Fixing

That the PPP has some impact on the prices of obtaining temporary nurses is undisputed. **HN8**[] That price fixing is equally violative of antitrust laws whether it is done by buyers or sellers is also undisputed. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 233-37, 68 S. Ct. 996, 1005-06, 92 L. Ed. 1328 (1948)*. And, it is no excuse that the price "fixed" is reasonable. *FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423-24, 110 S. Ct. 768, 775, 107 L. Ed. 2d 851 (1990)*. But whether the per se rule should apply "is not a question simply of determining whether two or more potential competitors have literally "fixed' a "price.' " *BMI,* 441 U.S. at 9, 99 S. Ct. at 1556-57.

Plaintiffs-appellants argue that the intent of the PPP was to stabilize prices and that such intent makes this practice a per se violation. But anticompetitive effects--not intent--is the focal point of antitrust legislation. The question is not did defendants intend to fix prices, but instead whether the PPP did so. In defining "price fixing" the Supreme Court wrote in these terms:

> **HN9**[] That price-fixing includes more than the **[**17]** mere establishment of uniform prices is clearly evident…. Prices are fixed … if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform…. They are fixed because they are agreed upon.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-23, 60 S. Ct. 811, 843-44, 84 L. Ed. 1129 (1940). In forming the PPP, the hospitals, among themselves, never agreed to a uniform price, to an acceptable price range, [13] or to a scale for determining price.

The PPP has an impact on price; all preferred agencies contracting with the hospitals will, to some degree, be tied into a set price for their services. But this point of law must be remembered: **[**18]** "**HN10**[] Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." *BMI,* 441 U.S. at 23, 99 S. Ct. at 1564. And, it cannot be forgotten that market fluctuations could result in a preferred agency's exercise of the escape clause--allowing that agency to reenter the market free to charge the prices it chooses. Most important, this case involves lots of distinct contracts. A pricing agreement of some kind is necessary in the contracting for goods and services; and competitive bidding is an acceptable way to decide with whom the hospitals wish to contract.

Earlier Supreme Court cases were faced with more direct price fixing, which led to the per se categorization of such schemes. **HN11**[] In the context of a blatant agreement to fix prices,

> it makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease **[**19]** prices.

United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310, 76 S. Ct. 937, 940, 100 ***[*748]*** *L. Ed. 1209 (1956)*. But we do not have an agreement to fix prices in this case: no prices were preset for nursing services.

The Supreme Court has recently taken another step away from per se treatment, particularly in maximum vertical price fixing arrangements. [14] *See State Oil Co. v. Khan, ___ U.S. ___, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Maximum vertical price fixing is no longer a per se violation. *Id. at ___, 118 S. Ct. at 278*.

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[13] That the SFHA--when it requested bids--suggested a price range to the participating agencies does not create an agreement on the prices they would accept. As shown by the accepted bids, prices outside the range were acceptable.

[14] The alleged attempt to fix prices by the hospitals' agreement with each other would be horizontal--an agreement among competitors. The alleged attempt to fix prices by the hospitals' agreements with the preferred agencies would be vertical.

The key to per se treatment is whether the conduct is of the kind that can only be anticompetitive. But, the PPP, arranged by the SFHA and the Palm Beach County hospitals, is not inherently an anticompetitive **[**20]** practice. No temporary nursing agency was precluded from competing to become a preferred agency. Also, all agencies are still able to provide nurses to medical facilities other than hospitals and even to hospitals should the need for nurses not be met by the preferred agencies. Although the PPP may stabilize prices to some degree, it is not the kind of "stabilization" that can be viewed as price fixing, especially when the escape clauses in the contracts are taken into account. These escape clauses allow the market and not the SFHA to be the ultimate decisionmaker for each hospital and each agency on the issues of price, demand, supply, and terms of dealing.

2. Group Boycotts

The same principles apply to a consideration of application of the per se rule whether the act complained of is labeled price fixing or a group boycott. "The recent jurisprudence of the Supreme Court and of the Court of Appeals of this Circuit cautions against the haphazard expansion of the "group boycott label' and the concomitant imposition of per se liability." *Retina Assocs., 105 F.3d at 1381*. "***HN12***[] Not all concerted refusals to deal are predominantly anticompetitive." *Northwest, 472 U.S. at 298, **[**21]** 105 S. Ct. at 2621*. In cases of group boycotts where the per se rule has been applied, "the boycott often cuts off access to a supply, facility, or market *necessary to enable the boycotted firm to compete,* … and frequently the boycotting firms possessed a *dominant position in the relevant market.*" *Id. at 294, 105 S. Ct. at 2619* (emphasis added).

In dealing with group boycott situations, market analysis has found its way into the determination of whether a given practice should be per se illegal. No longer is relevant market a factor only after it has been decided that the rule of reason applies. "Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that [the conduct] is virtually always likely to have an anticompetitive effect is not warranted." *Northwest, 472 U.S. at 296, 105 S. Ct. at 2620-21*.

In this case, no refusal to deal has been shown. All agencies were able to participate in the bidding to become preferred providers, and generally a hospital will still deal with any nursing agency when the preferred agencies with which the hospital has contracted for nursing services fail to **[**22]** meet its needs. The record shows, in fact, that more than a trifling portion of hospital nursing business in Palm Beach County continued to go to nonpreferred agencies after the PPP was in operation. Also, due to the rise in HMOs, home care, and similar trends in the medical world, facilities other than hospitals provide the market, the supply, and the facilities necessary for nonpreferred agencies to compete with each other and with preferred agencies in the marketplace.

Per se treatment has been given to those practices which history has shown have only anticompetitive effects. "Analyzing this case under the per se rubric would remain inappropriate absent some demonstration that the practice at issue historically leads to anticompetitive effects in the market." *Retina Assocs., 105 F.3d at 1381*. No history of this kind seems to exist for health-care preferred-provider programs materially similar to what we have before us now.

[*749] We conclude, based upon undisputed facts, that the practice of this PPP is not deserving of per se treatment and was properly evaluated under the rule of reason.

B. Rule of Reason

HN13[] The rule of reason requires "the factfinder [to weigh] all of the **[**23]** circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977)*. The rule of reason should be applied to practices designed to "increase economic efficiency or render markets more, rather than less, competitive." *BMI,* 441 U.S. at 19-20, 99 S. Ct. at 1562-63; *see also* *Northwest, 472 U.S. at 289-90, 105 S. Ct. at 2616-17*.

"To satisfy the rule of reason, the plaintiff must prove that the [conduct] had an adverse effect on competition." *Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1392 (10th Cir.1992)*. But, competition occurs only in a market. Thus, "before we can reach the larger question of whether [defendants] violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market." *Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1572 (11th Cir.1991)*. [15]

[24]** Interrogatories went to the jury. [16] The jury found that plaintiffs-appellants failed to establish the relevant market. Because no definable market was proved, plaintiffs could show no adverse effect on competition. Plaintiffs-appellants try to debate the required showing of market power. But their argument is based upon per se treatment of the antitrust claim. Because we have decided, as did the district court, that the PPP triggers no per se analysis, relevant market was critical to plaintiffs-appellants' claims.

The jury found that no relevant market was shown; and we will reverse the jury's determination on this factual issue only if it is clearly erroneous. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 381, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956)*. We cannot say the finding that no relevant market was established is clearly erroneous. **[**25]** The failure to establish the relevant market (either by product or geography) was fatal to plaintiffs-appellants' antitrust claims. So, we accept the jury verdict against them.

AFFIRMED.

Concur by: WELLFORD

Concur

WELLFORD, Senior Circuit Judge, concurring:

I concur in Judge Edmondson's opinion. The antitrust issues were addressed early in this case through a decision on setting aside a preliminary injunction in and expanded on in a concurring opinion authored by then *Chief Judge Tjoflat, 887 F.2d 1535, 1539 (11th Cir.1989)* (Tjoflat, C.J., concurring).

There were contested issues as to whether defendants possessed market power in a relevant market for temporary nursing services. The jury decided the contested relevant issue on which plaintiffs had the burden. There were contested issues as to whether defendants had monopoly "control over access to an essential element of competition" by means of the arrangement. Plaintiffs had the burden to prove this and they failed in this burden.

Judge Edmondson points out, as Judge Tjoflat previously did in this case, that *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 **[**26]** (1985)*, is key, and it "prohibits the application of the per se rule to cooperative buying arrangements unless a court has made certain preliminary findings of fact." *Id. Northwest* held that " **[*750]** absent a showing [of market power or *exclusive access* to an element essential to effective competition] with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis." *Northwest, 472 U.S. at 297, 105 S. Ct. at 2621*, *quoted in All* *Care Nursing Service, 887 F.2d at 1539*; *see also* Areeda & Havenkamp, ***Antitrust Law*** (1989 Supp.) P 1511 (discussing *Northwest* and suggesting that plaintiffs must establish market power of defendant before the court should finally decide *per se* or rule of reason application).

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[15] Because this case is subject to the rule of reason and because of the importance of relevant market and market power in evaluating the reasonableness of a purported restraint, the district court's jury instructions and interrogatories directing that the jurors must find for defendants if plaintiffs failed to establish the relevant market were proper applications of the law governing this case.

[16] The interrogatories, among other things, directed the jury to find for the defendants if the plaintiffs did not establish the necessary relevant market.

In addition, this circuit has indicated that "the presumption in cases brought under *section 1* of the Sherman Act is that the rule-of-reason standard applies." *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1567 (11th Cir.1991)*. We observed in that case, moreover, that "the Supreme Court has made it clear that the per se label should be applied infrequently and with caution." *Id.*

The majority opinion has covered all **[**27]** of the questions in this case; I merely emphasize the application of the rule-of-reason principle under the circumstances.

Rads, P.C. v. Mercy Mem'l Hosp.

United States District Court for the Eastern District of Michigan, Southern Division

February 20, 1998, Decided

CASE No. 97-71067

Reporter

3 F. Supp. 2d 772 *; 1998 U.S. Dist. LEXIS 17209 **

RADS, P.C., and DONALD BRONN, Plaintiffs, v. MERCY MEMORIAL HOSPITAL, Defendant.

Disposition: [1]** Defendant's motion to dismiss GRANTED and case DISMISSED.

Core Terms

antitrust, oncology, summary disposition, counterclaim, radiation, allegations, exclusive contract, preclusive effect, staff privileges, antitrust claim, relevant market, state court, Michigan Antitrust Reform Act, conspiracy, monopolize, counts

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

HN1[] **Estoppel, Collateral Estoppel**

To determine whether the state court's judgment precludes a federal court's consideration of a subsequent complaint, the court must turn to the state law of claim and issue preclusion. The state law directs that a prior judgment bars a subsequent action if: (1) the subject matter of the second action is the same; (2) the parties or their privies are the same; and (3) the prior judgment is on the merits.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

HN2[] **Public Enforcement, State Civil Actions**

The establishment, maintenance, or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices, is unlawful. Mich. Stat. Ann. § 28.70(3). Mich. Stat. Ann. § 28.70(2) reads: A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN3[] **Antitrust & Trade Law, Sherman Act**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States shall be deemed guilty of a felony, *15 U.S.C.S.§ 1*. Further, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States is hereby declared to be illegal. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4[] **Private Actions, Standing**

To properly allege an antitrust violation, a party must demonstrate that there is a decreased competition in the whole market. A personal individualized harm will not sustain a viable cause of action.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

HN5[] **Jurisdiction, Exclusive Jurisdiction**

Federal courts have exclusive jurisdiction over federal antitrust claims. *15 U.S.C.S. § 4*. Nevertheless, it is settled law that state-court judgments on state antitrust claims may preclude a federal court from deciding federal antitrust claims.

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For MERCY MEMORIAL HOSPITAL, defendant: Gregory G. Drutchas, John M. Sier, Kitch, Drutchas, Detroit, MI.

Judges: AVERN COHN, UNITED STATES DISTRICT JUDGE.

Opinion by: AVERN COHN

Opinion

[*773] MEMORANDUM AND ORDER

I.

This is an antitrust case. Plaintiffs RADS, P.C., and Dr. Donald Bronn (collectively referred to as "RADS") are suing defendant Mercy Memorial Hospital (Mercy), accusing Mercy of limiting competition in violation of the Sherman Antitrust Act, *15 U.S.C. §§ 1-2*. Count one of RADS's complaint claims an unlawful attempt to monopolize in violation of *15 U.S.C. § 2*; count two claims a conspiracy to restrain trade in violation of *15 U.S.C. § 1*. RADS specifically contends that Mercy unlawfully attempted to monopolize the provision of "radiation oncology services to [Mercy's] cancer patients who are in need of radiation oncology services," and Mercy's cancer patients are defined as the relevant market. RADS also asserts that Mercy and Dr. Arthur Porter [1] conspired to negotiate **[**2]** a contract with another radiation oncology center, thereby preventing RADS from servicing the relevant market.

Mercy originally moved to dismiss the complaint under *Fed. R. Civ. P. 12(b)(6)*, arguing that RADS did not allege an injury to competition, a requirement to have standing to bring a federal antitrust suit. In so responding to the complaint, Mercy limited the Court to an examination of the allegations of the complaint. Mercy put the issue as a determination of whether or not Mercy's purported denial to its cancer patients of a choice between radiation oncology treatment facilities constitutes an injury to competition. [2]

[3]** At the time RADS filed suit in this Court, however, Mercy had also sued RADS in a Michigan state court. In state court, Mercy sought a declaration that there was no contract or other legal relationship between RADS and Mercy; RADS filed a counterclaim. The counterclaim was in multiple counts: count one claims breach of contract; count two, promissory estoppel; counts three and four, tortious interference; count five, violation of the Michigan Antitrust Reform Act, *§ 3*; and count six, violation of the Michigan Antitrust Reform Act, *§ 2*. RADS's complaint in this Court and its counterclaim in the state court are identical, reading almost word-for-word in the factual allegations. The same may also be said of the antitrust allegations, except for two additional paragraphs in the federal complaint alleging Mercy's involvement in interstate commerce.

On October 17, 1997, the Monroe County Circuit Court dismissed RADS's antitrust counterclaims, determining that RADS failed to state claims under the Michigan Antitrust Reform Act, M.S.A. § 28.70(1) et seq. See Exhibits A & B. Mercy now moves to dismiss RADS's federal complaint on grounds of issue preclusion. For the following reasons, **[**4]** Mercy's motion is GRANTED, and the case is DISMISSED.

II.

A.

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[1] Although RADS initially named Dr. Porter as a defendant, the parties stipulated to his dismissal. See Order of Dismissal as to Defendant, Arthur Porter, M.D. (Sept. 25, 1997).

The parties have not addressed how Dr. Porter's dismissal affects RADS's claim of conspiracy.

[2] As the United States Court of Appeals for the Sixth Circuit has recently stated:

> Under the caselaw, it is not enough for the plaintiff to claim economic injury: "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."

Valley Products Co. v. Landmark, a Div. of Hospitality Franchise Systems, Inc., 128 F.3d 398, 402 (6th Cir. 1997) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*.

Mercy asserts that the state court judgment has preclusive effect on RADS's federal antitrust claims. In *Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985)*, the United States Supreme Court determined that, in some circumstances, a state-court judgment may have preclusive effect on a federal antitrust claim:

> To be sure, a state court will not have occasion to address the specific question **[*774]** whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court. Nevertheless, a federal court may rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation.

Id. at 381-82.

HN1[] To determine whether the Monroe County Circuit Court's judgment precludes this Court's consideration of RADS's complaint, the Court must turn to Michigan law of claim and issue preclusion. See id. Michigan law directs that a prior judgment bars a subsequent action if:

> (1) the subject matter of the second action [is] the same; (2) **[**5]** the parties or their privies [are] the same; and (3) the prior judgment [was] on the merits.

In re Pardee, 190 Mich. App. 243, 248, 475 N.W.2d 870 (1991). "A grant of summary judgment is considered a determination on the merits." *Franklin v. City of Pontiac, 887 F. Supp. 978, 983 (E.D. Mich. 1995)*. "The pendency of an appeal, if any, generally does not alter the finality of a judgment for purposes of res judicata." *Eliason Corp. v. Bureau of Safety and Regulation of the Michigan Department of Labor, 564 F. Supp. 1298, 1302 (W.D. Mich. 1983)*.

B.

Here the parties in both the state and federal actions are identical. In addition, the subject matter of RADS's complaint in this Court is the same as the subject matter of the antitrust counts of RADS's counterclaim in the Monroe County Circuit Court. In both the federal complaint and state counterclaim, RADS alleges that Mercy originally promised real property for a radiation oncology treatment center as well as staff privileges for the RADS oncologist. After RADS acquired a Certificate of Need from the Michigan Department of Health and otherwise relied on the hospital's promises, Mercy informed RADS that it would **[**6]** build its own radiation oncology treatment center. Mercy also declined to give an application for full staff privileges to the RADS oncologist. In the state counterclaim and here in the complaint, the allegations with respect to injury to the relevant market are identical.

As previously noted, in the Monroe County Circuit Court, RADS based its counterclaim on theories of breach of contract; tortious interference with a business relationship; and antitrust violations, including monopolization in violation of M.S.A. § 28.70(3) [3] and unlawfully conspiring to restrain trade in violation of M.S.A. § 28.70(2). [4] **[**7]** In this Court, RADS accuses Mercy of monopolization in violation of *15 U.S.C. § 2* [5] and conspiracy to restrain trade in violation of *15 U.S.C. § 1*. [6]

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[3] The statute reads:

> ***HN2***[] The establishment, maintenance, or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices, is unlawful.

M.S.A. § 28.70(3).

[4] The statute reads:

> A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.

M.S.A. § 28.70(2).

[5] The statute reads:

The Monroe County Circuit Court rendered a decision on the merits as to the antitrust claims. The court granted summary disposition to Mercy, presumably under M.C.R. 2.116, stating:

> The purpose of antitrust and unfair competition laws is obviously to protect the public by healthy competition and not primarily to protect individual plaintiffs. So the starting point in evaluating such claims **[*775]** is whether the purported restraint in trade is reasonable, under the circumstances.
> * * *
>
> In order ***HN4***[] to properly allege an antitrust violation, a party must demonstrate that there is a decreased **[**8]** competition in the whole market. A personal individualized harm will not sustain a viable cause of action.... RADS' allegation that Mercy somehow was conspiring against them in denying them the ability to apply for staff privileges is speculative at best. There's no concrete evidence or factual support to base their assertion upon.
> The -- so with respect to the conspiracy aspect of the -- of the complaint... the motion is going to be granted... for summary disposition....
> Now... Mercy can legally enter into an exclusive contract with any oncology group it sees fit, and not run afoul of [the Michigan Antitrust Reform Act] .... With respect to RADS being denied the ability to work with Mercy, the Court finds that there is no genuine issue of material fact that would -- and as a result, as a matter of law, that Mercy is entitled to have their motion granted as to this section of the Act....
> An important point here is RADS brings this... action... really as a personal injury to themselves. The Court finds that these antitrust allegations are appropriately dismissed by summary disposition....

See Exhibits A & B.

RADS has not undermined the preclusive effect of the Monroe **[**9]** County Circuit Court's ruling. Although RADS objects to the Monroe County Circuit Court's interpretation of Michigan ***antitrust law***, this is a subject for an appeal to the Michigan Court of Appeals. [7] **[**10]** Moreover, RADS has not alleged that the Monroe County Circuit Court lacked jurisdiction to hear state antitrust claims. See *S.S. Aircraft Co. v. Piper Aircraft Corp., 159 Mich. App. 389, 393, 406 N.W.2d 304 (1987)* ("[Plaintiff] has not alleged that the trial court lacked jurisdiction to hear the wrongful death cases, thus it may not attack the court's order by bringing a second suit."). [8]

> ***HN3***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States... shall be deemed guilty of a felony....

15 U.S.C. § 1.

[6] The statute reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States... is hereby declared to be illegal.

15 U.S.C. § 2.

[7] RADS points out that remedies under state and federal ***antitrust law*** vary, but RADS does not dispute that analysis of an antitrust injury is essentially the same under both state and federal ***antitrust law***. See *Kelley ex rel. Slay v. Michigan Nat'l Bank, 377 Mich. 481, 492, 141 N.W.2d 73 (1966)* ("In examining any combination, the overriding test, of course, is protection of the public interest."); *Goldman v. Loubella Extendables, 91 Mich. App. 212, 219, 283 N.W.2d 695 (1979)* ("The Michigan antitrust act is patterned after the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.*, and Federal court interpretations of the Sherman Act are persuasive authority as to the meaning of the Michigan act.").

[8] RADS correctly notes that ***HN5***[] federal courts have exclusive jurisdiction over federal antitrust claims. See *15 U.S.C. § 4*. Nevertheless, it is settled law that state-court judgments on state antitrust claims may preclude a federal court from deciding federal antitrust claims. See *Marrese, 470 U.S. at 380* ("Our decisions indicate that a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts.").

In cases in which a Michigan circuit court's judgment has preclusive effect on a federal claim, federal courts have dismissed the federal claim. See *Kaufman v. Seidman, 984 F.2d 182, 185 (6th Cir. 1993)*. RADS's federal complaint must therefore be dismissed. [9]

[11]** SO ORDERED.

AVERN COHN

UNITED STATES DISTRICT JUDGE

DATED: FEB 20 1998

Detroit, Michigan

[*776] EXHIBIT A

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[9] In addition, going beyond issue preclusion, clearly RADS's complaint must be dismissed under *Fed. R. Civ. P. 12(b)(6)*. There is no allegation of an injury to competition since the relevant market consists only of Mercy's cancer patients. It has not been alleged that Mercy possesses "dominance" over area residents. See *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 26, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. Mercy is permitted to enter into exclusive contracts for medical services, thereby limiting the choices of its patients. See *id. at 31*.

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[*777] ORDER GRANTING SUMMARY DISPOSITION ON COUNTS V AND VI OF DEFENDANT'S COUNTER-COMPLAINT

At a session of said Court held in the Courthouse, City of Monroe, County of Monroe, State of Michigan

ON __

PRESENT; HON. __

CIRCUIT COURT JUDGE

This matter is before the Court on Plaintiffs' Motion for Partial Summary Disposition, and the Court having read the briefs, heard arguments of counsel and otherwise being fully advised on the premises, for the reasons **[**12]** and grounds set forth on the record,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Disposition shall be granted in total;

IT IS FURTHER ORDERED that Counts V and VI of Defendants' Counter-Complaint be and hereby are dismissed with prejudice

Michael W. LaBeau

CIRCUIT COURT JUDGE

10-29-97

[*778] EXHIBIT B

MOTIONS FOR SUMMARY DISPOSITION

BEFORE: HONORABLE MICHAEL W. LaBEAU, CIRCUIT JUDGE

Monroe, Michigan - Friday, October 17, 1997

APPEARANCES:

(Please see following page for Appearances)

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[*780] THE COURT: All right. The antitrust claims deal with the Michigan Antitrust Reform Act. One -- *section 2*, which is *MCL 445.772*, I believe, provides that: A contract, combination, or conspiracy between two or more persons in restraint of or to monopolize trade or commerce in a relevant market is unlawful.

The other section of the Act deals with *Section 3*, which is 445.773 of the Compiled Laws, provides that: The establishment, maintenance, or use of a monopoly or any attempt to establish a monopoly of trade or commerce in a relevant market by any person for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices is unlawful.

Now, the case of Attorney General versus Michigan National Bank found at *377 Mich. 481, 141 N.W.2d 73*, stated, I believe at page 492, the -- or articulated a test to examine whether an alleged restraint on trade is unreasonable.

The case stated: In examining any combination, the overriding test, of course, is protection of the public interest. But not every joinder of competing businesses or acquisition of instrumentalities that have been used in competition is an undue restraint of trade or creation of **[**14]** a monopoly. Each situation must be measured by the rule of reason and a fundamental test is injury to the public.

Now, it seems that there are -- that two **[*781]** significant allegations relative to the antitrust violation is that -- is, first, that Mercy violated the Act when it failed to allow Dr. Bronn or RADS an application, and whatever derived from that; and, secondly, that Mercy violated the Act when it did not allow RADS to have an exclusive contract with Mercy.

That's -- those are some relevant areas here. Now, the Michigan National Bank case that the Court just cited suggests that: In examining these cases, the Court must approach it from a public policy perspective. Furthermore, the case also requires the Court to find an injury to the public-at-large. It does not, however, state -- the case, that is -- does not, however, state that a cause of action may be maintained if the injury was to an individual.

The purpose of antitrust and unfair competition laws is obviously to protect the public by healthy competition and not primarily to protect individual plaintiffs. So the starting point in evaluating such claims is whether the purported restraint in trade is reasonable, under **[**15]** the circumstances.

Another case that the Court found instructive, although distinguishable on its facts -- nevertheless, it did cite certain principles that I think are important -- and that was Jefferson Parish Hospital **[*782]** District Number 2 versus Hyde, found at *466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2*. In that case, the -- it was the United States Supreme Court -- it involved an exclusive contract, and the Supreme Court held that such an agreement cannot be held to be a restriction on trade as the ordinary consumer is unable to distinguish between different doctors, as they are unsophisticated.

They further reference -- or the case further states that a hospital has an unquestioned right to exercise control over the physicians to whom it accords staff privileges. And I think they're referring to another case when they -- when they make that statement. I didn't write that in my notes, but -- the -- and, of course, the Court believes that -- that any allegation that Mercy violated the Antitrust Act provisions when it denied RADS an exclusive contract appears to be tenuous at best.

Jefferson case clearly held that a hospital is well within its rights to enter an exclusive arrangement with other physician **[**16]** groups if it desires to do so.

Now, if another corporation entered into an exclusive arrangement with Mercy, this would not violate *Section 3* of the Act. I think the Jefferson court -- or case supports that, and there's no indication, other than conclusory statements that would even suggest that **[*783]** Mercy ever intended to fix prices or exclude competition. Rather, Mercy seems to have taken steps to insure a competitive bid for the building and contractual arrangement of a radiation/oncology clinic.

In order to properly allege an antitrust violation, a party must demonstrate that there is a decreased competition in the whole market. A personal individualized harm will not sustain a viable cause of action under both *Sections 2* and *3* of the Act.

With respect to *Section 2* of the Act, RADS' allegation that Mercy somehow was conspiring against them in denying them the ability to apply for staff privileges is speculative at best. There's no concrete evidence or factual support to base their assertion upon.

The -- so with respect to the conspiracy aspect of the -- of the complaint, which is *Section 2* of the Act, the motion is going to be granted pursuant -- for summary disposition pursuant **[**17]** to 2.116(c)(10).

Now, turning to *Section 3* of the Act, Mercy can legally enter into an exclusive contract with any oncology group it sees fit, and not run afoul of this Act. As stated in Jefferson, Mercy appears to be on legally solid ground if they -- if they were even to build their own facility; however, the possibility of

[*784] JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss is GRANTED and the above case is DISMISSED.

February 20, 1998

Date

End of Document

Image Tech. Serv. v. Eastman Kodak Co.

United States Court of Appeals for the Ninth Circuit

August 7, 1997, Argued, Submitted, San Francisco, California; January 21, 1998, Withdrawn From Submission; February 24, 1998, Resubmitted ; February 27, 1998, Filed

No. 96-16014

Reporter

136 F.3d 1354 *; 1998 U.S. App. LEXIS 3123 **; 1998-1 Trade Cas. (CCH) P72,067; 98 Cal. Daily Op. Service 1405; 98 Daily Journal DAR 1955

IMAGE TECHNICAL SERVICE, INC.; J-E-S-P COMPANY, INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; OMNI MICROGRAPHIC SERVICES, INC.; ATLANTA GENERAL MICROFILM CO., INC; DATEK LTD.; B.C.S. TECHNICAL SERVICES, INC.; CPO LTD., INC.; ADVANCED SYSTEMS SERVICE, INC.; AMTECH EQUIPMENT MAINTENANCE, INC., Plaintiffs-Appellees, v. EASTMAN KODAK CO., Defendant-Appellant.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of California. D.C. No. CV-87-01686-AWT. A. Wallace Tashima, District Judge, Presiding.

Disposition: REVERSED.

Core Terms

attorney's fees, district court, antitrust, fee award, disqualification, ethical, anti trust law, opening brief, disqualified, parties, merits

LexisNexis® Headnotes

Legal Ethics > Client Relations > Conflicts of Interest

HN1[] **Client Relations, Conflicts of Interest**

If a member has or has had a relationship with another party interested in the representation, the member shall not accept or continue such representation without all affected clients' informed written consent. A member shall not concurrently represent clients whose interests conflict, except with their informed written consent. California Rules of Professional Conduct Rule 3-310.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN2[] **Reviewability of Lower Court Decisions, Preservation for Review**

The court will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief. That principle applies when a party attempts to raise a new issue in its reply brief, because an issue advanced only in reply provides the appellee no opportunity to meet the contention.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

HN3[] **Remedies, Costs & Attorney Fees**

An award of attorney fees does not become final until the amount of the fee award is determined.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN4[] **Costs & Attorney Fees, Clayton Act**

The Clayton Act § 4 provides that a person injured by an antitrust violation shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney fee. *15 U.S.C.S. § 15*. The fee award is mandatory, and the purpose of such an award in antitrust cases is threefold: (1) to encourage private enforcement of the antitrust laws, (2) to insulate the treble damages award from the costs of obtaining recovery, and (3) to deter violations of the antitrust laws by requiring the payment of that fee by a losing defendant as part of his penalty for having violated the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Legal Ethics > Client Relations > Conflicts of Interest

Legal Ethics > Client Relations > Attorney Fees > General Overview

HN5[] **Private Actions, Costs & Attorney Fees**

Simultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification. An attorney cannot recover fees for such conflicting representation, because payment is not due for services not properly performed. This applies even where the matters in which the firm represents the clients with conflicting interests are unrelated. An attorney may claim fees only for services provided before the conflict arose and the ethical breach occurred.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

HN6[ ] Private Actions, Costs & Attorney Fees

While in general, statutes bestow fees upon parties, not upon attorneys, weighty authority demonstrates that the client himself is not entitled to keep the fees which are measured by and paid on account of the attorney's services.

Counsel: John R. Reese, San Francisco, California, for the defendant-appellant.

Donald R. Pepperman, Los Angeles, California, for the plaintiffs-appellees.

Judges: Before: Betty B. Fletcher, Stephen Reinhardt, and Andrew J. Kleinfeld, Circuit Judges. Opinion by Judge Fletcher.

Opinion by: BETTY B. FLETCHER

Opinion

[*1355] OPINION

FLETCHER, Circuit Judge:

Image Technical Service, Inc. and other companies ("Image Tech") filed an antitrust suit against Eastman Kodak Co. ("Kodak"). Before trial, Kodak moved to disqualify Coudert Brothers, a law firm representing Image Tech, because the firm represented a division of Kodak in other matters. The district court disqualified Coudert from further representation of Image Tech. Image Tech eventually won the lawsuit. In this appeal, Kodak seeks to reverse a district court judgment that it must pay Image Tech $ 400,000 in statutory legal fees for Coudert's representation.

FACTS

Image Tech is an independent service organization ("ISO") which services Kodak copying and micrographic equipment. **[**2]** In 1987, Image Tech and other ISOs (hereinafter referred to collectively as Image Tech) filed an antitrust suit against Kodak under *15 U.S.C. §§ 1* and *2*, alleging that Kodak adopted policies limiting the availability of parts to ISOs, and made it more difficult for ISOs to compete with Kodak in servicing Kodak equipment. The district court granted summary judgment for Kodak, and the Ninth Circuit reversed. *Image Technical Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612 (9th Cir. 1990)*. Image Tech was represented by The Law Offices of James A. Hennefer.

The Supreme Court granted Kodak's petition for certiorari. In July 1991, Image Tech retained Coudert Brothers as co-counsel to assist in the Supreme Court and in further district court proceedings. Coudert prepared the Supreme Court briefs. The Supreme Court affirmed the court of appeals' reversal of the summary judgment, *Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*, and remanded the case for trial. Coudert, which planned to participate in the preparation for trial and in the trial itself, began discovery and factual investigation in the district court.

On January **[**3]** 19, 1993, Kodak filed a motion to disqualify Coudert. District Judge Barbara Caulfield granted the motion on May 19, 1993, following a hearing. The district court found that Coudert had represented one of Kodak's major operating divisions, Eastman Chemicals, for at least six years in various international matters. The work did not involve issues directly relevant to the antitrust litigation. Coudert had violated Rule 3-310 of the California Rules of Professional Conduct, which stated at the time:

> HN1[] (A) If a member has or has had a relationship with another party interested in the representation . . . the member shall not accept or continue such representation without all affected clients' informed written consent.
> (B) A member shall not concurrently represent clients whose interests conflict, except with their informed written consent.

Coudert's representation of Image Tech conflicted with the interests of its existing client, Kodak, and Coudert had failed to obtain the informed written consent required, or even informed consent. Coudert thus had breached **[*1356]** its "duty of . . . undivided loyalty" and disqualification was required.

The district court also found that **[**4]** Kodak had not waived the right to object to Coudert's representation of Image Tech by failing to object in a timely fashion. There was no showing that Kodak was aware that Coudert represented one of its divisions and intentionally delayed filing a motion to disqualify, and so no waiver occurred. Further, Coudert as a law firm had the responsibility to perform a conflict check, while Kodak had no such obligation. Blecher & Collins took Coudert's place as co-counsel.

More than two years later, on September 19, 1995, a unanimous jury returned a verdict in favor of Image Tech and the other ISO plaintiffs, and awarded $ 23,948,300 in damages. After the trebling mandated by the Clayton Act, *15 U.S.C. § 15*, the damages award was $ 71.7 million.

Image Tech moved for an award of mandatory reasonable attorneys' fees and costs, seeking fees for all its counsel, including fees for the legal services Coudert provided before the firm's disqualification in 1993. The parties stipulated to an award of $ 3,950,000 for the services of other counsel, but Kodak disputed Image Tech's entitlement to any fee award for Coudert's work, because of the disqualification.

On January 18, 1996, the district court **[**5]** (A. Wallace Tashima, Circuit Judge, sitting by designation) filed the stipulation regarding fees for the work of the other counsel, and an interim order finding that Image Tech was entitled to receive fees for Coudert's representation. The court reasoned that Coudert's disqualification was prospective only, adding that it was not clear that the conflict would have required Coudert's disqualification before the Supreme Court but declining to address the issue. Because Clayton Act fees are awarded to the parties, not to their attorneys, it remained between Image Tech and Coudert whether Image Tech would pay Coudert any fees. The order stated "the court shall enter its final order on plaintiffs' motion for an award of attorneys' fees and costs" after the parties tendered their stipulation regarding amount to the court (or indicated that they could not agree on an amount).

Kodak filed a notice of appeal on the merits on February 13, 1996, with a docketing statement that included the issue whether attorneys' fees could be awarded to plaintiffs for work done by disqualified counsel. Kodak's motion for leave to file an oversized brief also mentioned the issue. Kodak's opening brief, filed **[**6]** April 12, 1996, did not raise the attorneys' fees issue. [1]

At about the same time as the notice of appeal, Kodak and Image Tech agreed to stipulate to a fee award to Coudert of $ 400,000, but the signed stipulation was not lodged with the district court until April 11, 1997. The stipulation "reserved the right to challenge on appeal the Court's finding that plaintiffs are entitled under the antitrust laws to recover fees and expenses for the work performed for Coudert Brothers." On April 29, 1997, the district court issued a "Post-judgment Order Awarding Reasonable Fees and Costs to Plaintiffs and Supplemental Judgment," simultaneously entering the stipulation as to the $ 400,000 in fees awarded Coudert. Kodak filed a timely appeal from the fee order on May 22, 1996.

I. *Waiver*

---

[1] In the merits appeal, this court affirmed in part and reversed in part, with no mention of the Coudert fee issue. *Image Technical Servs. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997)*.

Image Tech argues that Kodak **[**7]** has waived the argument that it was improper to award fees to disqualified counsel, because Kodak raised the issue in its docketing statement attached to the notice of appeal on the merits and then failed to address it in its opening brief in that appeal.

HN2[] This court "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief." *Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992)* (quotations omitted). That principle applies when a party attempts to raise a new issue in its reply brief, because "an issue advanced only in reply provides the appellee no opportunity **[*1357]** to meet the contention." *Ellingson v. Burlington N., Inc., 653 F.2d 1327, 1332 (9th Cir. 1981)* (appellant cannot raise attorneys' fees issue for first time in reply brief).

This is a different situation. Image Tech argues not that Kodak failed to raise the attorneys' fees issue in its opening brief in the instant appeal, but rather that it failed to raise the issue in its earlier opening brief in the appeal on the merits, and so is precluded from raising it at all. That amounts to arguing that Kodak lost the right to appeal the **[**8]** district court's final judgment on attorneys' fees because it mentioned the fees issue in its docket statement in the earlier appeal on the merits, but failed to include or develop the issue in the opening brief in that appeal.

We reject this reasoning. Judge Tashima's order finding that Image Tech was entitled to attorneys' fees for Coudert was entitled "*Interim* Order on Motion for Attorneys' Fees" (emphasis in original), and expressly reserved jurisdiction to enter a final order after the parties stipulated to an amount of fees, or to determine an amount if the parties could not agree. ***HN3***[] "An award of attorney's fees does not become final until the amount of the fee award is determined." *Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614, 617 (9th Cir. 1993)*. As in *Intel,* Kodak's first notice of appeal, "timely filed after the district court's . . . judgment but before the determination of the fee amount, pertained only to the *merits* of the litigation." *Id.* (emphasis in original). It was thus premature to appeal the fee award until the amount was determined by the court. The lack of an attorneys' fees argument in the opening brief on the merits appeal was therefore **[**9]** proper, and did not preclude Kodak from appealing the fee award once the award was final. Kodak did not waive its right to appeal the award of attorneys' fees for Coudert's representation.

II. *Fees for Coudert's Representation*

Kodak argues that because the district court found that Coudert had breached its duty of undivided loyalty to Kodak by representing both Kodak's division and Image Tech, Kodak was not required to pay the $ 400,000 in fees to Image Tech for Coudert's representation before the firm's disqualification. We review de novo the legal question whether Kodak was required to pay fees for Coudert's work. *United States ex rel Virani v. Jerry M. Lewis Truck Parts & Equip., Inc., 89 F.3d 574, 576 (9th Cir. 1996)*, *cert. denied, 117 S. Ct. 945, 136 L. Ed. 2d 834 (1997)*. California law controls whether an ethical violation occurred. *See* N.D. Cal. Local Rule 110-3 (standards of professional conduct in the Northern District are those of California Rules of Professional Conduct).

HN4[] Section 4 of the Clayton Act provides that a person injured by an antitrust violation "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." **[**10]** *15 U.S.C. § 15*; *see id* § 26 (plaintiff who prevails in action for injunctive relief under antitrust laws also entitled to reasonable attorneys' fee). The fee award is mandatory, *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1314 (9th Cir. 1982)*, and the purpose of such an award in antitrust cases is threefold: 1) to encourage private enforcement of the antitrust laws, 2) to insulate the treble damages award from the costs of obtaining recovery, and 3) to deter violations of the antitrust laws by requiring the payment of that fee by a losing defendant as part of his penalty for having violated the antitrust laws. *Perkins v. Standard Oil, 474 F.2d 549, 554 (9th Cir. 1973)*; *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc., 776 F.2d 646, 661 (7th Cir. 1985)*.

Any fee award in an antitrust case goes to the successful plaintiff, not to plaintiff's counsel. "The court's award goes first to the plaintiff as part of his recovery in accordance with the language of section 4. If he chooses to pass that money on to his attorneys, that is his business." *Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 88 (1st Cir. 1970)*. This is consistent **[**11]** with the goal of deterrence, which regards the fee award as part of the penalty for the defendant's violation of the antitrust laws. For example, when the contingent fee agreement between the plaintiff and its attorney would generate little in the way of fees because the damages award is small, a "reasonable" attorneys' fee still may be awarded **[*1358]** even if the contract between the plaintiff and the attorney would result in a smaller amount. *Id.*

"The imposition of this penalty was [not] meant to turn in any way on the nature or amount of the plaintiff's fee arrangement, a fortuity wholly unrelated to defendant's illegal conduct." . . . . The ultimate question in every inquiry into the fee award is what contribution the defendant should make toward the fees of plaintiff's counsel.

Perkins, 474 F.2d at 553 (quoting *Farmington Dowel, 421 F.2d at 90*).

Image Tech thus urges us to treat Kodak like any other antitrust defendant, and to evaluate the award of fees as just one part of the penalty for Kodak's antitrust violations, closing our eyes to the eventual disposition of the $ 400,000. But courts have been uneasy with such an absolutist approach, qualifying statements **[**12]** that it "is his business" what an antitrust plaintiff does with a fee award by adding that courts need not be willfully blind. "The fact that section 4 is concerned with awarding a fee which is reasonable for defendant to pay plaintiff does not preclude the court from concerning itself with what is excessive for plaintiff to pay his attorney." *Farmington Dowel, 421 F.2d at 87*. The mere fact that the plaintiff is entitled to receive the attorneys' fees does not prevent the court from deviating from the general rule where exceptional circumstances exist. The determination under the antitrust statute of "what contribution the defendant should make toward the fees of plaintiff's counsel" is complicated in this case, because defendant Kodak is not merely an antitrust violator, but is also the victim of an ethical violation by plaintiff's counsel Coudert. ***HN5***[] Simultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification. *Flatt v. Superior Ct., 9 Cal. 4th 275, 885 P.2d 950, 955 (Cal. 1994)*. An attorney cannot recover fees for such conflicting representation, *Blecher* **[**13]** *& Collins v. Northwest Airlines, Inc., 858 F. Supp. 1442, 1457 (C.D. Cal. 1994)*, because "payment is not due for services not properly performed." *Cal Pak Delivery, Inc. v. United Parcel Serv., 52 Cal. App. 4th 1, 60 Cal. Rptr. 2d 207, 215 n.2 (Cal. Ct. App. 1997)* (quotation omitted). This applies even where, as here, the matters in which the firm represents the clients with conflicting interests are unrelated. *Jeffry v. Pounds, 67 Cal. App. 3d 6, 136 Cal. Rptr. 373, 376 (Cal. Ct. App. 1977)*. An attorney may claim fees only for services provided before the conflict arose and the ethical breach occurred. *136 Cal. Rptr. at 377*.

The district court awarded fees because Coudert's disqualification was prospective only. But Coudert's ineligibility to recover fees was not prospective. Under California law the bar to compensation extended back to the beginning of Coudert's representation. Coudert represented Kodak throughout its representation of Image Tech, so there was never a time when the representation was conflict-free.

The district court also disavowed any responsibility for determining whether Coudert would receive any of the $ 400,000 awarded, concluding that the issue remained **[**14]** between Image Tech and Coudert. Yet when an attorney's ethical violation is in question, the district court retains some power to look beyond an award of fees to a *party* to determine whether an attorney will receive compensation for a breach of ethical rules. As the Second Circuit stated in *Litton Sys., Inc. v. AT&T, 700 F.2d 785, 827 (2d Cir. 1983)*,

> The payment of attorneys' fees is a part of the penalty for violating the antitrust laws. At the same time there is no doubt that attorneys as officers of the court must operate on an honor system, and must be appropriately disciplined to provide both specific and general deterrence.
>
> Our recent opinion in *Virani* articulates a similar dilemma in the context of evaluating a fee award under the False Claims Act, 31 U.S.C. § 3729-3732. Like the ***antitrust law***, the FCA provides that successful plaintiffs "shall" receive reasonable attorneys' fees from defendants. *Id.* at § 3730(d)(1). Such language on its face seems to say that the plaintiff can recover the attorneys' fee for himself. What then of the attorney? Are not the **[*1359]** fees for his services and should not he, if anyone receive them? It is usually assumed that the **[**15]** answer to the latter question is "Yes, of course, how could it be otherwise." That assumption simply tends to be in the background of decision making about fees. Yet there are times when someone will ask that a usually

> unacknowledged part of the background be brought to the forefront and perused before it recedes again into relative obscurity.

Virani, 89 F.3d at 577. **HN6**[] While "in general, statutes bestow fees upon parties, not upon attorneys . . . weighty authority demonstrates that the client himself is not entitled to keep the fees which are measured by and paid on account of the attorney's services." *Id.*; *see* Heston v. Secretary of HHS, 1997 U.S. Claims LEXIS 257, No. 90-3318 V, 1997 WL 702661 (Fed. Cl. Oct. 3, 1997) (discussing case law under a variety of fee-shifting statutes); Earth Island Inst. v. Christopher, 942 F. Supp. 597, 607 (Ct. Int'l Trade 1996) (noting dilemma and quoting *Virani*).

Virani concluded that under the FCA the client's right to a reasonable fee was actually a "power" to demand such a fee, and after the client exercised that power the attorney had a right to the fees. 89 F.3d at 578. The opinion notes in dictum that the appropriate fee under California law **[**16]** would be zero when an attorney represents clients with conflicting interests. Id. at 579.

A separate concurrence adheres to reasoning closer to that found in antitrust fees cases: "absent a contractual assignment to the attorney, the False Claims Act requires payment of the attorneys' fee award to the party, with the ultimate disposition of the award dependent upon the contract between the attorney and client." Id. at 580 (Thomas, J., concurring). "The fee award may bear no relation to the actual fee paid by the prevailing party to his or her attorney." Id. at 581. The concurrence does not address the situation in which there has been an ethical violation by the attorney.

While "court intervention in [antitrust] fee dispositions is bound to be confined to exceptional circumstances," International Travel Arrangers, Inc., v. Western Airlines, Inc., 623 F.2d 1255, 1278 n.27 (8th Cir. 1980), the circumstances in this case are exceptional: a law firm representing the antitrust plaintiffs simultaneously represented the antitrust defendant, a clear violation of the applicable ethical rules. Image Tech is under no obligation to pay any fees to the law firm, Coudert, for **[**17]** its conflicted representation. Absent some representation that Image Tech, the party requesting fees, will not retain the $ 400,000, it stands to receive a sizable windfall. And if Image Tech does not retain the $ 400,000 and pays Coudert, Coudert will receive compensation which California law says it cannot recover.

If Coudert had breached a duty of loyalty to Image Tech only, there would be a better argument for allowing Image Tech to recover and retain the fees. The $ 400,000 would not be so much a windfall as recompense for conflicted representation. Here, however, it compounds injustice to allow Image Tech to receive $ 400,000 from Kodak, the party injured by the ethical violation. Moreover, it is less of a concern that Kodak, as the defendant potentially liable for the fees, will receive a windfall if it is not ordered to pay Image Tech the fees, because Kodak is the client injured by Coudert's breach of its duty of loyalty when it simultaneously represented Kodak and Image Tech.

Image Tech warns of dire consequences if it is denied a fee award, arguing that defendants will strategically delay disqualification motions to avoid paying the largest possible amount of fees. The **[**18]** district court found that no strategic delay occurred in this case, however, so we are not faced with that situation.

We reverse the district court. In these exceptional circumstances Kodak need not pay Image Tech the $ 400,000 fee for Coudert's services.

REVERSED.

McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery

United States Court of Appeals for the Sixth Circuit

February 27, 1998, Filed

NO. 97-3024

Reporter

1998 U.S. App. LEXIS 3736 *; 1998-1 Trade Cas. (CCH) P72,109

McNEILUS TRUCK AND MANUFACTURING, INC., a Minnesota corporation; McNEILUS FINANCIAL SERVICES, INC., a Minnesota corporation; and McNEILUS FINANCIAL INC., a Texas corporation, Plaintiffs-Appellants, v. STATE OF OHIO, ex rel. BETTY MONTGOMERY, Attorney General for the State of Ohio; and MITCHELL J. BROWN, Commissioner of the Ohio Bureau of Motor Vehicles, Defendants-Appellees.

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Reported in Table Case Format at: *1998 U.S. App. LEXIS 15795*.

Prior History: On Appeal from the United States District Court for the Southern District of Ohio. 96-01122. Sargus, Jr. 12-12-96.

Disposition: AFFIRMED.

Core Terms

repair, remanufacturer, customer, chassis, dealers, place of business, binding, district court, manufacturer, injunction, irreparable harm, anti trust law, licensing, merits, truck, motor vehicle dealer, preliminary injunction, likelihood of success, antitrust claim, binding agreement, new motor vehicle, plaintiffs', grounds

LexisNexis® Headnotes

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Governments > State & Territorial Governments > Licenses

HN1[] **Franchise Relationships, Franchise Agreements**

The class of acceptable repair dealers under the binding repair agreement requirements of *Ohio Rev. Code Ann. § 4517.12(C)(2)* (1993) includes those within 20 miles of the purchaser's residence or place of business or a chassis dealer located nearest to the remanufacturer's location and place of business or the customer's residence or place of business.

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Maintenance & Safety

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Governments > State & Territorial Governments > Licenses

HN2[] **Commercial Drivers & Vehicles, Maintenance & Safety**

"Remanufacturer" means a person who modifies a truck chassis supplied by a manufacturer or distributor for use as a public safety or public service vehicle. "Public safety vehicle or public service vehicle" means a garbage packing truck or cement mixer. *Ohio Rev. Code Ann. § 4517.01(GG)* (1997).

Antitrust & Trade Law > Consumer Protection > Vehicle Warranties > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Real Property Law > Purchase & Sale > Contracts of Sale > General Overview

Governments > State & Territorial Governments > Licenses

Real Property Law > Purchase & Sale > Remedies > Duty to Disclose

HN3[] **Consumer Protection, Vehicle Warranties**

Ohio Rev. Code Ann. § 4517.02(E) states that no remanufacturer shall engage in the business of selling at retail any new motor vehicle without having written authority from the manufacturer or distributor of the vehicle to sell new motor vehicles and to perform repairs under the terms of the new motor vehicle warranty, unless, at the time of the sale of the vehicle, each customer is furnished with a binding agreement ensuring that the customer has the right to have the vehicle serviced or repaired by a new motor vehicle dealer who is franchised to sell and service vehicles of the same line-make as the chassis of the remanufactured vehicle and whose service or repair facility is located within either 20 miles of the remanufacturer's place of business or 20 miles of the customer's residence or place of business. If there is no such new motor vehicle dealer, the binding agreement may be with the new motor vehicle dealer who is franchised to sell and service vehicles of the same line-make as the chassis of the remanufactured vehicle purchased by the customer and whose service or repair facility is located nearest to the remanufacturer's place of business or the customer's residence or place of business. At the time of sale of any vehicle, each customer of the remanufacturer shall be furnished with a warranty issued by the remanufacturer for a term of at least one year.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Criminal Law & Procedure > Sentencing > Fines

Governments > State & Territorial Governments > Licenses

HN4[] **Distributorships & Franchises, Causes of Action**

Persons who violate Ohio's motor vehicle dealer licensing laws are subject to criminal penalties. *Ohio Rev. Code Ann. § 4517.99(A)*. Those who violate the statutes' provision relating to conditions of engaging in sales, *Ohio Rev. Code Ann. § 4517.02*, face penalties of a minor misdemeanor for a first offense and a $ 100 fine, and for subsequent offenses, a misdemeanor of the first degree and a $ 1000 fine, *Ohio Rev. Code Ann. § 4517.99(C)*.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN5[] **Appellate Jurisdiction, Interlocutory Orders**

28 U.S.C.S. § 1292(a)(1) grants a United States Court of Appeals jurisdiction of appeals from interlocutory orders refusing injunctions.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN6[] **Standards of Review, Abuse of Discretion**

An appellate court reviews the denial of a preliminary injunction under an abuse of discretion standard and accords great deference to the decision of the district court. A district court's determination will be upheld unless the district court relied upon clearly erroneous findings of facts, improperly applied the governing law, or used an erroneous legal standard.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN7[] **Injunctions, Preliminary & Temporary Injunctions**

In deciding whether to grant a preliminary injunction, a district court must consider (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN8[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act provides in part that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. *15 U.S.C.S. § 1*. Although the Sherman Act prohibits every agreement in restraint of trade, this language relates only to unreasonable restraints. Consequently, most antitrust claims are analyzed under a rule of reason. Under that analysis, a factfinder must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Some types of restraints have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se. Per se treatment is appropriate once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > State & Territorial Governments > Legislatures

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > Supremacy Clause > General Overview

HN10[] **Per Se Rule & Rule of Reason, Per Se Violations**

Under the *Supremacy Clause, U.S. Const. art. VI, cl. 2*, a statute enacted by Congress may not be abridged by an act of a state legislature. A state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under *§ 1* of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN11[] **State Sovereign Immunity, State Immunity**

States are immune under the Eleventh Amendment from suits in federal court for claims under the Commerce Clause unless they consent to be sued.

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For MITCHELL J. BROWN, Defendants - Appellees: Chester T. Lyman, Jr., Office of the Attorney General of Ohio, Columbus, **[*2]** OH.

For MITCHELL J. BROWN, Defendant - Appellee: Matthew L. Sagone, Attorney General's Office of Ohio, Columbus, OH.

Judges: Before: GUY, NELSON, and SUHRHEINRICH, Circuit Judges.

Opinion

Per Curiam. Plaintiffs appeal the district court's order denying their motion for a preliminary injunction and dismissing their antitrust claims against the State of Ohio. Plaintiffs had sought to enjoin the enforcement of an Ohio motor vehicle dealer licensing statute that requires remanufacturers of specialty trucks to have binding repair agreements with local dealers or dealers who are located near the purchaser. *See* OHIO REV. CODE ANN. § 4517.02(E) (Anderson 1997). They contend the injunction should have been issued on the grounds that the statute is a *per se* violation of federal antitrust laws. For the following reasons, we affirm.

I.

Plaintiffs, McNeilus Truck and Manufacturing, Inc., McNeilus Financial Services, Inc., and McNeilus Financial, Inc. (McNeilus), are engaged in the manufacture, sale, and lease of ready-mix concrete transit mixers and refuse packer trucks. In producing these trucks, McNeilus purchases truck chassis from truck manufacturers, such as Ford, Mack, **[*3]** Kenworth, and Navistar. Ohio sales are made at McNeilus' Gahanna, Ohio, location. McNeilus provides purchasers with a warranty for the cab portion of the vehicle, but chassis repairs must be made by the chassis manufacturer's authorized dealers.

In the spring of 1996, the Ohio Bureau of Motor Vehicles informed McNeilus that McNeilus' application for renewal of its license to sell new motor vehicles would be denied. The grounds given were failure to comply with the binding repair agreement requirements of Ohio Rev. Code Ann. § 4517.12(C)(2) (Anderson 1993) (current version at *id.* (1997)), which had been in effect since 1987 and at the time provided that binding repair agreements had to be obtained with dealers who were located within 20 miles of the license applicant's sales location:

> That, at the time of the sale of the vehicle, each customer of the applicant will be furnished with a binding agreement ensuring that the customer has the right to have the vehicle serviced or repaired by a new motor vehicle dealer who is licensed to sell and service vehicles of the same line-make as the chassis of the remanufactured vehicle purchased by the customer and whose service or repair **[*4]** facility is located within twenty miles of the applicant's location and place of business.

The Bureau withdrew its denial, however, when the Ohio legislature amended the provision to expand ***HN1***[] the class of acceptable repair dealers to include those within 20 miles of the purchaser's residence or place of business or a chassis dealer "located nearest to the remanufacturer's location and place of business or the customer's residence or place of business." S. 182, 121st Gen. Assembly, 2d Sess. *§ 4517.12(C)(2)* (Ohio 1996) (codified at *OHIO REV. CODE ANN. § 4517.12(C)(2)* (Anderson 1997)).

In addition to enlarging the number of dealers who would qualify under the binding repair agreement requirements, the 1996 amendments to Ohio's motor vehicle dealer licensing laws also redefined "remanufacturer" to expressly include businesses like McNeilus': ***HN2***[] "'Remanufacturer' means . . . a person who modifies a truck chassis supplied by a manufacturer or distributor for use as a public safety or public service vehicle . . . . 'Public safety vehicle or public service vehicle' means a . . . garbage packing truck or cement mixer." *Id. § 4517.01(GG)* (codified at *OHIO REV. CODE ANN. § 4517.01(GG)* **[*5]** (Anderson 1997)).

The amendments also added the binding repair agreement requirements to the separate statutory provision listing conditions for engaging in new motor vehicle sales in Ohio. *See id. § 4517.02(E)* (codified at *OHIO REV. CODE ANN. § 4517.02(E)* (Anderson 1997)). That provision provides in pertinent part as follows:

> ***HN3***[] (E) No remanufacturer shall engage in the business of selling at retail any new motor vehicle without having written authority from the manufacturer or distributor of the vehicle to sell new motor vehicles and to perform repairs under the terms of the manufacturer's or distributor's new motor vehicle warranty, unless, at the time of the sale of the vehicle, each customer is furnished with a binding agreement ensuring that the customer has the right to have the vehicle serviced or repaired by a new motor vehicle dealer who is franchised to sell and service vehicles of the same line-make as the chassis of the remanufactured vehicle purchased by the customer and whose service or repair facility is located within either twenty miles of the remanufacturer's location and place of business or twenty miles of the customer's residence or place of business. **[*6]** If there is no such new motor vehicle dealer located within twenty miles of the remanufacturer's location and place of business or the customer's residence or place of business, the binding agreement furnished to the customer may be with the new motor vehicle dealer who is franchised to sell and service vehicles of the same line-make as the chassis of the remanufactured vehicle purchased by the customer and whose service or repair facility is located nearest to the remanufacturer's location and place of business or the customer's residence or place of business. Additionally, at the time of sale of any vehicle, each customer of the remanufacturer shall be furnished with a warranty issued by the remanufacturer for a term of at least one year.

OHIO REV. CODE ANN. § 4517.02(E).

HN4[] Persons who violate Ohio's motor vehicle dealer licensing laws are subject to criminal penalties. *See id. § 4517.99(A)* (misdemeanor of the fourth degree). Those who violate the statutes' provision relating to conditions of engaging in sales, *id. § 4517.02*, face penalties of a minor misdemeanor for a first offense and a $ 100 fine, and for subsequent offenses, a misdemeanor of the first degree and **[*7]** a $ 1000 fine, *id. § 4517.99(C)*.

McNeilus unsuccessfully attempted to obtain binding repair agreements with authorized dealers in Ohio. When it could not, it filed this action in federal court for injunctive and declaratory relief. It sought an order declaring that *§ 4517.02(E)(1)* violated federal antitrust laws and therefore was invalid under the *Supremacy Clause*; (2) violated due process and denied plaintiffs equal protection under the law; and (3) contravened the *Commerce Clause*. McNeilus also petitioned the court to enjoin defendants, the State of Ohio, its Attorney General, and the Commissioner of the Ohio Bureau of Motor Vehicles, from enforcing *§ 4517.02(E)*.

McNeilus moved for a preliminary injunction "to maintain the status quo," pending its challenge. Following a hearing, the court denied the motion and dismissed plaintiffs' antitrust claims against the State of Ohio.

Plaintiffs appealed pursuant to ***HN5***[] *28 U.S.C. § 1292(a)(1)*, which grants this court jurisdiction of appeals from interlocutory orders refusing injunctions. [1] Pending appeal, plaintiffs moved this court for an injunction, which motion was denied on the grounds that plaintiffs had not demonstrated a likelihood **[*8]** of success on the merits or irreparable harm.

II.

HN6[] We review the denial of a preliminary injunction under an abuse of discretion standard and accord great deference to the decision of the district court. *Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1480 (6th Cir. 1995)*. A district court's determination will be upheld unless the district court "relied upon clearly erroneous findings of facts, improperly applied the governing law, or used an erroneous legal standard." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)*.

HN7[] In deciding whether to grant a preliminary injunction, **[*9]** a district court must consider

> (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994).

In balancing these four factors, the district court noted that defendants did not contend that the issuance of a preliminary injunction would cause serious harm to others. The court further opined that the fourth factor, public interest, was inextricably intertwined with the first two factors. Therefore, it limited its analysis to consideration of plaintiffs' likelihood of success on the merits and irreparable harm.

A. Likelihood of Success on the Merits

On appeal, plaintiffs take issue with the court's determination that they were unlikely to prevail on their antitrust claims. Plaintiffs argue that the binding repair agreement requirements contained in the licensing statutes **[*10]** are *per se* violations of federal antitrust laws, and, therefore, are invalid under the *Supremacy Clause*.

HN8[] The Sherman Act provides in pertinent part as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." *15 U.S.C. § 1*. Although the Sherman Act prohibits every agreement "in restraint of trade," the Supreme Court has long interpreted this language to relate only to "unreasonable restraints." *State Oil Co. v. Khan, 139 L. Ed. 2d 199, 118 S. Ct. 275, 279 (1997)*. Consequently, most antitrust claims are analyzed under a "'rule of reason.'" *Id.* Under that analysis, a factfinder must decide "whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Id.*

[1] Defendants argue that plaintiffs' objections "are best raised in other, more appropriate state proceedings," and that judicial economy requires denial of plaintiffs' request for relief. These arguments are without merit in light of explicit statutory authority granting this court jurisdiction to hear this appeal. *See* *28 U.S.C. §§ 1292(a)(1)*, *1331*.

The Supreme Court has recognized, however, that ***HN9***[] some types of restraints "have such predictable and pernicious anticompetitive effect, **[*11]** and such limited potential for procompetitive benefit, that they are deemed unlawful *per se." Id.* (citing *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958))*. *Per se* treatment, according to the Court, is appropriate "'once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" *118 S. Ct. at 279* (quoting *Arizona v. Maricopa County Med. Soc'y., 457 U.S. 332, 344, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982))*. Boycotts are an example of *per se* restraints. *United States v. General Motors Corp., 384 U.S. 127, 145, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*.

HN10[] Under the *Supremacy Clause, U.S. Const. art. VI, cl. 2*, a statute enacted by Congress may not be abridged by an act of a state legislature. *Testa v. Katt, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810 (1947)*. The test for determining whether state laws are preempted by federal ***antitrust law*** was articulated by the Supreme Court in *Rice v. Norman Williams Co., 458 U.S. 654, 661, 73 L. Ed. 2d 1042, 102 S. Ct. 3294 (1982)*. In that case, the Court addressed a constitutional challenge under the *Supremacy **[*12]** Clause* to a California statute that prohibited a liquor importer from importing any brand of distilled spirits for which it was not a designated importer. The Court applied the following standard:

> [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under *§ 1* of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Id. The Court held the statute was not preempted because the statute authorized **[*13]** a manufacturer to use vertical non-price restraints, which the Court had previously determined were not *per se* illegal. In this case, plaintiffs contend that the Ohio statutes are invalid in that they mandate boycotts.

With this background we turn now to the district court's assessment of the plaintiffs' likelihood of success on the merits. The provisions at issue require remanufacturers to make available to purchasers repair dealers who are conveniently located to them. The challenged provisions do not preclude dealers from agreeing to binding repair agreements. Indeed, plaintiffs themselves introduced evidence that at least two other remanufacturers had obtained binding agreements in compliance with *§ 4517.02(E)*.

McNeilus' "inability" to comply with the binding repair agreement requirements is, to some degree at least, a result of the way it assembles its vehicles. Because McNeilus circumvents local chassis dealers to buy chassis direct from manufacturers, local chassis dealers do not want to sign binding agreements with it to repair its finished products. As the district court noted, McNeilus could offer to repair the chassis as it does the cabs or it could purchase chassis **[*14]** from local dealers. Under these circumstances, we conclude the district court did not abuse its discretion in the conclusion it reached on the likelihood of success on the merits. *See New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co., 439 U.S. 96, 111, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978)* (if mere adverse economic effect could render state statutes invalid, states' power to engage in economic regulation would be effectively destroyed). We hasten to add that we make no finding at this juncture that plaintiffs cannot succeed on the merits. We review only the trial judge's exercise of discretion on a preliminary matter.

B. Irreparable Harm

Although the district court devoted the majority of its analysis to plaintiffs' likelihood of success on the merits, it also briefly addressed whether plaintiffs would suffer irreparable harm if the statutes were not enjoined pending plaintiffs' challenge. Plaintiffs do not take issue with the court's findings regarding irreparable harm. They contend that although the district court denied the injunction, the court ruled in their favor on this issue. Defendants vigorously deny this contention. The court's discussion of irreparable **[*15]** harm focused on repercussions to a licensee who had been convicted for violating the binding repair agreement provisions and whose license was revoked on those grounds. According to the court, such a licensee "would be unable to lawfully engage in business during the pendency of the appeal of the conviction, and might possibly go out of business." (App. 55.) The record does not support these facts, however. Defendants have made no attempt to prosecute plaintiffs, and according to the parties this matter is scheduled for trial in May. Therefore we conclude no irreparable harm has been shown in this case.

III.

We next consider whether the district court properly dismissed the antitrust claims against the State of Ohio on the grounds that the state was immune from suit. [2] The Supreme Court, in *Seminole Tribe v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 1131-32, 134 L. Ed. 2d 252 (1996)*, held that ***HN11***[] states are immune under the *Eleventh Amendment* from suits in federal court for claims under the *Commerce Clause* unless they consent to be sued. [3] The Sherman Act was enacted pursuant to the *Commerce Clause*. *See, e.g.,* *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232,* ***[*16]*** *241, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)*. The State of Ohio did not consent to suit in this case. [4]

[*17] Plaintiffs contend alternatively that they may maintain their antitrust claims against the State of Ohio under the doctrine of *Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)*. That doctrine, however, only allows a plaintiff to seek injunctive relief against a state official, not against the state itself. *Id. at 159-60*. [5]

AFFIRMED.

End of Document

[2] The parties erroneously contend that the district court dismissed the State and the Attorney General. A court speaks through its orders. Although the court's opinion concluded the Attorney General is not charged with enforcement of the licensing statutes, the order only provides "McNeilus' claim under the Sherman Antitrust Act, as it relates to the State of Ohio, is DISMISSED." (App. 63-64.) *See also* *id. at 4*.

[3] That Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or another State, or by Citizens or Subjects of any Foreign State." *U.S. CONST. amend. XI*.

[4] There is a question as to whether the dismissal of the State of Ohio is properly before us in these proceedings. However, since plaintiffs conceded at oral argument that a dismissal as to the State of Ohio only was proper, we find it unnecessary to address the jurisdictional issue.

[5] The plaintiffs also challenge the district court's determination that plaintiffs failed to name a defendant who is charged with enforcement of the statutes at issue in this case. It was revealed at oral argument that plaintiffs have subsequently added as defendants in this lawsuit Ohio's county and city prosecutors, who defendants concede, are the proper suable entities. Therefore, we need not address this matter further.

CDC Techs., Inc. v. IDEXX Labs., Inc.

United States District Court for the District of Connecticut

March 2, 1998, Decided; March 2, 1998, Filed

Civ. No. 3:95cv339 (JBA)

Reporter
7 F. Supp. 2d 119 *; 1998 U.S. Dist. LEXIS 23698 **

CDC TECHNOLOGIES, INC., a Connecticut corporation, Plaintiff, v. IDEXX LABORATORIES, INC., a Delaware corporation, Defendant.

Core Terms

distributors, hematology, in-clinic, veterinary, instruments, sales, laboratories, products, summary judgment, Additionally, testing, blood, relevant market, conspiracy, monopolize, analyzers, customers, direct sale, antitrust, marketing, monopoly power, foreclosure, blood sample, Sherman Act, foreclosed, argues, sells, genuine issue of material fact, Clayton Act, terminability

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Judges: William I. Garfinkel, United States Magistrate Judge.

Opinion by: William I. Garfinkel

Opinion

[*122] **Recommended Ruling on Defendant's Motion for Summary Judgment**

Plaintiff, CDC Technologies, Inc. ("CDC"), brings this action against defendant, IDEXX Laboratories, Inc. ("IDEXX"), alleging unlawful exclusive dealing under *15 U.S.C. §§ 1* and *14*, and *Conn. Gen. Stat. § 35-29*; unlawful restraint of trade under *15 U.S.C § 1* and *Conn. Gen. Stat. § 35-28*; and monopolization, conspiracy to monopolize, and attempt to monopolize under *15 U.S.C. § 2* and *Conn. Gen. Stat. § 35-27*. Plaintiff also alleges unfair trade practices **[**2]** under *Conn. Gen. Stat. § 42-110a et seq.*; civil conspiracy; and tortious interference with business relations.

Presently pending is IDEXX's Motion for Summary Judgment (Doc. # 48). For reasons set forth below, defendant's motion is GRANTED.

[*123] **FACTS**

IDEXX is a Maine-based corporation which sells products for the testing and analysis of veterinary blood samples. Among other products, IDEXX distributes the QBC® VetAutoread ("Autoread"), an instrument which performs hematology tests [1] on veterinary blood. (Def. SMF ¶ 1.) IDEXX also sells the related consumables. [2] (Id.) IDEXX sells the instruments both directly and through third party distributors. (Def. Mem. at p. 2.)

CDC is a Connecticut corporation which designs, manufactures and sells instruments (and the consumable products) to perform hematology analyses on veterinary blood. (Pl. SMF ¶¶ 2, 4.) CDC has sold its instruments directly through its own sales force and has used distributors to provide qualified leads [3] for **[**3]** instrument sales. (Pl. SMF ¶21.)

Both IDEXX and CDC hematology analyzers measure complete blood counts ("CBCs") on veterinary blood. The underlying technology of the instruments is identical to that used for human applications. (Def. SMF ¶ 14.) Indeed, instruments used for human applications have been adapted for use in veterinary clinics. (Def. SMF ¶¶ 15-17.)

In addition to in-clinic hematology analyzers, there are also other methods to measure CBCs of veterinary blood. Practitioners may send blood samples to independent veterinary reference laboratories at a cost of a few dollars per test. (Pl. Ex. 12 at 1002447; Def. Mem. at 3.) Practitioners may use manual methods, such as microscopes. (Id.) CBCs may also be measured by chemical analysis. (Id.) Moreover, CBC tests have been performed in a wide variety of locations including animal hospitals, private practitioner laboratories, animal disease laboratories, universities, pharmaceutical and toxicology laboratories, and human laboratories. (Def. Ex. 20 at 1004215.)

In early 1991, CDC contacted IDEXX **[**4]** to explore a possible business relationship wherein IDEXX would sell CDC's hematology products through its own sales force. (Def. SMF ¶ 18.) No agreement was ever reached, and by early 1992, CDC began to investigate other means to market its product. (Pl. SMF ¶ 20.)

In 1992 and 1993, CDC formed relationships with four major distributors: J.A. Webster, Inc. ("Webster"), A.J. Buck & Son, Inc. ("Buck"), Burns Veterinary Supply ("Burns"), and Midwest Veterinary Supply, Inc. ("Midwest"). (Pl. Mem. at 4.) CDC used these distributors to establish contact with significant veterinary clinics in the United States and to provide sales leads for its products. (Def. Mem. at 6-7.) However, CDC did not have distributor coverage throughout the entire country. (D.Carver dep. v.2 at 30.) Additionally, CDC did not permit distributors to sell or conduct demonstrations of CDC's hematology analyzer. (Dougherty dep. v.1 at 218-19; Pereira dep. v.1 at 62, 115.)

As noted above, CDC also reached customers through its direct sales force. Indeed, it found direct sales more profitable than sales through leads from distributors. (Pereira dep. v.1 at 60-1.) CDC also relied on other methods to pursue sales including **[**5]** telemarketing, direct mail campaigns, customer lists, advertising, and participation in trade shows. (D. Carver dep. v.1 at 228; Dougherty dep. v.1 at 112-13, 170, 173-74, 186; Pereira dep. v.1 at 37, 147).

In 1993, IDEXX entered into an agreement with Becton Dickinson, the company that developed Autoread, to market that instrument in the United States and other parts of the world. (Def. SMF ¶¶ 49-50.) IDEXX, in certain planning documents, noted that other sellers of hematology instruments had "poor distribution" and could be "block[ed] ... at [the] distribution channel[s]" in the United States. (Pl. SMF ¶ 46.) **[*124]** Additionally, certain of IDEXX's marketing plans noted an effort to "erect barriers to entry" and "to create an environment hostile to competitive entry." (Id. ¶ 47.) Moreover, Patricia Panaia, an IDEXX Marketing Manager, wrote a note on IDEXX marketing materials which stated "KILL MASCOT," an apparent reference to CDC's product. (Id. ¶ 50.) Although she did not recall what she

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[1] "Hematology tests" involve the counting of red blood cells, white blood cells, platelets, and associated diagnostic information.

[2] "Consumables" are products used to treat blood samples before their analysis by the instrument.

[3] A "qualified lead" is the identification of potential customers who have expressed interest in the purchasing of a product. (Pl. SMF ¶ 4.)

meant by "KILL MASCOT," she also wrote a note on another marketing document stating, "PUT THEM OUT OF BUSINESS." Ms. Panaia explained that this note referred to a competitor, Abaxis. (Id.) IDEXX's goal, **[**6]** among other things, was to "achieve [a] dominant share of the veterinary in-clinic hematology market." (Mackinnon dep. v.3 at 38-39; Pl. Ex. 8; Pl. Ex. 73 at 1002846.)

IDEXX began selling Autoread in 1994 and offered it to its existing distributors of other veterinary products. (Def. SMF ¶ 54.) The four distributors that had previously worked with CDC (Webster, Burns, Buck and Midwest) elected to carry IDEXX's Autoread and ceased carrying CDC's hematology instruments. (Pl. Mem. at 10.)

IDEXX had a longstanding policy of denying a distributor the right to market an IDEXX product if the distributor offered a competing product from another manufacturer. (Def. SMF ¶ 52.) In 1995, this exclusive dealing policy was formalized in writing between IDEXX and its distributors (for all products including Autoread). (Def. SMF ¶¶ 59- 60.) These written agreements were for a one year period, and a distributor could terminate the agreement without cause on 60 days notice. (Id.) Currently, IDEXX has control of at least 50% of the distributor market. (Pl. Mem. at 16.) Moreover, since IDEXX entered the in-clinic hematology market, they have accounted for 80% of the sales. (Pl. SMF ¶ 11.)

After IDEXX entered **[**7]** the market, CDC, initially, chose not to pursue relationships with available non-IDEXX national distributors. (Campbell dep. at 24; Caterino dep. v.1 at 43-46; Pereira dep. v.2 at 25-6; E.Carver dep. v.2 at 155-56.) Moreover, even before IDEXX entered the in-clinic hematology market, CDC had not had distributor coverage for some areas of the country. (D.Carver dep. v.2 at 30.) Eventually, CDC began once again to seek distributor relationships. By November, 1995, IDEXX had developed distributor coverage throughout much of the United States. (D.Carver dep. v.2 at 28-29.) In April, 1996, CDC had relationships with at least eight non-IDEXX distributors. (Caterino dep. at 47.)

Over the two years following IDEXX's entry into the in-clinic hematology market, CDC doubled its direct sales force, expanded its telemarketing and increased its budget for direct mail campaigns and advertising. (D.Carver dep. v.2 at 59-61, 70-72; Dougherty dep. v.1 at 111-12.) Despite the loss of their major distributors, CDC's sales rate continued to increase after IDEXX, entered the market. (Def. SMF ¶ 83.) CDC's sales generated by third-parties increased from 55 sales in 1992-1993 to 56 sales in 1994-1995. (Def. **[**8]** Mem. at 16.) CDC's direct sales increased from 52 sales in 1992-1993 to 402 sales in 1994-1995. (Id.)

While CDC has primarily focused its sales efforts in the United States, CDC has distributors in Korea, Canada and the United Kingdom. (E.Carver dep. v.3 at 53.) CDC has also sold products in foreign markets. (Geisel dep. v.1 at 132.) Likewise, IDEXX has distributors outside the United States. (Pollock dep. at 57-9.) However, IDEXX's contracts with these distributors does not include the exclusive dealing agreement at issue (Pl. Mem. at 25.)

Other companies have also developed and marketed hematology instruments for use on veterinary blood. (Def. SMF ¶ 12.) In fact, one company, ZynoCyte, Ltd., has introduced an in-clinic hematology instrument designed to analyze veterinary blood samples and has nationwide distribution of its product. (Sanderson dep. at 14-16.) Moreover, foreign companies have sold veterinary products in the United States (D.Carver v.4 at 54.)

SUMMARY JUDGMENT STANDARD

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the moving party is entitled to judgment as a matter of law. **[**9]** *Fed. R. Civ. P. Rule 56(c)*; **[*125]** *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The substantive law governing the case identifies those facts that are material on a motion for summary judgment. *Id. at 248*. A court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact...." *Rule 56(c)*; See *Miner v. City of Glens Falls, 999 F.2d 655, 661 (2d Cir. 1993)* (citations omitted). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992)* (internal quotation marks and citations omitted). The burden of showing that no genuine dispute about any material fact exists rests on the party seeking summary judgment. See *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*.

After discovery, if the party against whom summary judgment is sought "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. **[**10]** *Celotex Corp. V. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. In assessing the record to determine whether a genuine dispute as to a material fact exists, the court is required to resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. See *Anderson, 477 U.S. at 255*. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991)* (citations omitted).

DISCUSSION

I. EXCLUSIVE DEALING CLAIMS

Even if a contract is found to be an exclusive dealing arrangement, it will not violate § 3 of the Clayton Act, unless the court believes that performance of the contract "may . . . substantially lessen competition" or "tend to create a monopoly." [4] *Tampa Electric v. Nashville Coal Company, 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. In considering the legality of an exclusive dealing contract, a court must analyze three areas. *Tampa Electric, 365 U.S. at 327*. First, the line of commerce in question must be determined. Id. Second, the court must ascertain the area of competition in this line of commerce by careful examination of the market area in which the seller operates. **[**11]** Id. Finally, the court must determine whether the competition foreclosed by the exclusive dealing contract constitutes a substantial share of the market. *Id. at 328*. [5]

A. Relevant Product Market - The Line of Commerce in Question

In an antitrust action, the first issue is to define the relevant market. *Hayden Publishing Co., 730 F.2d 64, 69-70 (2d Cir. 1984)*; *Topps Chewing Gum. Inc. v. Major League Baseball Players Assoc., 641 F.Supp. 1179, 1189 (S.D.N.Y. 1986)*. Determination of the relevant market is a necessary predicate to **[*126]** an examination of the defendant's alleged violations. *United States v. E.I. Du Pont De Nemours and Company, 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)*. Market definition is an attempt to oversimplify complex economic interactions between different parties who have different costs, needs and interests. Id. Indeed, "[t]here is no subject in ***antitrust law*** more confusing than market definition." *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 598 (1st Cir.1993)*. "[T]he frustrating but routine question how to define the product market is answered in antitrust cases by asking expert economists to testify . . . . Usage patterns, customer **[**13]** surveys, actual profit levels, comparison of features, ease of entry, and many other facts are pertinent in answering the question." *Id. at 599*.

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[4] Section 3 of the Clayton Act states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller where the effect of such lease, sale, or contract for Sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14.

[5] Under *§ 1* of the Sherman Act, an exclusive dealing contract is unlawful if it illegally restrains trade. *15 U.S.C. § 1*. For purposes of this case, the analysis of Section 3 of the Clayton Act encompasses the standard prescribed for in *§ 1* of the Sherman Act. See Tampa Electric, 365 at 335. This Court further notes that *Conn. Gen. Stat. § 35-29* is patterned after, and substantially similar **[**12]** to, § 3 of the Clayton Act. Therefore, examination under the Clayton Act obviates the need for a separate analysis under *Conn. Gen. Stat. § 35-29*. See *State v. Hossan-Maxwell, Inc., 181 Conn. 655, 436 A.2d 284, 288 (Conn. 1980)*.

IDEXX defines the relevant product-market as the methods of chemical and hematological analysis of blood used to determine a CBC. (IDEXX Mem. at 3.) IDEXX maintains that the market includes at least three procedures by which practitioners attain the results of a hematology test: (1) sending a blood sample to an independent veterinary reference laboratory; (2) use of manual methods, such as microscopes; and (3) running the test on an in-clinic instrument. (Id.) [6] IDEXX further claims that in an early CDC business plan, CDC found that there were 250 million tests performed in the veterinary CBC market by a wide variety of means including tests in animal hospitals, private practitioner labs, veterinary reference labs, animal disease labs, universities, pharmaceutical and toxicology labs, and predominantly human labs. (Def. Ex. 20 at 1004215.) Additionally, IDEXX notes, and CDC admits, that most CBCs are performed in outside laboratories (E. Carver dep. v.5 at 33-34; Def. Ex. 37 at 12) and that CDC's expert admits that a majority of veterinarians **[**14]** look to sources other than CDC or IDEXX instruments for hematology testing. (Geisel dep. v.1 at 285-86.) Finally, IDEXX maintains that the technology underlying hematology instruments is interchangeable for human and animal samples and that, therefore, products which are currently used for analysis of human blood should be included in the product-market definition of hematology analyzers. (Def. SMF at 6-7.)

CDC counters that IDEXX's market definition is too broad and includes products different from those sold by CDC and IDEXX. (CDC Mem. at 22.) CDC claims that the product-market definition should be comprised solely of in-clinic hematology analyzers for use by veterinarians. (Id. at 24.) In support, CDC argues that IDEXX has focused sales efforts on customers for in-clinic instruments. (Pl. SMF at 4.) CDC also avers that IDEXX described the company's goal as to "achieve [a] dominant share of the veterinary in-clinic hematology market." (Mackinnon dep. v.3 at 38-39; Pl. Ex. 8; Pl. Ex. 73 at 1002846.) Moreover, CDC claims that CDC and IDEXX sell instruments specifically designed for use in veterinary clinics, while veterinary laboratories **[**15]** sell a service to test blood samples, not a product. (Pl. Ex. 2 at I004005; Def. Ex. 22 at CDC000230.) At very least, CDC maintains, veterinary hematology instruments for in-clinic use constitute a "submarket" within the broader market of hematology blood testing. "[W]ell defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Moreover, CDC claims that blood testing other than hematology, such as chemical tests, are not part of the same market in that they use different instruments and report different information. (CDC's SMF at ¶ 16.)

Both parties submit substantial and persuasive evidence to support their vastly different market definitions. However, each of the three general items that IDEXX includes in their market definition are very different approaches to measuring CBCs. The first issue for this Court is whether these methods are "reasonably interchangeable." *Hayden Publishing Co., 730 F.2d at 70-71* (citing *E.I. du Pont de Nemours & Co., 351 U.S. 377, 394, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. This Court cannot rule, for purposes of this motion, that in-clinic instruments are **[*127]** reasonably interchangeable with **[**16]** other methods for measuring CBCs.

The CDC and IDEXX in-clinic hematology instruments both measure CBCs. While outside laboratories may also measure CBCs, the competition from outside laboratories does not involve a competing instrument. Moreover, in-clinic instruments cost in the range of $10,000 whereas reference laboratories charge only a few dollars per test to measure CBCs. (See Pl. Ex. 12 at 1002447.) Additionally, CDC argues persuasively, at least at this juncture, that laboratories provide a service as opposed to a product. See *United States v. Grinnell Corp., 384 U.S. 563, 572-574, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. Moreover, the manual methods that IDEXX claims to be in the product market are not interchangeable with in-clinic instruments. They are arguably less sophisticated and are difficult to compare to in-clinic instruments. Finally, there are numerous exhibits [7] which assert a difference between in-clinic instruments and other products and services nominated by IDEXX for inclusion in the product market definition. These exhibits also raise a question of fact. See *Hayden Publishing Co., 730 F.2d at 70*.

Even if this Court where to **[**17]** include reference laboratories and manual methods in the product market of in-clinic instruments, there is still an issue of fact as to whether in-clinic instruments are a "well-defined submarket"

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[6] CDC and IDEXX instruments are in-clinic instruments.

[7] (See, inter alia, Pl. Ex. 2 at 1004005; Def. Ex. 22 at CDC 000230.)

within the broader product market. See *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. In determining whether a submarket may exist, the Court must look at , among other things, a product's particular characteristics including its uses, its prices and its customers. Id. In this case, there is a wide divergence of cost in testing CBCs. (See Pl. Ex. 12 at 1002447.) Arguably, the customers for in-clinic instruments would be larger facilities that could afford such a cost, while the customers for laboratories would be veterinarians with a small practices that requires sending blood samples to outside laboratories. Finally, while the uses for in-clinic instruments, reference laboratories, and manual methods are all to test veterinary blood, these uses may vary widely if the Court were to consider the volume, the accuracy and the manner of the testing.

In this case, there is a genuine issue of material fact concerning the relevant product market definition. "The conclusion that genuine **[**18]** issues of material fact preclude a finding as to relevant market as a matter of law is not unexpected." *Jennings Oil Company, Inc., 539 F.Supp. at 1352*. Pronouncement of the relevant market definition is a question of fact, not a question of law. *Hayden Publishing Co., 730 F.2d at 70*; *Jennings Oil Company, Inc., 539 F.Supp. at 1352*.

B. Relevant Market - The Area of Competition

The Court must next consider the relevant geographic area in which the sellers operate. *Tampa Electric, 365 U.S. at 327*. IDEXX argues that the relevant geographic market is the world. In support, IDEXX claims that CDC has made international sales and has relationships with foreign distributors. Additionally, they claim that there is a free flow of sales and marketing relationships internationally. Finally, IDEXX avers that foreign manufacturers sell blood-testing instruments in the U.S.

CDC maintains that the relevant geographic market is the United States. While CDC and IDEXX have sold hematology analyzers in other countries, CDC argues that there is no evidence that any foreign seller sold analyzers in the U.S. Moreover, CDC claims that the exclusive dealing arrangements imposed by IDEXX are focused on IDEXX distributors **[**19]** in the U.S. CDC additionally argues that they market their products very differently in foreign countries and that IDEXX's exclusive dealing contract was imposed upon distributors solely in the U.S.

For purposes of this motion, the Court concludes that the relevant geographic market is the United States. Moreover, even if the geographic market extended to foreign markets, it would not change this Court's ultimate decision.

[*128] C. Effect on Competition in the Relevant Market

Even if there are genuine issues of material fact regarding product and geographic market definitions, the Court must still determine whether IDEXX's exclusive dealing contract foreclosed a substantial share of the more narrowly defined market. *Tampa Electric, 365 U.S. at 327*. [8] Previously, the Supreme Court analyzed exclusive dealing agreements under a "quantitative" approach by considering solely the extent of the market foreclosure. *Standard Oil Co. v. United States, 337 U.S. 293, 313-14, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*. Later, the Supreme Court established a "qualitative" test which required a "rule of reason" analysis. *Tampa Electric v. Nashville Coal Company, 365 U.S. at 329*. The rule of reason test requires a court to examine the percentage **[**20]** of the market foreclosed, the duration of the exclusive arrangement, the "notice of termination" period, and the competitive effect of the exclusive dealing contract in the relevant market. Mary Lou Steptoe and Donna L. Wilson, Developments in

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[8] CDC's per se claim under *§ 1* of the Sherman Act is unavailing. So long as vertical arrangements between manufacturers and distributors do not involve explicit price-fixing, they are to be judged under the rule of reason test. *Business Electronics Corp. v. Sharp Elec. Corp., 485 U.S. 717, 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. The Court notes that exclusive dealings arrangements have never been held to a per se violation of antitrust laws. See *Bravman v. Bassett Furniture Industries, Inc., 552 F.2d 90, 101 (3d Cir. 1977)*; see also, Wayne D. Collins, Tying and Exclusive Arrangements, 720 PLI/Corp. 153, *258 (1991).

Exclusive Dealing, 10-SUM Antitrust 25, *25 (1996); see also, *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 18, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*.

In this case, the dispute involves a contract between IDEXX and each of its distributors and its effect on competition in the in-clinic hematology market. Even though the contract is undisputably an exclusive dealing arrangement, **[**21]** it does not necessarily violate the Clayton Act. Of course, virtually all exclusive dealing arrangements foreclose a competitor from some portion of the market. See *Tampa Electric, 365 U.S. at 322*; see also, *Omega Environmental, Inc., 127 F.3d at 1162* (citations omitted). Nevertheless, there may be economic benefits to exclusive dealing arrangements, including the enhancement of competition. *Omega Environmental, Inc. v. Gilbarco, 127 F.3d 1157, 1162 (9th Cir. 1997)* (citations omitted). For an exclusive dealing contract to violate § 3 of the Clayton Act, the probable effect must be to foreclose competition in a substantial line of the germane market. *Tampa Electric, 365 U.S. at 327-328*; *Standard Oil v. United States, 337 U.S. 293, 299, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*; see also, *Jefferson Parish Hosp. Dist. No. 2, 466 U.S. at 45* (O'Connor, J., concurring) ("Exclusive dealings is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of the market by the exclusive deal"). Additionally, and most significantly here, where a restraint functions at the distributor level, "it is less clear that [the] restraint . . . will have a corresponding impact on the level of competition **[**22]** in the consumer market." *Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1235 (8th Cir. 1987)*.

In the present case, there is scant evidence that IDEXX's exclusive dealing contract at the distributor level impeded CDC's ability to reach the ultimate customers of its hematology analyzer. Initially, the Court notes that distributors have always had a limited role at CDC. Distributors have provided sales leads, but have not sold or conducted demonstrations of CDC's hematology analyzer. (Dougherty dep. v.1 at 218-19; Pereira dep. v.1 at 62, 115.) CDC has reached customers through its direct sales force and CDC has found direct sales to be more profitable than sales through distributors. (Pereira dep. v.1 at 60-1.) Moreover, CDC has relied on numerous other avenues to pursue sales including telemarketing, direct mail campaigns, customer lists, advertising, and participation in trade shows. (D. Carver dep. v.1 at 228; Dougherty dep. v.1 at 112-13, 170, 173-74, 186; Pereira dep. v.1 at 37, 147). Over the two years following IDEXX's entry into the in-clinic hematology market, CDC doubled its direct sales force, expanded its telemarketing and increased its budget **[*129]** for direct mail campaigns and **[**23]** advertising. (D.Carver dep. v.2 at 59-61, 70-72; Dougherty dep. v.1 at 111-12 .) Most significantly, CDC's sales increased during this period.

CDC argues that these alternate avenues to generate sales and sales leads have no bearing on whether IDEXX's exclusive dealing agreement foreclosed the distributor market. (Pl. Mem. at 26.) This Court disagrees. The issues faced by this Court are substantially similar to those faced by the Ninth Circuit in *Omega Environmental, Inc., 127 F.2d 1157*. In Omega Environmental, Inc., the Ninth Circuit reversed a $9,000,000 jury verdict, which the trial judge had trebled. The Omega court found alternative channels, such as direct sales, relevant to assessing market foreclosure at the distributor level. Id. (citations omitted). Likewise, in the present case, the numerous alternatives that CDC availed itself to in marketing its product substantially eliminated any foreclosure effect of IDEXX's exclusive dealing policy with distributors. Antitrust laws were not designed to equip CDC with IDEXX's "legitimate competitive advantage." See Id.

Additionally, as in Omega, alternate distributors existed to provide generation of sales leads. (Geisel dep. Exh. 2.) **[**24]** CDC had never had distributor coverage throughout the entire country. (D.Carver dep. v.2 at 30.) Moreover, for a period of time after IDEXX entered the market, CDC chose not to pursue relationships with available non-IDEXX national distributors. (Campbell dep. at 24; Caterino dep. v.1 at 43-46; Pereira dep. v.2 at 25-6; E.Carver dep. v.2 at 155-56.) When CDC again sought distributor relationships, it developed distributor coverage throughout much of the United States. (D.Carver dep. v.2 at 28-29.) By April, 1996, CDC had formed relationships with at least eight non-IDEXX distributors. (Caterino dep. at 47.) The Court finds, therefore, that CDC was able to develop alternate distributor relationships, adequate for its purposes, despite IDEXX's exclusive dealing agreements.

This Court further concludes that the one-year duration of the IDEXX distributor contract, with its 60 day terminability clause, is sufficiently brief to negate any likelihood of substantial competition foreclosure. See *Omega Environmental, Inc., 127 F.2d at 1163* (citations omitted). Significantly, in Omega, the contract at issue had a similar one year term and 60 day terminability clause. In light of the fact that **[**25]** IDEXX's distributors could be released from the IDEXX contract within 60 days, CDC "need only offer a better product or a better deal to acquire their services." *Omega Environmental, Inc., 127 F.2d at 1164* (citations omitted).

CDC claims that distributors would be reluctant to leave IDEXX because of IDEXX's contract with these same distributors to sell other veterinary products. However, there is no admissible evidence in the record which would support such a proposition. Additionally, a distributor's reluctance to establish ties to a reasonably small company rather than a company with a strong reputation in the veterinary products market is not surprising or anticompetitive. In fact, "[i]t is the essence of competition." Id. (citations omitted).

Significantly, since 1994, at least one additional supplier has introduced an in-clinic hematology instrument designed to analyze veterinary blood samples: ZynoCyte, Ltd. ("ZynoCyte") (Sanderson dep. at 14-16.) IDEXX's exclusive dealing arrangements have apparently not been a substantial barrier to ZynoCyte, which enjoys nationwide distribution of its product. (Id.)

CDC alternatively argues that IDEXX's 80% share of the in-clinic hematology market **[**26]** and foreclosure of 50% of the distributor market require this Court to find a genuine issue of material fact regarding foreclosure. While, at first glance, these percentages appear significant, they "'considerably overstate the size of the foreclosure and its likely anticompetitive effect.'" *Omega Environmental, Inc., 127 F.3d at 1162* (quoting *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 237 (1st Cir. 1983)*. In Omega Environmental, Inc., the defendant captured 55% of the total market and 24% of the distributor market. Additionally, the Court found that defendant's policy foreclosed approximately 38% of the relevant market for sales. Although IDEXX's percentages of the **[*130]** total market and the distributor market are higher than those in Omega, the analysis is the same. There is no evidence that IDEXX's distributor agreements have prevented CDC from marketing or selling its product to veterinarians. Moreover, by virtue of the relatively brief exclusive dealings contracts, with their 60 day terminability clause, CDC is not prevented from competing with IDEXX for distributors. IDEXX should not be penalized for developing a strong and successful reputation within veterinary products **[**27]** market. In any event, CDC's sales continued to increase significantly after IDEXX entered the market in 1994. (Def. SMF ¶¶ 81-84.)

The ultimate issue is whether an exclusive dealings contract "suppresses competition." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1304 (9th Cir. 1982)*. In this case, CDC sells its product through direct sales, markets its products through numerous non-distributor sources, uses non-IDEXX distributors, and can compete for IDEXX's existing distributors by offering them a superior deal. "Antitrust laws require no more." *Omega Environmental, Inc., 127 F.2d at 1163*. Even when considering the evidence in the light most favorable to CDC, this Court concludes that IDEXX's Motion for Summary Judgement must be granted with respect to CDC's exclusive dealing claims.

II. MONOPOLY CLAIMS

In light of the Court's analysis under § 3 of the Clayton Act, IDEXX's Motion for Summary Judgment must also be granted with respect to CDC's claims under *§ 2* of the Sherman Act. [9] When there is no genuine issue of material fact regarding market foreclosure under § 3 of the Clayton Act, a claim under *§ 2* of the Sherman Act fails. If a claim "does not fall **[**28]** within the broader proscription of § 3 of the Clayton Act it follows that" it will not violate *§ 2* of the Sherman Act. *Tampa Electric, 365 U.S. at 335*. For the same reasons, CDC's corresponding state claim fails. [10]

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[9] *Section 2* of the Sherman Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine to conspire with any other person or persons, to monopolize any part of trade of commerce ... shall be deemed guilty of a felony.

[10] The elements of *Conn. Gen. Stat. § 35-27* are substantially similar to the elements under *§ 2* of the Sherman Act. See *Westport Taxi Serv., Inc. v. Westport Transit Dist., 235 Conn. 1, 664 A.2d 719, 729 (Conn. 1995)*. Thus, the *§ 35-27* claim must fall with the failure of CDC's federal claim. Id.

Under *§ 2* of the Sherman Act, the offense of monopolization requires proof of two elements: (1) monopoly power in the relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a result of a superior product or business acumen. *Grinnell, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778*; *Delaware & Hudson Ry. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990)*.

CDC cannot show that IDEXX has monopoly power in the in-clinic **[**29]** hematology market. There is no direct evidence in the record that CDC has monopoly power. CDC's expert stated that he had not measured market power and that he did not think it "possible to quantitatively measure market power in this instance." (Geisel dep. v.2 at 414-416.) Significantly, CDC's expert admitted that IDEXX had not reduced output of its product. (Geisel dep. v.1 at 283.) Monopoly power is equated with a company's power over price or ability to raise prices by reducing output. See, e.g., *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989)* (citation omitted).

CDC maintains that this Court should infer monopoly power from IDEXX's 80% share of the in-clinic hematology market. However, there is no evidence that this market share resulted in monopoly power in the relevant market CDC has not shown and cannot show that IDEXX can maintain an 80% market share over a period of time. To show market power, a plaintiff must show not only that defendant had a significant share of the market, but also that this share can be sustained over a period of time. *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434-43 (9th Cir. 1995)*. As discussed previously, **[**30]** there are no barriers to entry in the in-clinic hematology market. This point is illustrated by ZynoCyte's entrance into the **[*131]** market and relationship with national distributors. [11] Additionally, CDC's own sales have significantly increased in that same market since IDEXX entered the market in 1994. Market power cannot be sustained unless there are barriers that would prevent new competitors from entering the market or existing competitors from expanding to offset any potential output reduction. Id. Thus, CDC's monopoly claim fails.

To prove the offense of attempted monopolization under *§ 2* of the Sherman Act, the plaintiff must show: (1) the intent to monopolize; (2) that defendant has engaged in predatory or anticompetitive conduct; and (3) a dangerous probability of obtaining monopoly power. *Delaware & Hudson Ry., 902 F.2d at 180*. For reasons noted above, this claim also fails. CDC cannot show that IDEXX has a dangerous probability of obtaining monopoly power.

Finally, the conspiracy count, **[**31]** under *§ 2* of the Sherman Act, also fails. A conspiracy to monopolize requires proof of: (1) concerted action; (2) overt acts in furtherance of the conspiracy; and (3) specific intent to monopolize. *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1062 (2d Cir. 1996)*. There is no evidence that any distributor intended for IDEXX to achieve a monopoly position. If one party's intent to monopolize is not shared by another party, there can be no conspiracy to monopolize. *Belfiore v. New York Times, Co., 826 F.2d 177, 183 (2d Cir. 1987)*. [12] Thus, all of CDC's claims under *§ 2* of the Sherman Act fail as a matter of law. [13]

III. STATE LAW CLAIMS

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[11] The Court notes that there is also a substantial possibility that companies who market products for analysis of human blood could readily market those or similar devices to the veterinary market.

[12] Similarly, CDC's other claims under *§ 2* of the Sherman Act fail. CDC's claim of "leveraging" (Count III) fails as CDC cannot prove any anticompetitive effect or monopoly power in the in-clinic hematology market. See *Viacom Intern. Inc. v. Time. Inc., 785 F.Supp 371, 378 (S.D.N.Y. 1992)*. Likewise, CDC's "essential facility" claim fails. Even assuming that the distributor market satisfied the definition of a "facility," CDC "must show that an alternate to this facility is not economically feasible." *Twin Laboratories v. Weider Health and Fitness, 900 F.2d 566, 568 (2d Cir. 1990)*(citations **[**32]** omitted) As previously noted, alternative channels are available and economically feasible for CDC. Moreover, CDC cannot show that "'denial of its use inflicts a severe handicap on potential market entrants.'" *Twin Laboratories v. Weider Health and Fitness, 900 F.2d 566, 568 (2d Cir. 1990)* (quoting *Hecht v. Pro-Football, Inc., 570 F.2d 982, 992, 187 U.S. App. D.C. 73 (D.C. Cir. 1977)*. Thus, there are no severe barriers to potential or current market participants.

[13] While certain IDEXX documents, which indicate a desire to "create barriers to entry" and to "KILL MASCOT," may raise a question as to the intent element of the monopoly claims, there is not sufficient evidence to raise a genuine issue of material fact regarding the other elements of those claims.

A. Civil Conspiracy

The elements of the tort of civil conspiracy include: "'(1) a combination of two or more persons, (2) to do a criminal or unlawful act or a lawful act by criminal or unlawful means, (3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object, (4) which act results in damage to the plaintiff.'" *Marshak v. Marshak, 226 Conn. 652, 665, 628 A.2d 964 (1993)* (quoting *Williams v. Maislen, 116 Conn. 433, 437, 165 A. 455 (1933))*. **[**33]** This count is based on the same allegations as are CDC's exclusive dealing claims. When a civil conspiracy claim fails to set forth a separate cause of action, it must be dismissed. *Marshak, 226 Conn. at 665-66 (1993)*. Moreover, as noted above, there is no evidence of a conspiracy. Thus, IDEXX is entitled to summary judgment on this claim.

B. Tortious Interference

A claim of tortious interference with business relations and business expectancies requires proof that IDEXX intentionally interfered with CDC's business expectancies and, in doing so, caused CDC's harm or actual loss. *Harry A. Finman & Son, Inc. v. Connecticut Truck & Tractor Serv. Co., 169 Conn. 407, 415, 363 A.2d 86 (1975)*. In this case, CDC cannot prove interference which caused harm or actual loss. CDC's sales continued to increase after IDEXX entered the market in 1994. In addition, many other **[*132]** avenues existed for CDC to directly sell its products, pursue alternate distributors, or compete for distributors currently under contract with IDEXX. Moreover, in the absence of a contract between CDC and its former distributors, [14] IDEXX cannot be liable "'for interfering with the rights of parties to a contract that is terminable at will.'" **[**34]** *Consolidated Marketing Corp. v. Carol Cable Co., Civ. No. H81-262 (JAC), 1985 U.S. Dist. LEXIS 13682, *5 (D.Conn. Nov. 20, 1985)* (Cabranes, D.J.) (citing *Restatement (Second) of Torts § 768, comment i*). [15]

C. CUTPA

Finally, CDC alleges that IDEXX engaged in unfair methods of competition and unfair acts or practices in violation of *Conn. Gen Stat. §42-110a et seq*. ("CUTPA"). The allegations are based entirely on facts previously discussed **[**35]** under CDC's antitrust claims. Claims of unfair trade practices fail if no underlying antitrust violation is found. *Ben Elfman & Son, Inc. v. Criterion Mills, Inc., 774 F.Supp. 683, 687 (D.Mass. 1991)*; *J.H. Westerbeke Corp. v. Onona Corp., 580 F.Supp. 1173, 1192 (D.Mass. 1984)*. While the Connecticut Supreme Court has not yet ruled on this issue, this Court finds the rulings of the Massachusetts district court persuasive on this issue. [16] Thus, CDC's claims under CUTPA must fall.

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[14] CDC does not allege and there is no evidence in the record that an actual contract existed between IDEXX and its distributors, but only a "relationship." (Compl ¶¶ 20-25.)

[15] The *Restatement (Second) of Torts § 768* states:

> (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if
>
> > (a) the relation concerns a matter involved in the competition between the actor and the other and
> >
> > (b) the actor does not employ wrongful means and
> >
> > (c) his action does not create or continue an unlawful restraint of trade and
> >
> > (d) his purpose is at least in part to advance his interest in competing with the other.

[16] Connecticut courts look to Massachusetts courts to interpret CUTPA claims because Massachusset's unfair trade practices act is virtually identical to CUTPA. See, e.g., *Normand Josef Enterprises v. Connecticut National Bank, 230 Conn. 486, 646 A.2d 1289, 1306 (Conn. 1994)* (where the Connecticut Supreme Court noted that Connecticut has "repeatedly looked to the reasoning and decisions of the Supreme Judicial Court of Massachusetts with regard to the scope of CUTPA") (citations and quotations omitted).

CONCLUSION

For reasons set forth, defendant's Motion for Summary Judgment (Doc. # 48) is hereby: GRANTED. Any objections to this recommended ruling must be filed with the Clerk of the Court within ten (10) days of the receipt of **[**36]** this order. Failure to object within ten (10) days may preclude appellate review. See *28 U.S.C. § 636(b)(1)*; *Rules 72*, *6(a)* and *6(e) of the Federal Rules of Civil Procedure*; *Rule 2 of the Local Rules* for United States Magistrates; *Small v. Secretary of H.H.S., 892 F.2d 15 (2d Cir. 1989)*(per curiam); *FDIC v. Hillcrest Assocs., 66 F.3d 566, 569 (2d Cir. 1995)*. So Ordered this 2nd day of March, 1998 at Bridgeport, Connecticut.

/s/ William I. Garfinkel

William I. Garfinkel

United States Magistrate Judge

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Concord Boat Corp. v. Brunswick Corp.

United States District Court for the Eastern District of Arkansas, Western Division

March 6, 1998, Decided ; March 9, 1998, Filed, Entered on Docket

NO. LR-C-95-781

Reporter
1998 U.S. Dist. LEXIS 14570 *

CONCORD BOAT CORPORATION, et al, PLAINTIFFS v. BRUNSWICK CORPORATION, a Delaware corporation, DEFENDANT

Subsequent History: Summary judgment denied by, Partial summary judgment denied by *Concord Boat Corp. v. Brunswick Corp., 1998 U.S. Dist. LEXIS 14571 (E.D. Ark., Mar. 20, 1998)*

Prior History: *Concord Boat Corp. v. Brunswick Corp., 1998 U.S. Dist. LEXIS 23663 (E.D. Ark., Mar. 2, 1998)*

Disposition: **[*1]** Brunswick's motion for summary judgment on Plaintiffs' claims of attempted monopolization of the outboard and stern drive boat markets GRANTED IN PART and DENIED IN PART.

Core Terms

boat, market share, monopolization, outboard, submarkets, drive, stern, summary judgment, Marine, probability, monopoly power, estimate, engines, genuine, markets, records, relevant market, statistics, retail, business record, market power, manufacture, customers, probability of success, material fact, anticompetitive, integrated, nonmovant, bulbs, sales

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Attempts to Monopolize, Elements**

In order to maintain an attempted monopolization claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, plaintiffs must prove: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Summary Judgment, Opposing Materials**

Summary judgment is appropriate when the court finds that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The party opposing summary judgment may not rest on its pleadings but must present significant probative evidence demonstrating that a genuine dispute of material fact exists and that the moving party is not entitled to judgment as a matter of law. The court must view these materials in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor. The moving party bears the initial burden of informing the court of the basis for the motion and of identifying those parts of the record which demonstrate absence of a genuine issue of material fact. Once the moving party has met its burden, the nonmovant may not rely on conclusory allegations or mere conjecture, but rather must offer specific facts to support a verdict in its favor. As to any claim, or essential element thereof, for which the nonmoving party bears the burden of proof at trial, the nonmoving party must make a showing sufficient to establish the existence of that claim or element.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN3[] **Supporting Materials, Affidavits**

Business records are properly considered in connection with a *Fed. R. Civ. P. 56* affidavit.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN4[] **Regulated Practices, Market Definition**

The same proof which proves the existence of a relevant product market also shows the existence of a product submarket. In the absence of market data or similar hard evidence, courts are incapable of determining the extent of cross-elasticity of demand in the market.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

In ***antitrust law***, as a rule of thumb, market shares under 30 percent should be presumptively rejected.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[ ] **Monopolies & Monopolization, Actual Monopolization**

Whether a company is sufficiently poised to achieve monopoly power is defined as the power to raise prices or to exclude competition. In making the "dangerous probability" determination, courts primarily focus on market share as a measure of market power. Other factors relevant to determining dangerous probability include the strength and capacity of existing and potential competition, barriers to entry, the concentration of the market, the nature of the defendant's conduct, and the elasticity of consumer demand.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN7[ ] **Monopolies & Monopolization, Actual Monopolization**

If a genuine issue exists as to whether defendant succeeded in monopolizing the relevant market, it follows that there is at least a genuine issue as to whether plaintiff can prove a dangerous probability of success in monopolizing the market.

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For ALBEMARLE BOATS, INCORPORATED, counter-defendant: K. Craig Wildfang, Winthrop & Weinstine, P.A., Minneapolis, MN.

Judges: James M. Moody, United States District Judge.

Opinion by: James M. Moody

Opinion

ORDER

Currently before the Court is Defendant's motion for summary judgment on Plaintiffs' claims of attempted monopolization of the stern drive and outboard boat markets. [1]

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[1] On October 21, 1997, Plaintiffs filed a response to the motion arguing, *inter alia*, that a ruling on the motion should be deferred until discovery was complete. The Court granted Plaintiffs' request on November 19, 1997, and deferred a ruling on the motion until the close of factual discovery. On January 13, 1998, Plaintiffs filed a supplemental response, and on January 21, 1998 Defendant filed a reply memorandum. Defendant supplemented the record on February 2, 1998 to reflect proof obtained during expert depositions. The motion was argued orally on February 13, 1998. Plaintiffs were allowed to supplement the record on March 2, 1998 and March 5, 1998.

[*2] I. Background

Defendant Brunswick Corporation ("Brunswick") is a large, vertically integrated corporation which conducts business in several segments of the marine industry. Through its Mercury Marine Division, Brunswick manufactures marine engines which are distributed to a network of dealers, to independent boat manufacturers, and to Brunswick's sister boat building divisions, U.S. Marine and Sea Ray. Brunswick acquired U.S. Marine and Sea Ray in 1986.

Plaintiffs are a group of twenty-four independent boat builders and a large marine buying cooperative, Independent Boat Builders Incorporated ("IBBI"). All of the Plaintiffs are customers of Mercury Marine to the extent that they purchase a percentage of their engine needs directly from Mercury Marine or, alternatively, through IBBI. Plaintiffs are direct competitors of Sea Ray and U.S. Marine in the manufacture of boats.

Plaintiffs brought suit against Brunswick on December 7, 1995, alleging violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, and *Section 7* of the Clayton Act, *15 U.S.C. § 18*, along with various state law claims. Count Three of Plaintiffs' Fourth Amended Complaint ("Complaint") alleges **[*3]** an unlawful attempt to monopolize the relevant stern drive boat market. Count Five of the Complaint alleges an unlawful attempt to monopolize the relevant outboard boat market. Brunswick moves for summary judgment on these two claims.

HN1[] In order to maintain an attempted monopolization claim under *Section 2*, Plaintiffs must prove: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*; *Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1490 (8th Cir. 1992)*. Brunswick's motion focuses solely on element (3) above: whether there is a dangerous probability of achieving monopoly power. For the purposes of the motion Brunswick concedes that the relevant markets are those as stated in the Complaint. [2] Brunswick contends that it possesses such a low market share in the two relevant markets that there is no dangerous probability that it will achieve monopoly power.

[*4] In support of its motion, Brunswick submits the affidavit of Anthony J. Romersa, Brunswick's Director of Planning, Marine Operations. Romersa states that in 1996, Brunswick's share of the stern drive boat market was 37.1%, and that Brunswick's share of the outboard boat market was 12.6%. See, Romersa Affidavit at P 6 and Ex. C and D. Romersa's calculations were determined by comparing the worldwide sales of Brunswick boats at retail (the numerator) with the National Marine Manufacturing Association's ("NMMA") estimate of boats sold at retail by United States dealers (the denominator). Id. at P 6 and Ex. C. [3] Romersa states that his estimate of the number of

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[2] Brunswick has opposed Plaintiffs' definitions of the relevant markets throughout this case. The Complaint defines the relevant stern drive boat market as "the market for recreational power boats, except luxury motor yachts, which are packaged with a stern drive or inboard marine engine and sold in the relevant geographic market." See Complaint at P 37. The Complaint defines the outboard marine boat market as:

> The market for recreational power boats and fishing boats which are packaged with an outboard engine, or prerigged to take a particular brand of engine, and sold in the relevant geographic market. The outboard boat market consists of two segments or sub-markets, a freshwater segment and a saltwater segment.

See Complaint at P 39. These markets are to be distinguished from the separate markets for outboard and stern drive engines sold apart from a boat or "loose." Plaintiffs have brought actual monopolization claims with respect to those alleged product markets.

[3] It is undisputed that the geographic market in this case is the United States and Canada. Because of the nature of the available data, the estimates given by Romersa are slightly skewed. First, the estimate of Brunswick's retail sales is an estimate of worldwide sales. Thus, the numerator in the equation would be smaller if it were possible to determine Brunswick's retail sales solely in the United States and Canada. Second, the NMMA estimates only reflect sales by United States dealers. Thus, if it were possible to include sales by Canadian dealers, the denominator in the equation would be larger. In sum, according to

Brunswick boats sold at retail in a given year is based on the number of warranty cards that are returned to Brunswick after retail purchases of Brunswick boats, and on a monthly polling of dealers regarding the number of boats in their inventory. Id. at P 7.A. The number of warranty card returns is "grossed up" by a factor which represents an estimate of the percentage of boats sold for which warranty cards are not returned. Id. Romersa notes that Brunswick sold its fishing boat lines in 1996. He states that following **[*5]** the sale of those lines, Brunswick's share of the stern drive boat market is 35.7% and its share of the outboard boat market is less than 5%. Id. at P 7.D.

Plaintiffs' response and supplemental response level a number of attacks at Brunswick's motion. First, **[*6]** Plaintiffs argue that the Romersa Affidavit does not comport with *Rule 56(e)* because portions of the affidavit are not based on the personal knowledge of the affiant. Plaintiffs state that Romersa has no personal knowledge regarding the practices of the NMMA in compiling and computing the statistics which form the bases for his calculations of Brunswick's market shares. Second, Plaintiffs argue that the possible existence of submarkets should preclude summary judgment. And finally, Plaintiffs argue that this case is not one where the Court can focus solely on market share to determine a dangerous probability of success. Plaintiffs point to a variety of alleged anticompetitive conduct by Brunswick and argue that the alleged conduct, when factored in with Brunswick's market share, create sufficient questions of fact for the jury as to whether Brunswick has a dangerous probability of achieving monopoly power.

II. Discussion

A. Summary Judgment Standard

HN2[] Summary judgment is appropriate when the Court finds that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. **[*7]** Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)*. The party opposing summary judgment may not rest on its pleadings but must present "significant probative evidence" demonstrating that a genuine dispute of material fact exists, and that the moving party is not entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. The Court must view these materials in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor. *Id. at 255, 106 S. Ct. at 2513*. The moving party bears the initial burden of informing the court of the basis for the motion and of identifying those parts of the record which demonstrate absence of a genuine issue of material fact. *Celotex, 477 U.S. at 323, 106 S. Ct. at 2552-53*. Once the moving party has met its burden, the nonmovant may not rely on conclusory allegations or mere conjecture, but rather must offer specific facts to support a verdict in its favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-87, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538 (1986)*(construing *Fed. **[*8]** R. Civ. P. 56(e)*). As to any claim, or essential element thereof, for which the nonmoving party bears the burden of proof at trial, the nonmoving party must make a showing sufficient to establish the existence of that claim or element.

B. The Romersa Affidavit

Plaintiffs contend that the Romersa Affidavit is insufficient under *Rule 56(e)* as a matter of law because he does not have personal knowledge of the practices of the NMMA in compiling and computing the market statistics which form the basis for his calculations of Brunswick's market share. In response, Brunswick argues that Romersa is not required to have personal knowledge of the information because the records are business records of the NMMA and as such they are properly considered as part of the affidavit. Brunswick has submitted an affidavit from Charles Janini of the NMMA describing the process the NMMA uses to produce the documents at issue. During oral

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Romersa these estimates are the most accurate available, but the actual market shares would be smaller. See, Romersa Aff. at P 7.B.

argument, Plaintiffs seemed to concede that the NMMA records were admissible as business records, but stressed that the application of the business record exception should be applied even-handedly. [4]

[*9] The Court has doubts as to whether the Romersa Affidavit was ever deficient. ***HN3***[] Business records are properly considered in connection with a *Rule 56* affidavit. Romersa stated in his affidavit that Brunswick relies on the NMMA records in evaluating its performance in the marine industry. Thus, Romersa's reliance on the documents in the affidavit was proper. See, *United States v. Jakobetz, 955 F.2d 786, 801 (2nd Cir. 1992)*("Rule 803(6) allows business records to be admitted 'if witnesses testify that the records are integrated into a company's records and relied upon in its day to day operations'"); *United States v. Childs, 5 F.3d 1328, 1333 (9th Cir. 1993)*("Exhibits can be admitted as business records of an entity, even when that entity was not the maker of those records, so long as the other requirements of Rule 803(6) are met and the circumstances indicate the records are trustworthy.")

Even if the Romersa affidavit was insufficient to establish the foundation for the business records exception, the submission of the Janini affidavit has resolved any remaining issues. The Janini affidavit establishes that the NMMA records considered by Romersa are in fact business records **[*10]** under Rule 803(6). They would be admissible at trial, and Romersa's reliance on the records in connection with his affidavit was proper. Thus, the Court finds that the Romersa Affidavit is sufficient to meet the requirements of *Fed. R. Civ. P. 56(e)*.

Plaintiffs have questioned the reliability of the NMMA statistics based on conversations with Charles Janini. See, Letter from K. Craig Wildfang to Court dated March 5, 1998. Specifically, Janini disclosed that the NMMA's retail sales estimates are derived by estimating changes in the sales of a "control group" of boat builders that report wholesale shipments to the NMMA. Only a percentage of boat builders actually belong to the NMMA and report their wholesale sales. Plaintiffs argue that the NMMA statistics are more realistically an estimate of wholesale shipments derived from a very small sample of the marine industry rather than "Annual Retail Sales Estimates" as indicated by the title of Exhibit "B" to the Janini Affidavit. [5]

[*11] The Court has always recognized that the NMMA statistics are estimates only and do not represent the exact number of new outboard and sterndrive boats sold annually at retail. Because they are estimates, the Court also accepts that some margin of error should be considered in applying these figures to any analysis of market power for the purposes of the motion. The Court has taken this margin of error into account in assessing Brunswick's market power in the outboard and stern drive boat markets. As will be demonstrated below, the presence of this margin of error was not sufficient to change the Court's conclusions with respect to either market.

C. The Submarket Issue

For the purposes of this motion, Brunswick has conceded that the relevant markets are those defined in the Fourth Amended Complaint. Plaintiffs seek to avoid summary judgment by arguing that possible submarkets exist. This argument is rejected.

First, it should be noted that Plaintiffs' complaint is completely devoid of claims based upon alleged submarkets. The complaint does purport in one paragraph to define submarkets for the outboard boat market consisting of a "freshwater segment" and a "saltwater segment." **[*12]** See, Complaint at P 39. However, the remainder of the Complaint, which sets forth the operative language of Plaintiffs' claims, contains no reference whatsoever to any submarkets. See, Complaint at PP 82-86, 96-102. The claims themselves are brought on behalf of either "the stern

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[4] Plaintiffs' concern here (and willingness to concede that the NMMA records are business records) apparently stems from an ongoing dispute with Brunswick regarding other alleged business records, wherein Brunswick has refused to stipulate that certain documents are admissible as business records. The Court will in fact apply the law on Rule 803(6) even-handedly; however, each instance will have to be evaluated on its own merits.

[5] Although Plaintiffs challenge the reliability of the NMMA statistics, they have offered no statistics reflecting market shares that are more reliable or that dispute the NMMA estimates.

drive plaintiffs" or "the outboard plaintiffs" rather than any subset of Plaintiffs that manufacture a particular type of boat (which one would expect in the case of a submarket). In addition, other filings by Plaintiffs further demonstrate that the attempt claims were directed only at the broader markets consisting of the stern drive boat market and the outboard boat market. See, Preliminary Report of Dr. Robert E. Hall at 14 ("In my opinion, there are related product markets for the boats: the market for boats installed with stern drive or inboard engines and the market for boats installed with, or pre-rigged for, outboard engines."); see also, Plaintiffs' Second Supp. Resp. to Def.'s Damage Interrogatories dated Nov. 10, 1997 (omitting any reference to submarkets or damages arising from the attempted monopolization of submarkets.)

It is difficult for the Court to view Plaintiffs' submarket **[*13]** argument as anything but an eleventh hour tactic invoked solely to avoid summary judgment. The deadline for amending pleadings is long past, and expert discovery (at least as to economic experts) is complete. Final expert reports, which are preclusive in nature, have been submitted. Plaintiffs' expert has submitted no opinions or analyses regarding submarkets, and his reports and deposition testimony comport with the broader definition of the relevant boat markets as alleged in the Complaint.

Most importantly, however, Plaintiffs make no attempt to state which categories they believe are the appropriate submarkets even though the parties have conducted exhaustive discovery for over two years. An examination of Plaintiffs' pleadings demonstrates that they do not know what the appropriate submarkets would be at this time. [6] The trial of this matter is set to start in a little over a month, and it would be inappropriate to allow Plaintiffs to proceed on such a vague and disjointed submarket theory.

[*14] Plaintiffs have also submitted insufficient evidence to raise genuine issues regarding the existence of submarkets. Plaintiffs' supplemental and second supplemental memoranda purport to show that these submarkets may exist by merely demonstrating that Brunswick and the NMMA classify boats into certain categories and that Brunswick is capable of computing its market share in some discrete categories. Plaintiffs submit various exhibits that identify the categories in which boats can be classified, and also submit the testimony of several Brunswick representatives wherein they acknowledge the usefulness of categorizing certain types of boats.

The Eighth Circuit has noted that ***HN4***[] "the same proof which proves the existence of a relevant product market also shows . . . the existence of a product submarket." *H.J. Inc. v. International Telephone and Telegraph, 867 F.2d 1531 (8th Cir. 1989)*. In H.J. the Court went on to state that in the absence of market data or similar hard evidence Courts are incapable of determining the extent of cross-elasticity of demand in the market. Id. Although Plaintiffs have had ample opportunity to produce concrete evidence of cross-elasticity **[*15]** in support of a submarket definition, the only evidence they have produced is conjectural at best, and is certainly not the type a Court would consider conclusive in identifying a relevant market or submarket. Furthermore, because of the preclusive nature of the expert reports, Plaintiffs' expert will not have the opportunity to add opinions or analyses which might salvage Plaintiffs' arguments here.

The Court finds that Brunswick is entitled to move for summary judgment on the product markets as defined in the Complaint. Accordingly, the Court will proceed to address Brunswick's motion as it applies to the separate markets alleged in the Complaint for outboard and stern drive boats.

D. The Outboard Boat Market

In order to prevail on an attempted monopolization under *Section 2*, Plaintiffs must prove: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous

[6] Plaintiffs argue that the following might be appropriate submarkets in this case: fiberglass boats, aluminum boats, bass boats, open express fish boats, utility boats, open deck boats (with or without pontoons), express cruisers, runabouts, performance I/O, stern drive cruisers, entry boats, mid-level boats, premium boats, entry cruiser stern drive boats, entry runabout outboards, mid-level yachts, cruiser fiberglass boats, fiberglass outboard runabouts, fiberglass stern drive runabouts, fiberglass stern drive cruisers, and fiberglass center console outboard boats. The foregoing is only a partial list of the categories raised in Plaintiffs' pleadings.

probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*; *Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483 (8th Cir. 1992)*. Brunswick argues that it possesses **[*16]** an insufficient market share in the outboard boat market to meet the dangerous probability of success requirement.

The Romersa affidavit lists Brunswick's market share in the outboard boat market for the years 1987 to 1996 inclusive. In 1987 Brunswick held a 6.9% share of the outboard boat market. Brunswick's market share reached as high as 16.3% in 1989, but has steadily declined since then, reaching 12.6% in 1996. In 1996, Brunswick sold its fishing boat lines. The Romersa Affidavit states that following that sale, Brunswick's share of the outboard boat market dropped to less than 5.0%.

Brunswick's market share of the outboard boat market is now less that 5%, and with the exception of a few anomalies, has been declining since 1989. Under no construction of the law of attempted monopolization could Plaintiffs ever prevail on this claim. [7] Two leading commentators on ***HN5***[] ***antitrust law*** propose that as a rule of thumb, market shares under 30% should be presumptively rejected. See, IIIA Areeda & Hovenkamp, ***Antitrust Law*** P 807 (1996). The case law has generally embraced this concept as well. See, e.g., *M & M Medical Supplies and Service, Inc. v. Pleasant Valley Hosp., Inc.,* ***[*17]*** *981 F.2d 160 (4th Cir. 1992)*; *Acme Markets, Inc. v. Wharton Hardware and Supply Corp., 890 F. Supp. 1230 (D. N.J. 1995)*; ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments, p.299 n.399 (4th ed. 1997)(collecting cases).

Brunswick's low market share of the outboard boat market is conclusive as to this claim. The Court finds that there are no genuine issues of material fact on this issue. There is no dangerous probability that Brunswick will succeed in monopolizing the outboard boat market, and Brunswick's motion for summary judgment as to Count Five of the Complaint will be granted.

E. The Stern Drive Boat Market

Brunswick argues that its market share of the stern drive boat market is also too low to demonstrate a dangerous probability of success. The Romersa Affidavit states **[*18]** that in 1987, Brunswick's market share was 29.1%. The market share peaked in 1991 at 36.5%, and then declined slightly for three years. The share rose slightly in 1995 and 1996 to an all time high of 37.1%. Following the sale of the fishing boat lines, Brunswick's market share of the stern drive boat market is approximately 35.7%.

As Plaintiffs correctly point out, a claim for attempted monopolization is focused on the future. The ultimate issue is ***HN6***[] whether Brunswick is sufficiently poised to achieve monopoly power, which is defined as the power to raise prices or to exclude competition. *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)*; *National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020 (8th Cir. 1985)*. In making the "dangerous probability" determination, courts primarily focus on market share as a measure of market power. Other factors relevant to determining dangerous probability include the strength and capacity of existing and potential competition, barriers to entry, the concentration of the market, the nature of the defendant's conduct, and the elasticity of consumer demand.

The Seventh Circuit has noted that **[*19]** "market share is at best an indicator of market power." *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413 (7th Cir. 1989)*. While recognizing the relevance of market share statistics, Plaintiffs caution the Court to be "particularly wary of the numbers game." See, Plf.'s Mem. at 1-2 (citing, *Cliff Food Stores v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969)*.

This case is indeed one where the "numbers game" is not outcome determinative. Plaintiffs argue that the Court should consider the conduct of Brunswick to assess whether there is a dangerous probability of success. Plaintiffs

[7] Even making liberal allowances for inaccuracies in the NMMA statistics as to the number of boats sold, Brunswick's market share is still so far removed from a permissible threshold that the outcome remains the same.

focus on the fact that Brunswick possesses alleged monopoly power in the stern drive engine market. According to Plaintiffs, "control over marine engines translates into control over boats." See Plf. 's Supp. Mem. at 6. Plaintiffs argue that this alleged control over engines must be considered.

The Court has found two cases which uniquely support Plaintiffs' proposition that Brunswick's alleged control over marine engines should be a factor considered in conjunction with the dangerous probability requirement. In *Zschaler v. Claneil Enterprises, Inc., 958 F. Supp. 929 (D.* ***[*20]*** *Ver. 1997)*, the plaintiffs alleged that the defendants had monopolized and attempted to monopolize the markets for rental and property management services at a resort ski area. *Id. at 941*. The defendants were in a unique position in that they owned and controlled the ski area's long-standing telephone reservation system, and the plaintiffs alleged that the defendants were abusing this control by steering customers to defendants' own rental units. *Id. at 935*. Although the plaintiffs conceded that the defendant controlled only 35% of the rental market and 35% of the property management market, the court found:

> Plaintiffs have shown a genuine factual dispute as to the steering of Central Reservations callers . . . . Defendants' market share, when combined with their control of Central Reservations and alleged customer steering, does demonstrate a factual dispute as to the existence of a dangerous probability that Defendants would achieve monopoly control.

Id. at 942-943 (emphasis added). Thus, the court implicitly recognized that defendant had the potential to increase its market power due to its outright control of a crucial market resource, the Central **[*21]** Reservation system. The rationale of Claneil is applicable to the instant case.

Similarly, in *Energex Lighting Industries, Inc. v. North American Philips Lighting Co., 1990 U.S. Dist. LEXIS 7181, 1990-1 Trade Cas. (CCH) P69,057 (S.D.N.Y. 1990)*, the court was faced with a motion for summary judgment on a monopolization and attempted monopolization claim wherein the defendant, Phillips, possessed 25% of the relevant market for long life flourescent light bulbs. Phillips was Energex's sole source for flourescent bulbs. Phillips distributed bulbs to Energex but also sold directly to its own customers. In a separate opinion, found at *765 F. Supp. 93*, the court described the relationship as follows:

> Energex was a competitor of Philips but at the same time depended upon Philips to supply it with fluorescent bulbs. In the same vein, Phillips was a competitor of Energex but Energex was a very large customer of [Phillips]. . . . Due to these circumstances, Philips was in a position in which it could "squeeze" Energex by selling Energex fluorescent bulbs for resale at one price and selling the same product directly to companies that were customers of Energex at the same or lower prices.

Energex ***[*22]*** *v. North American Philips Lighting Co., 765 F. Supp. 93 (S.D.N.Y. 1991)*. In denying the motion for summary judgment on the monopolization claim, the court noted the significance of the vertically integrated relationship:

> Defendants do not dispute that they had 25% of the [market] when the alleged anti-competitive practice occurred. As a vertically integrated company, defendants were also in a unique position to exert further market power on Energex. . . . Although [Defendants' later market share increase] by itself does not prove monopoly power, When added to defendants' power as an integrated company, its potential ability to squeeze Energex, and the alleged predatory pricing practice, it can hardly be said, as defendants contend, that they lacked monopoly power as a matter of law.

Energex, 1990 U.S. Dist. LEXIS 7181, 1990-1 Trade Cas. (CCH) P69,057 (emphasis added). The Court went on to note that "***HN7***[] if a genuine issue exists as to whether defendant succeeded in monopolizing the relevant market, it follows that there is at least a genuine issue as to whether plaintiff can prove a dangerous probability of success in monopolizing the market." Id. As stated above, the Court made **[*23]** this finding in spite of the fact that Phillips only held a 25% share of the relevant market at the time of the alleged anticompetitive conduct.

The Court recognizes that the above cases are not factually identical to the present case, but both courts' consideration of other market "control" factors seems intuitive. Brunswick is in a unique position with respect to the stern drive boat market. If Brunswick does in fact have monopoly power in the stern drive engine market, it logically follows that Brunswick has some degree of control over the price at which independent boat manufacturers can bring their products to the marketplace. In the opinion of the Court, this substantially lessens the significance of Brunswick's market share statistics as an indicator of Brunswick's dangerous probability of attaining monopoly power.

The Court finds that Brunswick's market share of the stern drive boat market is not conclusive, and genuine issues of material fact exist as to whether there is a dangerous probability that Brunswick will succeed in monopolizing the stern drive boat market. Accordingly, summary judgment is not warranted, and Brunswick's motion will be denied with respect to Count **[*24]** Three of the Complaint.

III. Conclusion

In accordance with the above, Brunswick's motion for summary judgment on Plaintiffs' claims of attempted monopolization of the outboard and stern drive boat markets is GRANTED IN PART and DENIED IN PART. Summary judgment is hereby GRANTED with respect to Plaintiffs' Fifth Claim for Relief. Summary judgment is hereby DENIED with respect to Plaintiffs' Third Claim for Relief.

IT IS SO ORDERED this 6 day of March, 1998.

James M. Moody

United States District Judge

International Techs. Consultants v. Pilkington PLC

United States Court of Appeals for the Ninth Circuit

February 16, 1996, Argued, Submitted, San Francisco, California ; March 6, 1998, Filed

No. 94-17143

Reporter
137 F.3d 1382 *; 1998 U.S. App. LEXIS 3874 **; 1998-1 Trade Cas. (CCH) P72,073; 98 Cal. Daily Op. Service 1602; 98 Daily Journal DAR 2255

INTERNATIONAL TECHNOLOGIES CONSULTANTS, INC., Plaintiff-Appellant, v. PILKINGTON PLC, Defendant, and GUARDIAN INDUSTRIES CORPORATION, Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the District of Arizona. D.C. No. CV-93-00552-WDB. William D. Browning, District Judge, Presiding.

Disposition: Affirmed in part and reversed in part.

Core Terms

consent decree, patents, duress, glass, float, covenant, lawsuit, pleaded, trade secret, state court, antitrust, technology, invention, monopoly, expired, anti trust law, plate glass, manufacturing, plant, tin, district court, parties, decree, confidential, licensees, temporary restraining order, consultant, financing, voidable, alleges

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN1[] **Private Actions, Remedies**

A consent decree in a private action imposes no more on the party to be bound than that party agreed to. The instrument must be construed as it is written and not as it might have been written had the party seeking enforcement established his factual claims and legal theories in litigation.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN2[] **US Department of Justice Actions, Civil Actions**

Where the complaint alleges new antitrust conduct subsequent to the last date alleged in the prior adjudication, the subsequent claim is not barred by res judicata or collateral estoppel. It is elementary that new antitrust violations may be alleged after the date covered by decision or settlement of antitrust claims covering an earlier period. It cannot be emphasized too strongly that the continuation of conduct under attack in a prior antitrust suit is generally held to give rise to a new cause of action.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

Trade Secrets Law > Civil Actions > General Overview

HN3[] **Bad Faith, Fraud & Nonuse, Bad Faith**

As a matter of ***antitrust law***, the use of baseless litigation to drive out competition can amount to an antitrust violation.

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

HN4[] **Affirmative Defenses, Coercion & Duress**

Duress by threat makes a contract voidable if a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative; the contract is voidable by the victim.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

HN5[] **Settlements, Consent Judgments**

A party claiming duress must show that it was illegally compelled or coerced to act by fear of serious injury to its person, reputation, or fortune.

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

HN6[] **Affirmative Defenses, Coercion & Duress**

Once the duress that forced a party to agree to a contract has ceased to exist, the victim of duress must tell the other party that it regards the contract as void or else lose the voidability created by the duress. The power of a party of avoid a contract for duress is lost if, after the circumstances that made it voidable have ceased to exist, he does not within a reasonable time manifest to the other party his intention to avoid it.

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

HN7[] **Congressional Duties & Powers, Copyright & Patent Clause**

See *U.S. Const. art. I § 8*.

Patent Law > Ownership > Patents as Property

HN8[] **Ownership, Patents as Property**

The owner of the patent is given a limited monopoly. The justification is that the public is best served by giving inventors monopolies on commercial exploitation of their innovations for enough time to furnish an incentive to do the work and spend the money creating them. The monopoly is conditioned on public disclosure of the details of their inventions, so that others can use or improve upon them after the limited times for which the United States Constitution allows patents.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Stimulation of Commerce

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Constitutional Law > Congressional Duties & Powers > General Overview

Patent Law > Ownership > General Overview

Patent Law > Ownership > Patents as Property

Patent Law > ... > Damages > Collateral Assessments > Costs

HN9[] **Interstate Commerce, Stimulation of Commerce**

The stated objective of the United States Constitution in granting the power to Congress to legislate in the area of intellectual property is to promote the progress of science and useful arts. The patent laws promote this progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy and the emanations by way of increased employment and better lives of United States' citizens. In return for the right of exclusion, this reward for inventions, the patent laws impose upon the inventor a requirement of disclosure.

Patent Law > Ownership > Patents as Property

HN10[] **Ownership, Patents as Property**

To ensure adequate and full disclosure so that upon the expiration of the 17 year period the knowledge of the invention inures to the people, who are thus enabled without restriction to practice it and profit by its use, the patent laws require that the patent application shall include a full and clear description of the invention and of the manner and process of making and using it so that any person skilled in the art may make and use the invention.

Patent Law > Ownership > Patents as Property

HN11[] **Ownership, Patents as Property**

The concept of theft does not apply to useful inventions after their patent protection expires.

Counsel: Steven M. Edwards, Davis, Scott, Weber & Edwards, P.C., New York, New York, for the plaintiff-appellant.

Elliot S. Kaplan, Robins, Kaplan, Miller & Ciresi, Minneapolis, Minnesota, for the defendant-appellee.

Judges: Before: Joseph T. Sneed, Harry Pregerson and Andrew J. Kleinfeld, Circuit Judges. Opinion by Judge Kleinfeld.

Opinion by: ANDREW J. KLEINFELD

Opinion

[*1384] OPINION

KLEINFELD, Circuit Judge:

International Technologies has been engaged for some time in attempts to participate in the plate glass industry, dominated by Pilkington and its licensees, including Guardian. An earlier pair of lawsuits between International Technologies and Guardian resulted in a consent decree. The issue before us is whether the consent decree barred this new lawsuit.

FACTS

The district court granted judgment on the pleadings, so no evidence has been presented and no findings have been made. We do not know whether the facts set out below are true. They are a summary of what the unsuccessful plaintiff pleaded. **[**2]** The appellate task in reviewing dismissal under *Federal Rule of Civil Procedure 12(c)* is to determine whether, if the facts were as pleaded, they would entitle the plaintiff to a remedy. See *Merchants Home Delivery Serv., Inc. v. Hall & Co., 50 F.3d 1486, 1488 (9th Cir. 1995)*.

International Technologies Consultants ("ITC") has been trying for years to get into the engineering and consulting end of the plate glass business. It has been thwarted by Pilkington and its licensees. ITC claims that the means by which Pilkington and its licensees have thwarted its participation in the industry amount to antitrust violations under the Sherman Act, sections 1 and 2, and also constitute various common law torts.

Glass is made by melting sand, limestone, and other minerals such as dolomite. Until a few decades ago, good plate glass that would allow a clear view without bubbles or ripples was made by drawing glass from a furnace in strips, rolling it to the desired thickness, grinding it flat, and polishing it on both sides. The modern "float" technique is to pour the molten glass on a layer of very pure molten tin, so that the molten glass floats on the tin. The surface of the molten tin **[**3]** is very smooth. When the glass hardens it is about as smooth as the molten tin was and does not need grinding and polishing. This float process makes better plate glass for less money than the old way.

Although the float process was first patented in 1905, it did not become commercially widespread until Alistair Pilkington developed a practical version, patented in the late 1950's and early 1960's.

By the beginning of 1992, Pilkington plc owned all but one of the manufacturing plants around the world employing the float process for making plate glass. Because the older method was commercially obsolete, this gave the Pilkington firm a monopoly. But the firm had two problems maintaining its monopoly, expiring patents and difficulty maintaining secrecy.

The critical patents expired in the late 1970's and early 1980's. Expiration of the patents did not by itself destroy Pilkington's ability to control the industry. While the patents had still been in effect, Pilkington had licensed their use, and required the licensees to keep the details of the float glass process secret. But the nature of plate glass makes it hard to keep a secret about how to make it. It cannot all be made in one **[**4]** plant by one manufacturer. Unlike, say, photographic film, glass is brittle and heavy, so shipping expense and breakage make it impractical **[*1385]** to manufacture all the world's plate glass in one place. Instead, factories produce glass by the float process all over the world. Yet 95% of the commercial grade plate glass in the world is produced by Pilkington and its licensees.

Guardian started out as a challenger to Pilkington's dominance. It hired experts from the glass manufacturing division of Ford Motor Company, a Pilkington licensee, and went into the business of designing and operating float glass factories. After a flurry of lawsuits, Pilkington and Guardian settled their differences and made a secret agreement to prevent new entrants into the market. Guardian was to take the lead in order to enable Pilkington, a British company, to reduce its exposure to United States ***antitrust law***.

Appellant ITC began effective marketing of float technology in the early 1980's. ITC does not actually manufacture glass; rather, it sells engineering and consulting services to glass manufacturers, to help them build float process manufacturing plants. Its engineers used the public domain information **[**5]** in Pilkington's expired patents, and their own knowledge, rather than Pilkington's manufacturing secrets, to design ITC's technology.

Pilkington successfully destroyed a number of ITC ventures. In 1984, ITC had Norwegian government and private support for a float glass plant there. Pilkington falsely told the Norwegian government that its proprietary rights prevented anyone from operating float glass manufacturing plants without a Pilkington license, told ITC's sources of financing that ITC had stolen the design, and threatened to sue them if they cooperated with ITC. ITC's major source of financing pulled out because of Pilkington's threats of lawsuits.

ITC then obtained government and private financing to build a plant in Donora, Pennsylvania. One of the subcontractors it hired to formulate bid specifications, Stewart Engineering, had done work for Pilkington, but not on the design of the tin bath component of the float technology. Pilkington had Guardian sue Stewart Engineering in state court in Michigan. The lawsuit was based on false allegations with no reasonable basis that Stewart had stolen the Pilkington-Guardian float process technology. This baseless litigation had the **[**6]** practical consequence, as intended, of driving away ITC's financing so that the project collapsed. Guardian then took no further action in the lawsuit, leaving it pending but unpursued.

In 1990, ITC bid on a huge project to build a plant in Indonesia, again using Stewart Engineering. Guardian told ITC's financing sources, the government of Indonesia and private sources, that it would sue for patent infringement if they proceeded with ITC. Though some suppliers backed out, the project was still proceeding. When it was more than half done, Guardian began filing papers in the Michigan lawsuit against Stewart Engineering. The lawsuit had been lying fallow for 18 months, yet Guardian moved for a temporary restraining order, returnable the same day as the motion. ITC was added as a defendant and slapped with the temporary restraining order, with no practical opportunity for it to defend itself. The Michigan state court order prevented ITC from building the tin bath in Indonesia using the Stewart Engineering design, so at this critical stage of construction, the Indonesia project was stopped. To get around the state court order, ITC brought an antitrust suit in federal court and tried to **[**7]** get a preliminary injunction and removal of the Michigan state court action. This strategy failed, and the federal antitrust suit was dismissed without prejudice.

About a month after the Indonesia project was shut down by the Michigan state court order, the Indonesian joint venturer began the termination process to fire ITC as co-venturer. The Indonesian company told ITC that it had to either defeat the trade secrets claim immediately, or else quickly redesign the tin bath to avoid the trade secrets issue. ITC's engineer, Robert Greenler, then redesigned the tin bath. His new design avoided the supposed trade secrets. After the Michigan state court judge strongly encouraged Guardian and ITC to settle, they reached an agreement in principle, and the court vacated the temporary restraining order against ITC.

[*1386] The Michigan state court settlement is in the form of a confidential consent decree. It says it "will be held confidential except as required by law or as necessary to enforce the terms of this Consent Decree." The decree says that ITC would use the Greenler design for the plant in Indonesia, and Guardian would not assert any trade secret claims with respect to use of the Greenler **[**8]** design. The parties agreed that "this Consent Decree and non-assertion shall not be used by any party in any manner in any future litigation among the parties." ITC covenanted not to sue Guardian on all claims "which arise out of the same facts" as the Michigan state court lawsuit, and all claims brought or arising out of the same facts as those in the federal antitrust suit that ITC had dismissed. ITC was permanently enjoined from using the Stewart design.

According to the complaint, the reason ITC agreed not to sue Guardian for claims arising out of the same facts or claims was economic coercion. Guardian and Pilkington had driven it to the edge of financial ruin by their relentless and illegal tactics, and ITC was about to be fired from the Indonesian project unless it settled the Michigan case.

When Dean Wiley, ITC's managing director, flew to Indonesia to tell the Indonesians that the Michigan case was settled and get the project going again, the Indonesian co-venturer wanted to see a copy of the consent decree. Even though the purpose of the consent decree was to enable ITC to resume the Indonesia project, Guardian refused to allow ITC to show it to the Indonesian company, **[**9]** insisting that the confidentiality provision applied. Because ITC could not show its Indonesian co-venturer the consent decree, the co-venturer fired ITC.

In 1989, ITC agreed to work with a European glass distributor on constructing a float glass plant in France. Work on what they called the "Euroglas" project began in 1991. One of Pilkington's licensees persuaded a bank to deny a loan on the basis that Pilkington was the exclusive worldwide licensor of float glass technology. Another bank was interested in lending, but the financing had to await government permits. Pilkington and Guardian worked with environmental groups so that they would oppose issuance of the permits. Guardian also claimed with no basis whatsoever that the tin bath design ITC proposed to use was a secret owned by Guardian, and threatened litigation. By making this threat, Guardian intentionally violated the consent decree, because it knew full well that ITC was using the permitted Greenler design and not the Stewart design. As a result of Guardian's aggressive and meritless attacks, the Euroglas project stalled.

ITC then went back to the Michigan state court and obtained an order clarifying the decree. The order **[**10]** provided that a mutually agreeable consultant would decide whether ITC's design was permitted or prohibited under the consent decree. The expert consultant reported that the ITC design was entirely unobjectionable. Thus ITC had been in the right all along, that it was not using Pilkington's trade secrets.

Numerous subsequent prospective customers of ITC were warned off by Pilkington and Guardian. Though meritless, the threats of litigation and claims of proprietary rights had the practical effect of causing a worldwide boycott of ITC. As a result, ITC was unable to complete a single float glass plant, and Pilkington and its licensees retained a worldwide monopoly on float glass technology. This monopoly rested on expired patents and fraudulent claims of trade secrets.

ITC sued Guardian and Pilkington in federal district court in Arizona, claiming that their conduct summarized above entitled ITC to antitrust and other remedies. The district court granted judgment on the pleadings in favor of Guardian, on the ground that the Michigan state court consent decree barred the action, as a matter of res judicata. ITC appeals. ITC's case against Pilkington was not the subject of a final judgment **[**11]** in district court, but there was a Rule 54(b) certification making the Guardian judgment final.

ANALYSIS

ITC makes two arguments, that the covenant not to sue in the Michigan state court consent decree does not apply to its claims in **[*1387]** the case at bar, and that the covenant is unenforceable.

A. Scope of the consent decree.

The res judicata effect of the Michigan consent decree is the central issue in this case. The Michigan state court case was settled, not litigated to a conclusion. ***HN1***[] A consent decree in a private action imposes no more on the party to be bound than that party agreed to. See *United States v. Armour & Co., 402 U.S. 673, 682, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)* ("The instrument must be construed as it is written, and not as it might have been written had the [party seeking enforcement] established his factual claims and legal theories in litigation.").

In the Michigan case, ITC covenanted not to sue on designated claims, and its covenant was incorporated in the consent decree. The res judicata question is whether the claims ITC brought in the case at bar were covered by its covenant not to sue. The answer is plain - ITC promised not to sue again **[**12]** on claims which were brought in the Michigan state and federal cases, and those arising out of the same facts alleged in those cases. Here is the language delineating the scope of the covenant not to sue:

> A. All claims which were brought, or which arise out of the same facts as those, in the Action.
>
> B. All claims which were brought, or which arise out of the same facts as those, in the case *Wiley and International Technologies Consultants, Inc. v. Guardian Industries Corp. and Pilkington P.L.C.* Civil action 91-CV-40293-PL (U.S. District Court for the Eastern District of Michigan).

To determine whether ITC stated a claim as to which relief was barred by the consent decree, in light of this language delineating its scope, we compare the Michigan antitrust complaint that ITC filed in the Michigan federal case with the complaint filed in district court in the case at bar. [1]

[13]** The complaints in the case at bar and the Michigan antitrust case overlap. The Michigan complaint asserts the same general background regarding Pilkington's scheme to use licensing to maintain a world wide monopoly after its patents expired. The old and new complaints both allege that Pilkington and Guardian conspired to monopolize the plate glass market by sabotaging ITC's Donora, Pennsylvania, project and its Indonesia project. The words of the averments are different, but the claims arise out of the same facts.

The consent decree barred ITC from making claims brought or arising out of the same facts as those brought in the Michigan antitrust case. Thus, unless economic coercion relieves ITC from the consent decree, the district court properly dismissed ITC's claims based on the Donora project. Even if Guardian's conduct regarding the Donora project was an antitrust violation, ITC promised not to sue them again for it.

Indonesia is a little more complicated. ITC promised not to sue Guardian again for its conduct regarding Indonesia, insofar as any such claims "were brought, or . . . arise out of the same facts" as those in the Michigan case. Yet ITC did just that. Unless economic **[**14]** coercion relieves ITC from the terms of the decree, the district court properly dismissed ITC's claims arising out of Guardian's alleged conduct that led up to the Michigan cases.

But ITC's complaint in the case at bar deals also with subsequent Indonesia conduct that was not and could not have been pleaded in the Michigan case. The averments are **[*1388]** that *after* the consent decree, Guardian

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[1] We have in the excerpts of record Guardian's complaint against ITC filed in Michigan state court, and ITC's complaint against Guardian filed in Michigan federal court. We apparently do not have in the excerpts ITC's answer and counterclaims filed in Michigan state court. We have obtained the complete record and have been unable to find it there either. It is conceivable that it is in one place or the other, but the combination of poor indexing, lack of sequential page numbers, and discontinuous tab numbers in the excerpts, and excessive sealing of most items in the clerk's record, makes it a practical impossibility to assure that anything is, or is not, in the record. We therefore take ITC's allegations in the Michigan cases from the complaint it filed in Michigan federal court, without regard to what may or may not be in whatever answer and counterclaim might have been filed in the Michigan state court case.

without any legitimate basis prevented ITC from showing the Indonesians the consent decree settling the Michigan case, and thereby caused the Indonesians to back out of the deal in fear of Guardian's trade secret and patent claims. Those claims were not "brought" and did not "arise out of the same facts as those" brought in the Michigan case. They could not have been brought, because the facts had not yet transpired when the Michigan case settled. As to these claims arising out of post-consent decree conduct, dismissal was not justified by the language of the consent decree.

The Euroglas project in France was not mentioned at all in the Michigan case. It could not have been, because it had not happened yet. The conduct alleged regarding the Euroglas project occurred after the decree was issued. **[**15]** ITC could not have and did not make any claim in the Michigan litigation, or allege any facts out of which a claim could arise, regarding the later Euroglas project. Thus the Euroglas claims were not barred by the consent decree.

The complaint in the case at bar alleges that Guardian and Pilkington sabotaged ITC's Euroglas project. Partly they used the old techniques of threatening baseless litigation based on false claims of patents and trade secrets, to scare the financing off. Additionally they used a new tactic: encouraging and working with environmental groups to clog the government permit process.

Two questions arise regarding the Euroglas project. The first is whether the new conduct, such as using environmental groups as cat's paws, and manipulating a director of a French bank, could be used as the basis of ITC's antitrust claims. These ITC claims cannot be characterized as arising out of the same facts as those in the Michigan cases. Accordingly, unless a subsequent amendment to the consent decree, discussed below, expands the decree to cover them, the antitrust claims arising out of these subsequent events are not barred.

The second question is whether conduct, to the **[**16]** extent that it is the same as Guardian and Pilkington used to sabotage the Pennsylvania and Indonesia projects, can be the basis of a claim regarding the Euroglas project. On this issue, Guardian argues that the claims are barred under the new damage from previously adjudicated conduct rule in *Go-Video, Inc. v. Matsushita Elec. Indus. Co. (In re Dual-Deck Video Cassette Recorder Antitrust Litig.), 11 F.3d 1460 (9th Cir. 1993)*. ITC contends that there is no bar under the new conduct rule in *Harkins Amusement Enters., Inc. v. Harry Nace Co., 890 F.2d 181 (9th Cir. 1989)*. ITC is correct.

In *Harkins,* we held that ***HN2***[] where the "complaint alleges new antitrust conduct subsequent to" the last date alleged in the prior adjudication, the subsequent claim is not barred by res judicata or collateral estoppel. *Id. at 183*. "It is elementary that new antitrust violations may be alleged after the date covered by decision or settlement of antitrust claims covering an earlier period." *Id. at 183*. We quoted the leading antitrust scholar, Professor Areeda, for the proposition that "'it cannot be emphasized too strongly that the continuation of conduct under attack in a prior antitrust **[**17]** suit is generally held to give rise to a new cause of action.'" *Id. at 183* (quoting 2 Philip Areeda and Donald F. Turner, ***Antitrust Law*** § 323c (1978)). By winning the first action, the defendants "did not acquire immunity in perpetuity from the antitrust laws." *Harkins, 890 F.2d at 183*.

We noted an exception in *Harkins,* where a prior litigation defeat would bar the plaintiff. Where particular conduct was charged in the first case, and the same conduct was alleged to have caused subsequent damages in the second case, the determination in the first case might bar the plaintiff from asserting that particular claim in the second case. *Id. at 183*.

Dual-Deck Video fell within the *Harkins* exception. The plaintiff alleged damages from subsequent consequences of the earlier conduct, and that conduct had already been held not to violate the antitrust laws. *See Dual-Deck Video, 11 F.3d at 1464*. We distinguished *Harkins,* and followed a Fifth Circuit case, *Exhibitors Poster Exchange Inc., v. National Screen Service, Corp., 517 F.2d 110 (5th Cir. 1975)*. *See Dual-Deck Video, 11 F.3d at 1463*. The complaint alleged "only **[*1389]** subsequent market consequences **[**18]** of the old conspiracy," and "continuation of commercial activity pursuant to the old arrangements held not to be an antitrust conspiracy." *See id. at 1463-64*. "Nothing new was alleged - no new conspiracy, no new kinds of monopolization, no new acts. Distinct conduct was alleged only in the limited sense that every day is a new day, so doing the same thing today as yesterday is distinct from what was done yesterday." *Id. at 1464*. Collateral estoppel applied because the earlier lawsuit "already answered the question" of whether the conduct amounted to an antitrust conspiracy. *Id.*

The case at bar is, as to the post-Michigan events, like Harkins, not *Dual Deck Video*. The consent decree did not say that ITC could not sue if Pilkington and Guardian did in the future what they had done in the past. Nor was there any adjudication that conduct such as Pilkington and Guardian had allegedly engaged in the past did not violate the antitrust laws. The consent decree said no more and no less than that ITC would not sue Guardian for claims brought or arising out of the same facts as those in state and federal Michigan actions. It presented no bar to suing Guardian for claims **[**19]** which were not brought in the Michigan actions and not arising out of the same facts, such as the French Euroglas project.

As to the Indonesia project, the complaint in the case at bar alleges both old claims and new. The new claim arising out of post-decree conduct is that by forbidding ITC from showing the Indonesians the consent decree, which would have proven ITC's right to use the Greenler design, Guardian committed an additional antitrust violation.

Appellee argues that because the consent decree was subsequently amended, it does apply to the subsequent conduct. A 1992 amendment made two substantive changes. One is to the confidentiality provision. The old confidentiality provision said that the consent decree would be held confidential except as required by law or as necessary to enforce it:

> 3. This Consent Decree will be held confidential except as required by law or as necessary to enforce the terms of this Consent Decree. All parties agree that this confidentiality provision is not a bar to enforcement of all or any part of this Consent Decree.

Because the consent decree obligated Guardian not to assert any trade secret claims with respect to use of the Greenler **[**20]** design in Indonesia, arguably enforcement of the consent decree entitled ITC to show it to the Indonesians when Guardian did subsequently assert trade secret claims with respect to use of the Greenler design in Indonesia. Showing it to the Indonesians might be a self-help means of enforcement.

The 1992 revision also changed paragraph 3, though the substantive difference is not entirely clear. This sentence was added:

Guardian shall not bring to the attention of third parties the existence of this Consent Decree unless it has reason to believe that the Consent Decree is being violated or in a reasonable response to an inquiry by a third party.

The previous sentences of paragraph 3 were not deleted.

There is nothing in the 1992 amendment that expands the covenant not to sue. Guardian's conduct in preventing the Indonesians from finding out about the consent decree, which occurred after the earlier decree was entered, is not sheltered by the amendment. ITC's theory is that the whole purpose of the consent decree, that is, of why it caved in on its claims, was so that it could proceed with the Indonesia project. Then, violating the implied covenant of good faith and fair dealing, **[**21]** and in furtherance of the Pilkington-Guardian worldwide monopoly on float glass technology, Guardian prevented ITC from using the consent decree to show the Indonesians that the trade secret dispute was over. That is a new claim and the amendment to the consent decree does not bar it.

The order amending the consent decree also adds a new provision referring to the French project. In the original consent decree, the parties agreed that ITC would designate a consultant acceptable to Guardian to inspect the tin bath being built in Indonesia. To verify that ITC was using the permitted **[*1390]** Greenler-Stewart design, not the prohibited Guardian design, ITC agreed to let Guardian inspect future float glass projects for five years.

Although the parties here agreed to a procedure which might settle their differences and enable ITC's participation in the Euroglas project to move ahead, that appears to be all they agreed upon. There is no language in the amendment changing the covenant not to sue. There are no words purporting to expand the covenant not to sue to apply to the French project. Nor does logic compel the conclusion that, by agreeing to a procedure for a consultant, ITC by implication **[**22]** waived its antitrust claims. It would be logical for ITC to say "we don't think you have any right to prevent us from using the patented design, now that the patents have expired, and we don't think there are any trade secrets associated with it, but in fact we're not using it and we're willing to let you look and see that we're not using it." There was no contested adjudication, so there is nothing on which to base our decision except the language to which the parties agreed. Guardian did not obtain language which expressly or by implication amounted to a waiver or release of whatever antitrust claims ITC might have relating to the French project. The parties agreed that "the conclusions of the inspection do not constitute an adjudication or determination that is legally binding on either party." Thus, ITC's antitrust claims relating to the Euroglas project are not barred.

B. Duress.

As we have explained above, the consent decree binds ITC not to sue Guardian on claims brought in the two Michigan actions, or arising out of the same facts. ITC has covenanted not to sue Guardian for its conduct affecting the Donora project and the Indonesia project (except for preventing ITC **[**23]** from showing the consent decree to the Indonesians).

ITC argues that as to those claims covered by the consent decree, it should nevertheless be allowed to sue, because its covenant not to sue was obtained by duress. Its pleadings allege that improper threats by Guardian of baseless litigation left ITC no reasonable alternative except to agree to the consent decree.

It is well established ***HN3***[] as a matter of ***antitrust law*** that the use of baseless litigation to drive out competition can amount to an antitrust violation. See, e.g., *A & E Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 715 (9th Cir. 1968)*; *CVD, Inc. v. Raytheon Co., 769 F.2d 842 (1st Cir. 1985)* (bad faith assertion of trade secrets claim for purpose of restraining competition can be a violation of antitrust laws). ITC has pleaded that Guardian used baseless litigation and threats of baseless litigation to maintain its 95% world monopoly, including an improperly obtained temporary restraining order that shut down its Indonesia project. Because the Michigan decree was a consent decree in a private action based entirely upon the agreement of ITC and not on any judgment in adversarial proceedings, it can have no effect **[**24]** beyond that to which ITC validly agreed. *See* *United States v. Armour & Co., 402 U.S. 673, 681-82, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)*.

The conduct alleged in ITC's complaint falls within the traditional definition of duress which makes a contract voidable:

> *Section 175 - When* ***HN4***[] *duress by threat makes a contract voidable*
> (1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

Restatement (Second) of Contracts § 175 (1981).

The threat must be improper. ITC's pleadings aver impropriety; ITC alleges that Guardian threatened a lawsuit and obtained a temporary restraining order by claiming that ITC was stealing its intellectual property, even though Guardian knew full well that the patents had expired, and that ITC had used knowledge in the public domain. Duress also requires that the victim have no reasonable alternative to succumbing to the duress, such as defending against an improperly brought lawsuit. ITC sufficiently pleaded absence of a reasonable alternative, for two reasons. **[*1391]** The threats made to lenders and employers of ITC **[**25]** could and did, according to the pleadings, kill the projects, and there was no way ITC could do anything about them. As for the actual litigation, the obtaining of a temporary restraining order was pleaded as "use of oppressive tactics," because ITC had no fair opportunity to contest it, it was obtained despite Guardian's knowledge that it was meritless, and it had the practical effect of giving Guardian the victory, ending ITC's participation in the Indonesia project, regardless of whether ITC ultimately won the lawsuit. The duress pleaded is analogous to Illustration 2 in the Restatement:

> 2. A makes an improper threat to commence a civil action and to file a lis pendens against a tract of land owned by B, unless B agrees to discharge a claim that B has against A. Because B is about to make a contract with C for the sale of the land and C refuses to make the contract if the levy is made, B agrees to discharge the claim. B has no reasonable alternative, A's threat is duress, and the contract is voidable by B.

Guardian argues that Michigan defines duress more narrowly, citing *Apfelblat v. National Bank Wyandotte-Taylor, 158 Mich. App. 258, 404 N.W.2d 725 (Mich. Ct. App.* ***[**26]*** *1987)* and *Enzymes of Am., Inc. v. Deloitte, Haskins & Sells, 207 Mich. App. 28, 523 N.W.2d 810 (Mich. Ct. App. 1994)*, *rev'd on other grounds sub nom. Porta-John Corp. v. Deloitte, Haskins & Sells, 450 Mich. 889, 539 N.W.2d 513 (Mich. 1995)*. These cases establish a rule that ***HN5***[] a party claiming duress must show that it was *illegally* compelled or coerced to act by fear of serious injury to its person, reputation, or fortune. *See Enzymes, 523 N.W.2d at 814*; *Apfelblat, 404 N.W.2d at 728*. [2] ITC alleges that Guardian violated the antitrust laws by maintaining sham litigation which left ITC with no alternative but to agree to the consent decree. Thus, Guardian's conduct fits even within the narrow Michigan definition of duress.

[27]** Guardian argues that duress cannot void the agreement, because ITC waited too long to challenge the consent decree on this ground, and ratified its covenant not to sue by subsequent conduct. The pleadings aver duress on June 21, 1991, when Guardian moved for a temporary restraining order in the Michigan case. ITC first claimed duress in the case at bar, filed December 6, 1993, two and a half years later. As for ratification, Guardian argues that ITC took the benefits of the consent decree, so it cannot now disaffirm its burdens.

There is no merit to Guardian's argument that ITC ratified the consent decree by taking its benefits. The benefit ITC sought by agreeing to the consent decree was elimination of the barrier to the Indonesia project. But according to its pleading, Guardian improperly deprived ITC of this benefit by preventing ITC from showing the consent decree to the Indonesians.

Guardian's delay argument is more substantial. According to ITC's pleading, Guardian drove it out of the Indonesia project in August of 1991. [3] Yet ITC did not claim voidability for duress until it filed this lawsuit in December of 1993, two and a half **[*1392]** years later. Indeed, after the Indonesia project **[**28]** had been killed, ITC consented to the inspection procedure amendment to the consent decree, relating to the Euroglas project in France, without claiming duress. The duress that allegedly forced ITC to agree to the consent decree ended once it had lost the Indonesia project, in August of 1991.

[29]** ***HN6***[]

Once the duress that forced a party to agree to a contract has ceased to exist, the victim of duress must tell the other party that it regards the contract as void, or else lose the voidability created by the duress:

> *Section 381. Loss of power of avoidance by delay.*
> (1) The power of a party of avoid a contract for . . . duress . . . is lost if, after the circumstances that made it voidable have ceased to exist, he does not within a reasonable time manifest to the other party his intention to avoid it.

Restatement (Second) of Contracts § 381(1) (1981). ITC lost the power to avoid the consent decree for duress by not manifesting its intention to avoid it within a reasonable time after its participation in the Indonesia project was

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[2] A federal district court has predicted that the Michigan Supreme Court would abandon the element of illegality, and rule that duress need not arise from an illegal act. *See Kelsey-Hayes Co. v. Galtaco Redlaw Castings Corp., 749 F. Supp. 794, 797 n.5 (E.D. Mich. 1990)*. We need not decide whether that court was correct, because ITC has alleged conduct on the part of Guardian that was both "improper," under the Restatement rule, and "illegal," per the Michigan cases.

[3] The dates are somewhat confusing. The Michigan state court decree in the record does not show the filestamp, but ITC's pleading avers that it was entered August 13, 1991, and that is consistent with the rest of the record. The pleading is inconsistent regarding the date ITC was driven out of the Indonesia project. Paragraph 49 says Mulia sent a letter July 26, 1993 firing ITC effective August 26, 1993. But paragraphs 42 through 48 describes ITC's firing by Mulia was part of a crisis that happened fast, in the summer of 1991. Paragraphs 50 through 54 describe events subsequent to Mulia's letter, leading up to the covenant not to sue in August 1991. These paragraphs aver that ITC's managing director flew to Indonesia to get its firing rescinded immediately after the consent decree was entered August 13, 1991, but on August 15 Guardian prevented ITC from showing the consent decree to the Indonesians, so ITC was terminated with finality. The context shows that the 1993 date in paragraph 49 was a typographical error.

dead. We therefore conclude that the district court correctly determined that ITC pleaded itself out of a duress defense to the consent decree.

CONCLUSION

The founding fathers recognized a critical difference between intellectual and other forms of property, by specifying in the Constitution that patents can be granted only "for limited times":

> HN7[] The Congress shall have Power to . . .
>
> promote the Progress of Science **[**30]** and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

U.S. Const. art. I § 8.

HN8[] The owner of the patent is given a limited monopoly. The justification is that the public is best served by giving inventors monopolies on commercial exploitation of their innovations for enough time to furnish an incentive to do the work and spend the money creating them. The monopoly is conditioned on public disclosure of the details of their inventions, so that others can use or improve upon them after the "limited Times" for which the Constitution allows patents.

HN9[] The stated objective of the Constitution in granting the power to Congress to legislate in the area of intellectual property is to "promote the Progress of Science and useful Arts." The patent laws promote this progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the **[**31]** emanations by way of increased employment and better lives for our citizens. In return for the right of exclusion - this "reward for inventions" - the patent laws impose upon the inventor a requirement of disclosure. HN10[] To ensure adequate and full disclosure so that upon the expiration of the 17-year period "the knowledge of the invention enures to the people, who are thus enabled without restriction to practice it and profit by its use," the patent laws require that the patent application shall include a full and clear description of the invention and "of the manner and process of making and using it" so that any person skilled in the art may make and use the invention.

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480-81, 40 L. Ed. 2d 315, 94 S. Ct. 1879 (1974) (internal citations and footnote omitted).

Alistair Pilkington invented an ingenious new method of making high quality flat glass at high speed, much less expensively than by grinding and polishing it, in the 1950's. He thereby made a great contribution to cheap, good plate glass for everyone. There was no way to exploit his invention while keeping it a close secret, as with the formula for Coca-Cola, because the weight **[**32]** and fragility of glass required that the method be used in factories around the world. The patent enabled the Pilkington company to take exclusive benefit of the idea for a limited period of time, even though numerous other people necessarily knew the method almost immediately. **[*1393]** But intellectual property, unlike, say, real estate, can be owned pursuant to a patent only for a limited time.

Thomas Jefferson explained why HN11[] the concept of theft does not apply to useful inventions, after their patent protection expires:

> It has been pretended by some, (and in England especially,) that inventors have a natural and exclusive right to their inventions, and not merely for their own lives, but inheritable to their heirs. . . . Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, a natural right be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; **[**33]** but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess

> himself of it. Its peculiar character, too, is that no one possess the less, because every other possess the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and the improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breath, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may pursue utility, but this may or may not be done, according to the will and convenience of society, without claim or complaint from anybody . . . .

Thomas Jefferson, **[**34]** letter to Isaac McPherson, August 13, 1813, in Adrian Koch and William Peden, eds., *The Life and Selected Writings of Thomas Jefferson* 629-30 (1944).

We do not know whether Guardian and Pilkington have conspired to prevent others from using the ideas in Pilkington's expired patents, in violation of the antitrust laws, by means of unjustified litigation and threats of litigation. But if they have, as the complaint alleges, then the world is being deprived of the economic value of Alistair Pilkington's great invention. Indeed, in poorer areas of the world, doubtless people lack windows to let in the sun and keep out the rain, wind, cold, and insects, because of improper exploitation of monopoly pricing. Though ITC has given away its right to sue Pilkington and Guardian for some of its claims, it has not for others. The claims are at the heart of what is socially valuable in ***antitrust law***. A good way to find out if they are true is to put the parties to their proof, and if there is a genuine issue of fact, to require them to try the case. Indeed that is the only lawful way to test the truth of the averments.

Accordingly, we affirm in part and reverse in part. ITC is bound by the **[**35]** consent decree, and barred by its covenant not to sue from asserting the claims brought or arising out of the same facts as those brought in the Michigan state court and federal cases. It is not barred from asserting the claims not so brought and not arising out of the same facts. Costs are awarded in favor of ITC against Guardian.

Repeat-O-Type Stencil v. Hewlett-Packard Co.

United States Court of Appeals for the Ninth Circuit

June 3, 1997, Argued and Submitted, Pasadena, California; June 18, 1997, Withdrawn from Submission; March 5, 1998, Resubmitted ; March 9, 1998, Filed

No. 96-55205

Reporter
1998 U.S. App. LEXIS 4396 *

REPEAT-O-TYPE STENCIL, MANUFACTURING CORPORATION, a New Jersey corporation, Plaintiff/Appellant, v. HEWLETT-PACKARD COMPANY, a California corporation, Defendant/Appellee.

Notice: **[*1]** RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: *1998 U.S. App. LEXIS 14179*.

Certiorari Denied October 13, 1998, Reported at: *1998 U.S. LEXIS 6494*.

Prior History: Appeal from United States District Court for the Central District of California. D.C. No. CV-95-7284 DT (RMCx). Dickran M. Tevrizian, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

patent, cartridges, baseless, infringement, modifications, ink, antitrust, sham, reconstruction, impermissible, housing, argues, grave, summary judgment, district court, anticompetitive, unsuccessful, competitor, process-as, refillable, quotation, ink-jet, lawsuit, redress, immune, repair, chart, marks, cap

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Civil Procedure > Appeals > Standards of Review > De Novo Review

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Noerr-Pennington Doctrine, Sham Exception**

The court reviews de novo dismissal under *Fed. R. Civ. P. 12(b)(6)*. Under the Noerr-Pennington doctrine, the Supreme Court has held that persons seeking redress through administrative agencies and the courts are immune from antitrust liability for seeking such redress. Sham litigation is an exception to this grant of immunity.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

HN2[] **Motions to Dismiss, Failure to State Claim**

To determine if litigation is a sham, the Supreme Court instructs to first determine if the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Then, only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. The court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process-as opposed to the outcome of that process-as an anticompetitive weapon. In addition to this test, the court requires that when the antitrust plaintiff challenges a single suit rather than a pattern a finding of sham requires not only that the suit is baseless, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anticompetitive.

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For HEWLETT-PACKARD CO., Defendant - Appellee: Morgan Chu, Esq., Bruce D. Kuyper, Melissa Gleiberman, IRELL & MANELLA, Peter Sullivan, Esq., GIBSON, DUNN & CRUTCHER, Los Angeles, CA.

Judges: Before: BROWNING, FLETCHER and KOZINSKI, Circuit Judges.

Opinion

MEMORANDUM *

Repeat-O-Type ("ROT") appeals the decision of the district court dismissing for failure to state a claim ROT's claim that Hewlett-Packard ("HP") engaged in sham litigation against ROT. ROT argues that HP's patent claims were objectively baseless.

HN1[] We review de novo dismissal under *Federal Rule of Civil Procedure 12(b)(6)*. *See* *Stone v. Travelers Corp., 58 F.3d 434, 436-37 (9th Cir. 1995)*. Under the *Noerr-Pennington* doctrine, the Supreme **[*2]** Court has held that persons seeking redress through administrative agencies and the courts are immune from antitrust liability for seeking such redress. *See* *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*. Sham litigation is an exception to this grant of immunity. ***HN2***[] To determine if litigation is a sham, the Supreme Court instructs us to first determine if "the lawsuit [is] objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*. Then, "only if [the] challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* "The court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor, through the use of the governmental process-as opposed to the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *9th Cir. R. 36-3*.

outcome of that process-as an anticompetitive weapon." *Id.* (emphasis in original) (citation and internal quotation marks omitted). In **[*3]** addition to this test, we require that "when the antitrust plaintiff challenges a single suit rather than a pattern . . . a finding of sham requires not only that the suit is baseless, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anticompetitive." *Boulware v. State of Nevada, Dep't of Human Resources, 960 F.2d 793, 797-98 (9th Cir. 1992)* (citation and internal quotation marks omitted).

As an initial matter, the grant of summary judgment to ROT on the patent claims is no proof that HP's claims were baseless. *See* *Professional Real Estate Investors, 508 U.S. at 65* (concluding that "even in the absence of supporting authority, [the defendant] would have been entitled to press a novel copyright claim as long as a similarly situated reasonable litigant could have perceived some likelihood of success"); *see also* *Liberty Lake Investments, Inc. v. Magnuson, 12 F.3d 155, 158 (9th Cir. 1993)* ("When the antitrust defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful **[*4]** action must have been unreasonable or without foundation.") (quoting *Professional Real Estate Investors, 508 U.S. at 60 n.5*).

HP argues that its twelve patent claims were not objectively baseless and that they were based upon a reasonable extension of the theory of impermissible reconstruction, which prohibits the purchasers of a patented product from transforming the product into another product. HP argued in its suit against ROT for trademark and patent infringement that ROT's modification of the Stanley and Kukla cartridges was not permissible repair because the items replaced (ink in the Stanley cartridge and the cap on the Kukla cartridge) were not worn or spent and did not involve any repair necessary to preserve the intended life of the cartridge. Instead, HP argued that ROT's modifications were designed to create a new, refillable, product and therefore constituted a reconstruction of a patented product.

ROT argues that HP's patent claims were baseless because: 1) HP did not explain infringement on nine of the twelve patents, but only discussed three patents in its Motion for Partial Summary Judgment; 2) HP did not file a claims chart identifying which patent claims were **[*5]** violated; 3) HP's assertion of infringement of U.S. Patent No. 4,931,811 (the " '811" patent) is a per se violation of ***antitrust law***; [1] and 4) HP's assertion of infringement of U.S. Patents No. 4,827,294 (the " '294" patent) and No. 5,108,503 (the " '503" patent) had nothing to do with any of the products involved in this case.

We are not persuaded that HP's actions were objectively baseless or that they demonstrated grave abuse. We note that HP discussed its infringement theory with reference to several representative patent claims because the dispositive issue on eleven of them (excluding the ink patent) was the same: "whether ROT's modifications to unused HP ink-jet cartridges constituted an impermissible reconstruction of the cartridges." Nor do we find that **[*6]** a claims chart is a prerequisite for a suit.

The '811 patent claim is not like the patent misuse found in *Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 86 L. Ed. 363, 62 S. Ct. 402 (1942)*. HP is not selling patented refillable cartridges, requiring its customers to buy only HP unpatented ink and suing a competitor for its creation of the cartridges; it is asserting that ROT made illegal modifications to HP's patented, non-refillable cartridges.

Although ultimately unsuccessful, HP's claims based on the '294 and '811 patents were not objectively baseless. Claim 3 of the '294 Patent describes an inkjet cartridge and its pen body housing with an ink storage compartment therein; ROT's modification of the Kukla cartridge involved breaking the cap off of this housing. HP's theory of infringement was that this action impermissibly modified the patented housing. Similarly, with respect to the '811 patent, HP did perform an infringement analysis of ROT's inks before it added the claim to its complaint on November 30, 1993, and it produced, documents setting forth that analysis on April 15, 1994.

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[1] ROT argues that it is a violation of the Sherman Act to attempt to use a patent on a container to establish a monopoly on the contents of the container. *See* *Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 86 L. Ed. 363, 62 S. Ct. 402 (1942)*.

Overall, HP's patent claims, while unavailing, are not objectively baseless nor do **[*7]** they demonstrate grave abuse, therefore, the judgment of the district court is affirmed.

AFFIRMED.

End of Document

Cardtoons L.C. v. Major League Baseball Players Ass'n

United States District Court for the Northern District of Oklahoma

March 11, 1998, Decided ; March 12, 1998, Filed; March 13, 1998, Entered on Docket

Case No. 93-C-576-E

Reporter
1998 U.S. Dist. LEXIS 22242 *

CARDTOONS, L.C., an Oklahoma Limited Liability Company, Plaintiff, vs. MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, an unincorporated association, Defendant.

Disposition: **[*1]** Motion to Dismiss/For Summary Judgment (Docket # 146) granted in favor of Defendant on all claims. Plaintiff's Motion to File Supplemental Brief (Docket # 163) granted.

Core Terms

summary judgment, immunity, motion to dismiss, material fact, matter of law, letters, major league baseball, Players, sending, urges, sham, unincorporated association, tortious interference, threat of litigation, injunctive relief, membership rights, subjective intent, prima facie tort, genuine issue, cease-and-desist, Nonmovant, discovery, baseless, infringe, parodies, Libel, cards

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment pursuant to *Fed. R. Civ. P. 56* is appropriate where there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The plain language of *Fed. R. Civ. P. 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. To survive a motion for summary judgment, a nonmovant must establish that there is a genuine issue of material facts. A nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Civil Procedure > Sanctions > Baseless Filings > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN2[] **Noerr-Pennington Doctrine, Sham Exception**

The Noerr-Pennington doctrine, developed in the context of ***antitrust law***, is applied to other areas as a constitutional defense based upon *First Amendment* principles. Litigation cannot be deprived of immunity as a sham unless it is objectively baseless. Neither Noerr immunity nor its sham exception turns on subjective intent alone. Rather, to be a "sham," litigation must meet a two-part definition. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. The immunity is extended to efforts to influence adjudicative bodies, including courts. Further, a threat of litigation bears the same petitioning immunity as actual litigation.

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For CARDTOONS, L.C., plaintiff: James William Tilly, Tilly & Associates, Tulsa, OK.

For MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, defendant: James E Weger, Robert R Peters, II, Jones Givens Gotcher & Bogan, Tulsa, OK.

For MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, defendant: Dennis D Palmer, Michael P Allen, Russell S Jones, Jr, Shughart Thomson & Kilroy, Kansas City, MO.

For MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, counter-claimant: James E Weger, Jones Givens Gotcher & Bogan, Tulsa, OK.

For MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, counter-claimant: Dennis D Palmer, Shughart Thomson & Kilroy, Kansas City, MO.

For CARDTOONS, L.C., counter-defendant: Keith Allen Ward, Richardson Law Firm, Tulsa, OK.

For CARDTOONS, L.C., counter-defendant: James William Tilly, Tilly & Associates, Tulsa, OK.

For *FIRST AMENDMENT* PUBLISHING, INC., amicus: Joseph Mauro, *First Amendment* Publishing **[*2]** Inc., Deer Park, NY.

Judges: JAMES O. ELLISON, Senior Judge, United States District Court.

Opinion by: JAMES O. ELLISON

Opinion

ORDER

This Order addresses the Motion to Dismiss/For Summary Judgment (Docket # 146) of the Defendant, Major League Baseball Players Association, an unincorporated association (MLBPA). The Court considers the motion as one for Summary Judgment and shall apply the standard applicable to such motions in its determination. Further, in order to consider all argument and evidence presented, the Court grants Cardtoons' Motion to File Supplemental Brief in Response to MLBPA's Motion to Dismiss/For Summary Judgment (Docket # 163).

Legal Analysis

HN1[] Summary judgment pursuant to *Fed.R.Civ.P. 56* is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 274 (1986)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986)*. In *Celotex, 477 U.S. at 317 (1986)*, **[*3]** it is stated:

> "The plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts…" Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith, 475 U.S. 574, 585, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

This action was originally brought by Plaintiff for declaratory judgment that its trading cards featuring parodies of active major league baseball players did not infringe on the publicity rights of members of the MLBPA. Plaintiff also joined in the original complaint claims for injunctive relief and tortious interference with contract. The Court later allowed Plaintiff to file an Amended Complaint which added claims for prima facie tort, libel and negligence.

The Court first addressed Plaintiff's claim that the parody **[*4]** cards did not violate MLBPA's right of publicity. Cardtoons prevailed on this issue at both the trial level and on appeal. The claim for injunctive relief has been granted.

There remains for determination the Plaintiff's pendent state tort claims. All of Plaintiff's tort claims arise from the action of Defendant in sending cease-and-desist letters to Plaintiff and its printer, CHAMPS Marketing, Inc. in which Defendants claimed Plaintiff and CHAMPS were infringing upon the publicity rights of the members of MLBPA.

Defendant urges a motion to dismiss the remaining counts pursuant to *Fed.R.Civ.P. 12(b)(6)* on the grounds that Defendant's conduct was privileged as a matter of law arising from the right to petition government for redress of grievances guaranteed by the *First Amendment to the United States Constitution* and thus each count of the Amended Complaint fails to state a claim upon which relief can be granted. Defendant alternatively moves for summary judgment pursuant to *Fed.R.Civ.P. 56* urging that no genuine issue exists as to any material fact relating to Plaintiff's claims and that Defendant is entitled to immunity under the *First Amendment to the United States Constitution* **[*5]** as a matter of law. Plaintiff urges that summary judgment is not proper since there are uncertainties over the predicate facts arising from a conflict in evidence offered by opposing experts on mixed issues of law and fact. Cardtoons' position is that discovery is needed to determine MLBPA's subjective intent in sending the letters.

Neither party's expert opinion is necessary or proper for the resolution of the basic issue nor will they be considered. The issue before the Court is clear cut and unambiguous. The sending of the cease-and-desist letters is undisputed. The only question is whether they were covered by a *First Amendment* privilege, the same privilege that protects the initiation of litigation. There need be no further fact-finding on that issue.

HN2[] The *Noerr-Pennington* doctrine was developed in the context of ***antitrust law***; however it has been applied to other areas as a constitutional defense based upon *First Amendment* principles.

The United States Supreme Court in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* held:

> "Litigation cannot be deprived of immunity as **[*6]** a sham unless it is objectively baseless. ... Neither Noerr immunity nor its sham exception turns on subjective intent alone. See, e.g., *Allied Tube & Conduit Corp. V. Indian Head, Inc., 486 U.S. 492, 503, 108 S. Ct. 1931, 1938, 100 L. Ed. 2d 497*. Rather, to be a "sham," litigation must meet a two-part definition. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."

The opinion recognizes the extension of the Noerr-Pennington doctrine to other areas. The immunity has been extended to efforts to influence adjudicative bodies, including courts. See also *California Motor Transport Co. V. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

Here, the case history establishes objective reasonableness. The Report and Recommendation of the Magistrate, the initial ruling of this Court and the conclusions of the appellate court all acknowledge the reasonableness of MLBPA's position and the fact that the issue presented a close call.

[*7] Further, a threat of litigation bears the same petitioning immunity as actual litigation. *Coastal States Marketing, Inc. V. Hunt, 694 F.2d 1358 (5th Cir. 1983)*.

Conclusion

The threats of litigation contained in Defendant's letters are protected under immunity granted by the *First Amendment to the United States Constitution*. Application of the Noerr-Pennington doctrine is appropriate. Plaintiff's remaining claims for Tortious Interference with Contract, Prima Facie Tort, Libel and Negligence must fail as a matter of law. The Motion to Dismiss/For Summary Judgment (Docket # 146) is granted in favor of Defendant on all claims. Plaintiff's Motion to File Supplemental Brief (Docket # 163) is granted.

It is so ORDERED this 11TH Day of March, 1998.

JAMES O. ELLISON, Senior Judge

United States District Court

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Major League Baseball Players Association, an unincorporated association, and against the Plaintiff, Cardtoons. Plaintiff shall take nothing of its claim.

DATED, THIS 11TH DAY OF MARCH, 1998.

[*8] JAMES O. ELLISON, SENIOR JUDGE

UNITED STATES DISTRICT COURT

[L'Altrella v. Weight Watchers Internat'l](#)

Superior Court of Connecticut, Judicial District of Fairfield, At Bridgeport

March 16, 1998, Decided ; March 27, 1998, Filed

CV 950334348

Reporter
1998 Conn. Super. LEXIS 845 *; 1998 WL 166467

Ann L'Altrella v. Weight Watchers Internat'l

Notice: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Subsequent History: Memorandum of Decision on Motion For Reconsideration of September 14, 1998, Reported at: *1998 Conn. Super. LEXIS 2602*.

Disposition: Motion to strike the first, second, third and seventh counts denied. Motion to strike the sixth count granted.

Core Terms

defendants', Antitrust, motion to strike, amended complaint, antitrust statute, alleges, business relationship, counts, injuries, cause of action

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN1[] **Defenses, Demurrers & Objections, Motions to Strike**

When considering a motion to strike, the court construes the complaint in a manner most favorable to sustaining its legal sufficiency and accepts all the facts alleged in and reasonably inferred from the challenged count or counts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN2[] **Public Enforcement, State Civil Actions**

The Connecticut Antitrust Act was intentionally patterned after the ***antitrust law*** of the federal government. Therefore, the Connecticut courts' construction of the Connecticut Antitrust Act is aided by reference to judicial opinions interpreting the federal antitrust statutes. Accordingly, the court follows federal precedent when it interprets the act unless the text of the state antitrust statutes, or other pertinent state law, requires the court to interpret it differently.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Public Enforcement, State Civil Actions**

A plaintiff cannot recover for personal injuries under the antitrust statutes.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Public Enforcement, State Civil Actions**

Lost profits can be recovered under the antitrust statutes. *Conn. Gen. Stat. § 35-35*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Public Enforcement, State Civil Actions**

The Connecticut Antitrust Act (CUTPA) is concerned with conduct, and not the relationship between the parties. Indeed, CUTPA is not limited to conduct involving consumer injury and a competitor or other business person can maintain a CUTPA cause of action without showing consumer injury. This is consistent with the statutory provision which grants a private cause of action to private persons. It states that any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by CUTPA may bring an action. *Conn. Gen. Stat. § 42-110g(a)*.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Interference With Business Relations

Torts > Business Torts > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN6[] **Causes of Action, Interference With Business Relations**

The essential elements of the tort of unlawful interference with a business relationship are (1) a business relationship between the plaintiff and another party, (2) the defendant's intentionally interfering with it while knowing of the relationship and (3) as a result of the interference, the plaintiff suffered actual loss.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Commercial Interference > Business Relationships > General Overview

HN7[] **Defenses, Demurrers & Objections, Motions to Strike**

In deciding a motion to strike, the court cannot consider facts outside the pleading. Such is an impermissible speaking motion to strike.

Judges: MELVILE, JUDGE.

Opinion by: MELVILE

Opinion

MEMORANDUM OF DECISION RE DEFENDANTS' MOTION TO STRIKE

Before the court is the defendants' motion to strike the first, second, third, sixth, and seventh counts of the plaintiff's amended complaint. ***HN1***[] When considering a motion to strike, the court construes the complaint in a manner most favorable to sustaining its legal sufficiency; *Nestor v. Travelers Indemnity Co., 41 Conn. App. 625, 629, 677 A.2d 475 (1996)*; and accepts all the facts alleged in and reasonably inferred from the challenged count or counts. See *Clohessy v. Bachelor, 237 Conn. 31, 33, 675 A.2d 852 (1996)* (where the court recited and accepted as true the facts alleged in, and reasonably inferred from, the stricken third count alleging a cause of action for negligent infliction of emotional distress).

In the present case, the same facts are alleged to support each count within the amended complaint. **[*2]** The alleged facts, accepted as true, are as follows. In 1987, the plaintiff, Ann L'Altrella, was hired as a company provider by the defendant companies, Weight Watchers International and Weight Watchers North America. In the spring of 1994, while still employed by the defendants, the plaintiff started her own business. As a part of her new business, the plaintiff advertised and sold a dietary food supplement known as Thermachrome 5000. The plaintiff alleges that the business of advertising and selling Thermachrome 5000 was outside the scope of her employment with the defendants.

The amended complaint further alleges that Maryann Povodnich and Donna Walker were also employed by the defendants. On or about June 14, 1994, while acting within the scope of their employment, Povodnich and Walker met with the plaintiff to discuss her sale of Thermachrome 5000. The amended complaint does not set forth any further details of this meeting.

Approximately three weeks later, on July 5, 1994, the plaintiff was directed to sign a letter from the defendants. The letter contained the following statements, which the plaintiff alleges were substantially false: that Thermachrome 5000 was the **[*3]** product of a competitor of the defendants; that Thermachrome 5000 was a product in competition with the defendants' products or services; that the plaintiff was therefore endorsing, promoting or selling a product in competition with the defendants' products; that the plaintiff agreed to sign a letter acknowledging these facts; and, that if the plaintiff refused to sign an acknowledgement letter, it would be deemed to signify her resignation from employment with the defendants. The letter further refers to a prior letter dated June 15, 1994.

Three days later, on July 8, 1994, the defendants notified the plaintiff, through their employee Povodnich, that in order to continue her employment with the defendants, she had to sign a document that contained a purported admission by the plaintiff that the sale of Thermachrome 5000 was the sale of a competitor's product, and, a statement by the plaintiff that she would cease any further sale of Thermachrome 5000. The defendants would deem the plaintiff's failure to sign the document as the plaintiff's resignation. The plaintiff refused to sign the document.

The following day, July 9, 1994, the plaintiff was denied entry into the defendant's **[*4]** workplace. She was informed in the parking lot that she was denied entry because she resigned from her position with the defendants. The plaintiff alleges that she did not resign from her position, and instead was terminated for refusing to accede to the defendants' demand that she stop selling Thermachrome 5000.

In the first, second, third, sixth, and seventh counts, the plaintiff alleges that the defendants' actions constitute a violation of the Connecticut Antitrust Act (CUTPA), a breach of the implied covenant of good faith and fair dealing, a tortious interference with a business relationship and, a wrongful termination respectively. As a result of the defendants' alleged wrongful conduct, the plaintiff alleges that she has sustained the following substantial injuries, which she seeks to recover in each of the five counts challenged by the defendants' motion to strike: (a) lost profits; (b) loss of business opportunity; (c) impaired earning ability; (d) reduced income; (e) injury to credit and financial standing; (f) shock to her nervous system, migraines, and loss of sleep; and, (g) harassment, humiliation, and injury to her reputation. [1]

[*5] II

Count One--The Connecticut Antitrust Act

The defendants move to strike the first count on the ground that the plaintiff lacks standing to bring an antitrust claim under the Connecticut Antitrust Act. The defendants argue that the plaintiff was not the target of the defendants' alleged antitrust activity, and she did not suffer an "antitrust injury" that is compensable under the act. The defendants therefore argue that the first count should be stricken.

HN2[] The Connecticut Antitrust Act "was intentionally patterned after the ***antitrust law*** of the federal government . . . Therefore, our construction of the Connecticut Antitrust Act is aided by reference to judicial opinions interpreting the federal antitrust statutes . . . Accordingly, we follow federal precedent when we interpret the act unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently." (Brackets omitted; citations omitted; footnote omitted; internal quotations omitted.) *Westport Taxi Service, Inc. v. Westport Transit District, 235 Conn. 1, 15-16, 664 A.2d 719 (1995)*; see also *General Statutes 35-44b* (It is the intent of the General Assembly that in construing **[*6]** [the Connecticut Antitrust Act], the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes").

Although inartfully pled, the plaintiff has stated an antitrust claim that withstands a motion to strike. The facts alleged by the plaintiff are on all fours with the facts recited in *Bowen v. Wohl Shoe Co., 389 F. Supp. 572 (S.D. Tex. 1975)*. In *Bowen*, the court concluded that the facts as alleged were sufficient to state a cause of action under the federal antitrust statutes. See *id., at 577-82*. The court therefore follows this federal precedent because the text of Connecticut's antitrust statutes, or other pertinent state law, does not require otherwise. *Westport Taxi Service, Inc. v. Westport Transit District, supra, 235 Conn. 15-16*; *General Statutes 35-44b*.

The confusion in the present case concerning the plaintiff's standing arises from the plaintiff's dual personality. The plaintiff wears two hats in the amended complaint. She is the defendants' ex-employee and, she is the owner/proprietor of a business that was arguably the target or, within the target area, of the defendants' conduct. The defendants' **[*7]** assertion that the plaintiff is proceeding as an ex-employee is not without substantiation. In the amended complaint the plaintiff seeks damages for injuries that are personal, for instance, shock to her nervous system, migraines and loss of sleep. ***HN3***[] The plaintiff cannot recover these personal injuries under the antitrust

[1] In the first count, the plaintiff also seeks treble damages, attorneys fees, and costs, pursuant to *General Statutes 35-35*.

statutes. See Young v. Colonial Oil Co., 451 F. Supp. 360, 361 (MD GA 1978) (emotional distress is not a "business injury," and thus, not compensable under the federal antitrust statutes).

Nonetheless, the plaintiff also seeks damages for injuries to her "business or property," i.e., **HN4**[] lost profits, which can be recovered under the antitrust statutes. General Statutes 35-35. The defendants should have utilized a request to revise to separate the plaintiff's dual personalities and delete the non-antitrust injuries from the enumerated claim of damages. Hence, although inartfully pled, the plaintiff's first count withstands the motion to strike.

III

Count Two--CUTPA

The plaintiff's dual personality also confuses the second count, which alleges a violation of CUTPA. The defendants seize upon the plaintiff's status as an ex-employee, and argue that the second **[*8]** count should be stricken because CUTPA does not extend to the employee/employer relationship.

HN5[] CUTPA is concerned with conduct, and not the relationship between the parties. Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 492, 656 A.2d 1009 (1995). Indeed, CUTPA is not limited to conduct involving consumer injury and a competitor or other business person can maintain a CUTPA cause of action without showing consumer injury. Id., 496. This is consistent with the statutory provision which grants a private cause of action to private persons. It states that any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by CUTPA may bring an action. General Statutes 42-110g(a). The plaintiff has alleged that the defendants' conduct, allegedly an unfair and deceptive trade practice, injured the plaintiff's business, and thus, injured the plaintiff. The defendants' alleged conduct, if proven, may constitute conduct which falls within the wide range of conduct prohibited by CUTPA. See Associated Investment Co. v. Williams Assoc., 230 Conn. 148, 172, 645 A.2d 505 (1994) (Katz, **[*9]** J., dissenting). Therefore, the second count also survives a motion to strike, even though the plaintiff seeks damages for injuries that cannot be recovered under CUTPA.

IV

Counts Three and Seven

Construed in the manner most favorable to the plaintiff, the amended complaint alleges that the plaintiff was fired by the defendants because she refused to engage in conduct that allegedly violated the Connecticut Antitrust Act and CUTPA. If it is against public policy to terminate an employee for reporting the violation of a law; General Statues 31-51m(b); it is against public policy for an employer to terminate an employee because she refused to participate in violating the Connecticut Antitrust Act. See Faulkner v. United Technologies Corp., 240 Conn. 576, 583, 588, 693 A.2d 293 (1997); see also id., 586, citing, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 170, 179, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (noting that the *Tameny* court found that a plaintiff who alleged that his employer discharged him for refusing to violate federal antitrust statutes, stated a cause of action). The plaintiff therefore has alleged that the defendants violated a strong public **[*10]** policy. The motion to strike the third and seventh counts is therefore denied.

V

Count Six--Tortious Interference with Business Relationship

In the sixth count, the plaintiff alleges that the defendants tortiously interfered with her business relationship with the distributors and manufacturer of Thermachrome 5000. **HN6**[] The essential elements of the tort of unlawful interference with a business relationship are (1) a business relationship between the plaintiff and another party, (2) the defendant's intentionally interfering with it while knowing of the relationship and (3) as a result of the interference, the plaintiff suffered actual loss. *Dinapoli v. Cooke, 43 Conn. App. 419, 426, 682 A.2d 603 (1996)*. As argued by the defendants, the plaintiff has failed to allege any facts in the amended complaint to demonstrate in what manner the defendants interfered with a relationship between the plaintiff and the distributors and manufacturer of Thermachrome 5000. The facts alleged only indicate that the plaintiff was fired for her refusal to allow the defendants to interfere with her business relationship. Further, the plaintiff has failed to allege facts that demonstrate that she suffered **[*11]** any actual loss. Indeed, the facts alleged indicate that the plaintiff refused to sever her relationship with her business relations. The plaintiff attempts to provide the facts necessary to support her claim in her memoranda of law in opposition to the defendants' motion to strike. ***HN7***[] The court, however, cannot consider facts outside the pleading. Such is an impermissible speaking motion to strike. Therefore, the facts alleged by the plaintiff in her amended complaint are insufficient to state a claim for tortious interference with a business relationship. Accordingly defendant's motion to strike is granted.

VI

Conclusion

The motion to strike the first, second, third and seventh counts is denied. The motion to strike the sixth count is granted.

SO ORDERED

MELVILE, JUDGE

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Smith v. NCAA

United States Court of Appeals for the Third Circuit

February 12, 1998, Argued ; March 16, 1998, Filed

Nos. 97-3346 and 97-3347

Reporter

139 F.3d 180 *; 1998 U.S. App. LEXIS 4694 **; 1998-1 Trade Cas. (CCH) P72,084; 40 Fed. R. Serv. 3d (Callaghan) 489

R. M. SMITH, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Renee M. Smith, Appellant

Subsequent History: **[**1]** Counsel Corrected March 25, 1998.

Certiorari Granted September 29, 1998, Reported at: *1998 U.S. LEXIS 4651*.

Prior History: On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Civ. No. 96-01604).

Disposition: Affirmed the district court's dismissal of appellant's Sherman Act claim, vacated its dismissal of the Title IX claim, and reversed the district court's denial of her motion for leave to amend her complaint with respect to her Title IX claim. Remanded to the district court for further proceedings consistent with this opinion and direct the district court to reinstate her state law contract claim, over which the district court declined to exercise jurisdiction pursuant to *28 U.S.C. § 1367(c)*.

Core Terms

district court, federal funds, athletics, Sherman Act, recipient, intercollegiate, amend, bylaw, institutions, Postbaccalaureate, eligibility requirements, student-athlete, receives, federal financial assistance, eligibility rules, anti trust law, procompetitive, allegations, proposed amended complaint, failure to state a claim, education program, promulgation, television, futile, sports, motion for leave, leave to amend, anticompetitive, undergraduate, eligibility

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Mootness > General Overview

Education Law > ... > Gender & Sex Discrimination > Title IX > Remedies

HN1[] **Justiciability, Mootness**

A claim is not moot where there is a viable damages claim.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN2[] **Standards of Review, De Novo Review**

The court exercises plenary review over the district court's dismissal of a complaint for failure to state a claim. The court accepts all of the allegations as true, views them in the light most favorable to plaintiff, and will affirm the dismissal only if plaintiff can prove no set of facts entitling plaintiff to relief.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN3[] **Standards of Review, Abuse of Discretion**

The court reviews the district court's denial of a motion for leave to amend a complaint for abuse of discretion.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Higher Education & Professional Associations, Colleges & Universities**

The Sherman Act *§ 1*, *15 U.S.C.S. § 1*, provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is illegal. Although the section literally prohibits every contract, *§ 1* does not preclude all restraints on trade, but only those that are unreasonable.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Higher Education & Professional Associations, Colleges & Universities**

A collegiate athletic association's adoption of a rule furthering its noncommercial objectives, such as preserving the educational standards of its members, is not within the purview of ***antitrust law***.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Higher Education & Professional Associations, Colleges & Universities**

An association whose eligibility requirements are not plainly anticompetitive, are not per se unreasonable.

Education Law > ... > Gender & Sex Discrimination > Title IX > Athletics

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

Education Law > ... > Gender & Sex Discrimination > Title IX > Protected Individuals

HN7[] **Title IX, Athletics**

Title IX of the Educational Amendments of 1972, *20 U.S.C.S. § 1681*, provides that no person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. *20 U.S.C.S. § 1681(a)*. Intercollegiate athletics is an educational program or activity within the statute. *20 U.S.C.S. § 1687*; *34 C.F.R. § 106.41(a)*.

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

HN8[] **Title IX, Scope of Title IX**

20 U.S.C.S. § 1687(2)(A) defines "program or activity" as a college, university, or other postsecondary institution, or a public system of higher education; or any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended federal financial assistance.

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

HN9[] **Title IX, Scope of Title IX**

See *34 C.F.R. § 106.2(h)(1997)*.

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

Civil Procedure > Parties > Pro Se Litigants > General Overview

HN10[] **Pro Se Litigants, Pleading Standards**

When plaintiff is a pro se litigant, the court has a special obligation to construe the complaint liberally.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN11[] **Amendment of Pleadings, Leave of Court**

Pursuant to *Fed. R. Civ. P. 15(a)*, a plaintiff has an absolute right to amend the complaint once at any time before a responsive pleading is served. Thereafter, a plaintiff must seek leave of the district court to amend the pleading. Although it is within the district court's discretion, district courts should grant such requests freely when justice so requires.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN12[] **Pleadings, Amendment of Pleadings**

A plaintiff has no right to amend where both the complaint and the action are dismissed, but may seek leave of court to do so.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN13[] **Standards of Review, Abuse of Discretion**

While the grant or denial of an opportunity to amend is within the discretion of the district court, an outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of that discretion; it is merely an abuse of that discretion and is inconsistent with the spirit of the federal rules. On the other hand, a district court justifiably may deny leave to amend on grounds such as undue delay, bad faith, dilatory motive, and prejudice, as well as on the ground that an amendment would be futile. An amendment is futile if the complaint, as amended, would not survive a motion to dismiss for failure to state a claim upon which relief could be granted. In determining whether the amendment would be futile, the district court applies the same standard of legal sufficiency as under *Fed. R. Civ. P. 12(b)(6)*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN14[] **Standards of Review, Abuse of Discretion**

If a district court concludes that an amendment is futile based upon its erroneous view of the law, it abuses its discretion in denying a plaintiff leave to amend to include a legally sufficient allegation.

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Judges: BEFORE: GREENBERG, NYGAARD and MCKEE, Circuit Judges.

Opinion by: GREENBERG

Opinion

[*182] OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

Renee M. Smith, a pro se litigant, appeals from the district court's order of May 21, 1997, dismissing her complaint for failure to state a claim, and from the district court's order of June 5, 1997, denying her motion for leave to amend her complaint. Smith's complaint alleges violations of *section 1* of the Sherman Act, *15 U.S.C. § 1*, and Title IX of the Educational Amendments of 1972, *20 U.S.C. § 1681*, as well as a state law breach **[**3]** of contract claim against the National Collegiate Athletic Association ("NCAA"). Smith's allegations arise from the NCAA's promulgation and enforcement of a bylaw prohibiting a student-athlete from participating in intercollegiate athletics while enrolled in a graduate program at an institution other than the student-athlete's undergraduate institution.

The district court had jurisdiction over the federal claims in this matter pursuant to *28 U.S.C. §§ 1331* and *1337* and *15 **[*183]** U.S.C. § 15*, and over the state law claim pursuant to *28 U.S.C. § 1367*. This court has jurisdiction to review the final orders of the district court pursuant to *28 U.S.C. § 1291*. [1]

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[1] According to the NCAA rules, a student-athlete is eligible to participate in intercollegiate athletics for a total of four seasons within a five-year period. Because Smith's five year-period of eligibility has expired and, according to the NCAA her complaint seeks only declaratory relief, the NCAA concludes that her Title IX claim is moot. We disagree.

Smith's Title IX claim is not moot although her period of eligibility has expired because she retains a claim for damages. *See Ellis Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 442, 104 S. Ct. 1883, 1889, 80 L. Ed. 2d 428 (1984)* (holding that ***HN1***[] a claim is not moot where there is a viable damages claim); *National Iranian Oil Co. v. MAPCO Int'l, Inc., 983 F.2d 485, 489 (3d Cir. 1992)*; *Jersey Cent. Power & Light Co. v. New Jersey, 772 F.2d 35, 41 (3d Cir. 1985)*. Although count II of Smith's complaint, which asserts a Title IX claim, states that "this action is a request for a declaratory relief challenging sex discriminatory practices and policies of the NCAA . . . in violation of Title IX," her complaint also includes a clause which prays

[4]** ***HN2***[] We exercise plenary review over the district court's dismissal of Smith's complaint for failure to state a claim. *See* *Lake v. Arnold, 112 F.3d 682, 684 (3d Cir. 1997)*. We accept all of her allegations as true, view them in the light most favorable to her, and will affirm the dismissal only if she can prove no set of facts entitling her to relief. *See* *Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996)*; *ALA, Inc. v. CCAir, Inc., 29 F.3d 855, 859 (3d Cir. 1994)*. ***HN3***[] We review the district court's denial of her motion for leave to amend her complaint for abuse of discretion. *See* *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)*.

II. FACTS AND PROCEDURAL HISTORY

Smith graduated from high school in the spring of 1991 and enrolled in St. Bonaventure University the following fall, where she participated in Division I athletics. Smith played intercollegiate volleyball for St. Bonaventure during the 1991-92 and 1992-93 athletic seasons. By her choice, Smith did not participate in intercollegiate volleyball for St. Bonaventure during the 1993-94 season.

Smith graduated from St. Bonaventure in two and one half years. Thereafter, she enrolled in a postbaccalaureate **[**5]** program at Hofstra University, and then in 1995 she enrolled in a second postbaccalaureate program at the University of Pittsburgh. St. Bonaventure did not offer either of these postbaccalaureate programs. The NCAA is an unincorporated association comprised of public and private colleges and universities and is responsible for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletes, and academic standards. The member institutions agree to abide by and enforce these rules. The NCAA denied Smith eligibility to compete for Hofstra and the University of Pittsburgh in the 1994-95 and 1995-96 athletic seasons, respectively, based upon Bylaw 14.1.8.2 in the NCAA Manual (the "Postbaccalaureate Bylaw"). The Postbaccalaureate Bylaw provides that a student-athlete may not participate in intercollegiate athletics at a postgraduate institution other than the institution from which the student earned her undergraduate degree. [2] Both Hofstra and the University of Pittsburgh applied to the NCAA for a waiver of the bylaw with respect to Smith, but the NCAA denied both requests. **[*184]** Smith was, however, in good academic standing and in compliance **[**6]** with all other NCAA eligibility requirements for the 1994-95 and 1995-96 athletic seasons.

In August 1996, Smith instituted this suit challenging the NCAA's **[**7]** enforcement of the bylaw as well as the NCAA's refusal to waive the bylaw in her case. More particularly, Smith alleged that the Postbaccalaureate Bylaw is an unreasonable restraint of trade in violation of *section 1* of the Sherman Act and the NCAA's refusal to waive the bylaw excluded her from intercollegiate competition based upon her sex in violation of Title IX. Smith also asserted a state law breach of contract claim based upon the NCAA's denial of eligibility. On May 21, 1997, the district court dismissed Smith's federal claims for failure to state a claim upon which relief could be granted. The court held that the NCAA's refusal to waive the bylaw was not the type of action to which the Sherman Act applied. It also held that Smith's complaint did not allege adequately that the NCAA was a recipient of federal funding so as to be subject to Title IX. By the same order, the district court exercised its discretion to dismiss Smith's state law contract claim

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for additional relief including damages and any further relief which the court finds appropriate. App. at 5. In our view, a fair reading of the complaint establishes that it asserts an action for damages under Title IX. *See* *Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992)* (holding that a claim for damages exists in an action to enforce Title IX).

[2] The bylaw at issue provides that

> [a] student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period . . . .

Rule 14.1.8.2 of NCAA Manual.

pursuant to *28 U.S.C. § 1367(c)*. *See* *Smith v. National Collegiate Athletic Ass'n, 978 F. Supp. 213 (W.D. Pa. 1997)*.

Thereafter, Smith submitted a proposed amended complaint and moved the district court for leave to amend **[**8]** her complaint, which the district court denied "as moot" on June 5, 1997. Smith filed timely appeals from these orders, which we have consolidated.

III. DISCUSSION

A. SHERMAN ACT CLAIM

Count I of Smith's complaint alleges that the NCAA, in promulgating and enforcing the Postbaccalaureate Bylaw, violated *section 1* of the Sherman Act because the bylaw unreasonably restrains trade and has an adverse anticompetitive effect. As we have indicated, the district court dismissed this claim for failure to state a claim upon which relief could be granted, holding that "the actions of the NCAA in refusing to waive the Postbaccalaureate Bylaw and allow the Plaintiff to participate in intercollegiate athletics is not the type of action to which the Sherman Act was meant to be applied." *See* *Smith, 978 F. Supp. at 218*. Smith argues that the district court erred in limiting the application of the Sherman Act to the NCAA's commercial and business activities. We disagree.

HN4[] *Section 1* of the Sherman Act provides, in relevant part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, **[**9]** is declared to be illegal." *15 U.S.C. § 1*. Although the section literally prohibits "every" contract, *section 1* does not preclude all restraints on trade, but only those that are unreasonable. *See* *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 98* & n.17, *104 S. Ct. 2948, 2959* & n.17, *82 L. Ed. 2d 70 (1984)*; *Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-44, 102 S. Ct. 2466, 2472-73, 73 L. Ed. 2d 48 (1982)*. The Clayton Act, *15 U.S.C. §§ 15*, *26*, grants a private right of action to, *inter alia*, a person "injured in his business or property" by a violation of *section 1* of the Sherman Act. [3] Smith misconstrues the law in arguing that the Supreme Court has refused to limit antitrust remedies to commercial interests. The cases she cites address whether the plaintiffs alleged injuries within the meaning of the Clayton Act; in that context, the Court held that the statute was not limited to redressing injuries to commercial interests. *See* *Reiter v. Sonotone Corp., 442 U.S. 330, 338-39, 99 S. Ct. 2326, 2330, 60 L. Ed. 2d 931 (1979)* (holding that "injury to business or property" was not limited to commercial interests); **[**10]** *Blue Shield of Va. v. McCready, 457 U.S. 465, 473,* ***[*185]*** *102 S. Ct. 2540, 2545, 73 L. Ed. 2d 149 (1982)* (holding that a subscriber to a health plan who had employed the services of a psychologist alleged a redressable antitrust injury); *see also McNulty v. Borden, Inc., 474 F. Supp. 1111, 1115-18 (E.D. Pa. 1979)* (holding that an employee of an alleged antitrust violator was injured in his business or property). The question which we now face is different; it is whether antitrust laws apply only to the alleged infringer's commercial activities. Thus, rather than focus on Smith's alleged injuries, we consider the character of the NCAA's activities.

[11]** In this regard, we recognize that the Supreme Court has suggested that antitrust laws are limited in their application to commercial and business endeavors. Thus, the Court has explained that

> [the Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought (by these laws) was the prevention of the restraints to the competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

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[3] Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93, 60 S. Ct. 982, 992, 84 L. Ed. 1311 (1940). The Court also has noted that "in *Apex* [it] recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." **[**12]** Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7, 79 S. Ct. 705, 710 n.7, 3 L. Ed. 2d 741 (1959).

The Supreme Court addressed the applicability of the Sherman Act to the NCAA in National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70, holding that the NCAA's plan to restrict television coverage of intercollegiate football games violated *section 1*. The Court discussed the procompetitive nature of the NCAA's activities such as establishing eligibility requirements as opposed to the anticompetitive nature of the television plan. *See* id. at 117, 104 S. Ct. at 2969. Yet, while the Court distinguished the NCAA's television plan from its rule making, it did not comment directly on whether the Sherman Act would apply to the latter.

Although insofar as we are aware no court of appeals expressly has addressed the issue of whether antitrust laws apply to the NCAA's promulgation of eligibility rules, *cf.* McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1343 (5th Cir. 1988) (assuming without deciding that the NCAA's eligibility rules were subject to antitrust scrutiny and holding that the "no-draft" **[**13]** and "no-agent" rules do not have an anticompetitive effect), many district courts have held that the Sherman Act does not apply to the NCAA's promulgation and enforcement of eligibility requirements. *See* Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738, 744-46 (M.D. Tenn. 1990) (holding that ***antitrust law*** cannot be used to invalidate NCAA eligibility rules, but noting in dicta that the "no-agent" and "no-draft" rules have primarily procompetitive effects); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that ***antitrust law*** does not apply to NCAA eligibility rules); College Athletic Placement Servs., Inc. v. National Collegiate Athletic Ass'n, 1974 U.S. Dist. LEXIS 7050, 1975 Trade Cas. (CCH) P60,117, *available in* 1974 WL 998, * 2, * 3 (D.N.J. 1974) (holding that ***HN5***[] the NCAA's adoption of a rule furthering its noncommercial objectives, such as preserving the educational standards of its members, is not within the purview of ***antitrust law***), *aff'd* , 506 F.2d 1050 (3d Cir. 1974) (table).

We agree with these courts that the eligibility rules are not related to the NCAA's commercial or business activities. Rather than intending to provide **[**14]** the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics. Based upon the Supreme Court's recognition that the Sherman Act primarily was intended to prevent unreasonable **[*186]** restraints in "business and commercial transactions," Apex, 310 U.S. at 493, 60 S. Ct. at 992, and therefore has only limited applicability to organizations which have principally noncommercial objectives, *see* Klor's, Inc., 359 U.S. at 214 n.7, 79 S. Ct. at 710 n.7, we find that the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements. [4]

[15]** Moreover, even if the NCAA's actions in establishing eligibility requirements were subject to the Sherman Act, we would affirm the district court's dismissal of this claim. The NCAA's ***HN6***[] eligibility requirements are not "plainly anticompetitive," National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978), and therefore are not per se unreasonable, *see* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. at 101, 104 S. Ct. at 2960 (refusing to apply per se rule to NCAA's television plan because the NCAA is involved in an industry where horizontal restraints are necessary to the availability of the product); McCormack, 845 F.2d at 1343-44; College Athletic Placement Servs., 1974 U.S. Dist. LEXIS 7050, 1975 Trade

[4] The recent decision of the Court of Appeals for the Tenth Circuit in Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1998 WL 23710 (10th Cir. 1998), does not alter our result. At issue in *Law* was the NCAA's bylaw restricting entry-level coaches' annual compensation. The court held that although the restriction was a horizontal price restraint, which is usually per se invalid, the rule of reason applied because certain products, such as intercollegiate sports, require horizontal restraints in order to exist. *See id.* at * 5-* 6 (citing National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. at 100-01, 104 S. Ct. at 2959-60).

The bylaw at issue in *Law* concerned a restriction on the business activities of the institutions, whereas the Postbaccalaureate Bylaw does not. Because our analysis regarding the applicability of the Sherman Act focuses on the distinction between commercial and noncommercial activities, *Law* is inapposite. Further, because of the significant difference in the nature of the bylaw at issue in *Law* and the Postbaccalaureate Bylaw, the *Law* court's rule of reason analysis is not instructive here.

Cas. (CCH) P60,117, *available in* 1974 WL 998, * 3. Consequently, if the eligibility requirements were subject to the Sherman Act, we would analyze them under the rule of reason.

Under the "rule of reason" test, a court considers all relevant factors in determining a defendant's purpose in implementing the challenged restraint and the effect of the restraint on competition, *see* *Orson, Inc. v. Miramax Film Corp.,* ***[**16]*** *79 F.3d 1358, 1367-68 (3d Cir. 1996)* (citing *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 243-44, 62 L. Ed. 683 (1918))*, and asks essentially whether the challenged rule promotes or hinders competition. *See* *McCormack, 845 F.2d at 1344*.

As noted above, the Supreme Court has recognized the procompetitive nature of many of the NCAA's restraints, including eligibility requirements. *See* *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. at 117, 104 S. Ct. at 2969*. According to the Supreme Court,

> what the NCAA and its member institutions market in this case is competition itself--contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules . . . must be agreed upon, and all restrain the manner in which institutions compete. . . . Thus, the NCAA plays a vital role in enabling [intercollegiate sports] to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice **[**17]** . . . and hence can be viewed as procompetitive.

468 U.S. at 101-02, 104 S. Ct. at 2960-61 (footnote omitted). In particular, the Court explained that "it is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics" and suggested that rules establishing eligibility requirements of student-athletes were such controls, while rules limiting television broadcasts were not. *See* *id. at 117, 104 S. Ct. at 2969*.

[*187] While the parties have not cited any opinion addressing the particular bylaw at issue here, and we have found none, other courts have held that the NCAA's "no-draft" and "no-agent" rules, which disqualify a student-athlete from further intercollegiate competition if the student-athlete enters a professional draft or contacts an agent, are reasonable because they are procompetitive. *See* *McCormack, 845 F.2d at 1343*; *Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1087-94 (7th Cir. 1992)* (holding that NCAA's "no-draft" and "no-agent" rules do not have an anticompetitive **[**18]** impact on a discernable market); *Gaines, 746 F. Supp. at 746*; *Jones, 392 F. Supp. at 304* (noting in dicta that "any limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals"); *see also* *Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356, 379 (D. Ariz. 1983)* (holding that NCAA sanctions such as rendering a college team ineligible for post-season play and for television appearances imposed for violations of rule against providing compensation to student-athletes did not violate ***antitrust law*** because sanctions were reasonably related to the NCAA's goals of preserving amateurism and promoting fair competition).

We agree with these courts that, in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field. *See* *McCormack, 845 F.2d at 1345*. Likewise, the bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive. Clearly, the rule discourages institutions with graduate or professional schools from inducing undergraduates **[**19]** at other institutions to forgo participating in the athletic programs at their undergraduate institutions in order to preserve eligibility to participate in intercollegiate athletics on a postbaccalaureate basis. Likewise, the rule discourages undergraduates from forgoing participation in athletic programs on their own initiative to preserve eligibility on a postbaccalaureate basis at another institution. Indeed, we think that the bylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it by affirming an order granting a motion to dismiss Smith's antitrust count for failure to state a claim on which relief can be granted.

B. TITLE IX CLAIM

HN7[] Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *20 U.S.C. § 1681(a)*. Intercollegiate athletics is an educational program or activity within the statute. *See 20 U.S.C. § 1687*; *34 C.F.R. § 106.41 (a)*. [5]

[20]** Thus, the NCAA is subject to Title IX provided that it receives federal financial assistance within the meaning of *section 1681(a)*.

Federal regulations define "recipient" as including

> any public or private agency, institution or organization, or other entity, or any other person, *to whom Federal financial assistance is extended directly or through another recipient* and which operates an educational program or activity *which receives or benefits* from such assistance, including any subunit, successor, assignee or transferee thereof.

34 C.F.R. § 106.2(h) (1997) (emphasis added). The plain language of the statute and regulation is quite broad and encompasses indirect recipients of federal funds. *See Grove City College v. Bell, 465 U.S. 555, 564,* ***[*188]*** *104 S. Ct. 1211, 1216, 79 L. Ed. 2d 516 (1984)* (holding that a college received federal funds where the funds were granted to its students as financial aid rather than directly to the college because the language of the section does not distinguish between direct and indirect receipt of federal funds).

The Court of Appeals for the Sixth Circuit addressed the applicability of Title IX to a state high school athletic **[**21]** association in *Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994)*. In *Horner*, the plaintiffs, female student-athletes, alleged that the association received dues from its member high schools, many of which receive federal funds, and that a state statute authorized the designation of the association as an agent of the state board of education. *See Ky. Rev. Stat. Ann. § 156.070(1)*, *(2)*. In that capacity, the association performed the board's statutory duties with respect to interscholastic sports. The plaintiffs alleged that the association violated Title IX by sanctioning fewer sports for girls than boys and by refusing to sanction a particular sport for girls. The court held that the association would be subject to Title IX if the plaintiff could prove her allegations with respect to its functioning and financing. *See id.*

The district court attempted to distinguish *Horner* by noting that "even if the [NCAA] receives dues from member schools which receive federal funds, unlike the situation in Horner, there is no statutory connection between the parties such that the Defendant can be considered the 'agent' of its member institutions that **[**22]** receive federal financial assistance." *See Smith, 978 F. Supp. at 220*. Thus, according to the district court, the distinguishing characteristic here is the lack of statutory authority for the NCAA. We disagree. The NCAA acts no less than the association in *Horner* as an agent of its member institutions merely because it lacks statutory authority for its activities. The NCAA is a voluntary organization created by and comprised of the educational institutions which essentially acts as their surrogate with respect to athletic rules.

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[5] ***HN8***[] The statute defines "program or activity" as

> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or . . .
>
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance . . . .

20 U.S.C. § 1687. In addition, federal regulation in part provides that

> ***HN9***[] no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a).

In its construction of section 504 of the Rehabilitation Act, which contains language identical to that of Title IX in 20 U.S.C. § 1681(a) regarding receipt of federal assistance, [6] **[**24]** the Supreme Court has indicated that Congress, as in Title IX, did not distinguish between direct and indirect financial assistance. *See* United States Dep't of Transp. v. Paralyzed Veterans of Amer., 477 U.S. 597, 606-07, 106 S. Ct. 2705, 2711-12, 91 L. Ed. 2d 494 (1986) (citing Grove City College, 465 U.S. at 564, 104 S. Ct. at 1216 (holding that a college received federal funds where the funds were granted to its students as financial aid rather than directly **[**23]** to the college)). The Court, however, drew a distinction between those entities which indirectly *benefit from* federal assistance and those that indirectly *receive* federal assistance, holding that only those the *receive* federal funds are within the statute. Thus, the Court rejected the argument that all commercial airlines are "recipients" of federal funds simply because airport operators receive federal funds which benefit the airlines in the form of runways, *inter alia*. *See* id. at 606, 106 S. Ct. at 2711. The Court defined "recipient" from a contractual perspective, limiting "recipients" of federal funds, and therefore the obligations of the act, to those who are in a position to decide whether to "receive" federal funds and thereby accept the concomitant obligations of the statute. *See id.* [7]

[*189] Notwithstanding the parallel language of the Rehabilitation Act and Title IX, we do not apply the *Paralyzed Veterans* Court's definition of "recipient" to Title IX in the circumstances here. In our view, the broad regulatory language under Title IX, which defines a recipient as an entity "which operates an educational program or activity which *receives or benefits*" from federal funds, 34 C.F.R. § 106.2(h) (1997) (emphasis added), requires that we reach a different result. Application of *Paralyzed Veterans* here would render the regulatory definition **[**25]** of "recipient" under Title IX a nullity. After all, unlike the commercial airlines in *Paralyzed Veterans*, the NCAA is not merely an incidental beneficiary of federal funds. Quite to the contrary, it seems to us that the relationship between the members of the NCAA and the organization itself is qualitatively different than that between airlines and airport operators, for we think that it would be unreasonable to characterize the latter as surrogates for the airlines. Given the breadth of the language of the Title IX regulation defining recipient, we hold that allegations in Smith's proposed amended complaint, that the NCAA receives dues from its members which receive federal funds, if proven, would subject the NCAA to the requirements of Title IX.

The district court found that Smith's original complaint did not allege that the NCAA was a recipient of federal funds, and therefore dismissed the Title IX claim. *See* Smith, 978 F. Supp. at 219. Smith's complaint included the following allegation:

> This action is a request for declaratory relief challenging sex discriminatory practices and policies of the NCAA, Hofstra University, and the University of Pittsburgh in violation **[**26]** of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681. Title IX prohibits sex discrimination in an educational program or activity receiving federal financial assistance.

Compl. P 25. We agree that Smith's original complaint did not contain an allegation that the NCAA receives federal financial assistance. Thus, the district court properly dismissed her original Title IX complaint. [8]

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[6] The Rehabilitation Act states that

> no otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance*.

29 U.S.C. § 794 (emphasis added).

[7] The Court noted that "Congress enters into an arrangement in the nature of a contract with the recipients of the federal funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." 477 U.S. at 605, 106 S. Ct. at 2711. The Court further noted that "by limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds." Id. at 606, 106 S. Ct. at 2711.

But we have not confined our analysis to Smith's original complaint for, as we have indicated, following the district court's dismissal of her claims, Smith moved for leave to amend her complaint pursuant to *Fed. R. Civ. P.* ***[**27]*** *15*. By order dated June 5, 1997, the district court denied this motion, stating only that the motion "is denied as moot, the court having granted defendant's motion to dismiss on May 20, 1997." App. at 117. Because the district court gave no further explanation, it is unclear whether the district court was unaware of its discretion to allow the proposed amended complaint despite the dismissal or whether the court believed that the amendment would be futile even if pleaded. Nevertheless, under either view, the district court erred in denying Smith's motion for leave to amend.

HN11[] Pursuant to *Fed. R. Civ. P. 15(a)*, a plaintiff has an absolute right to amend her complaint once at any time before a responsive pleading is served. Thereafter, a plaintiff must seek leave of the district court to amend her pleading, and although it is within the district court's discretion, district courts should grant such requests freely when justice so requires. *Id.*

After the district court enters judgment on a motion to dismiss, a plaintiff no longer may amend her complaint as of right. *See* *Newark Branch, NAACP v. Town of Harrison, 907 F.2d 1408, 1417 (3d Cir. 1990)*; *Kauffman v. Moss, 420 F.2d* ***[**28]*** *1270, 1276 (3d Cir. 1970)*. However, even though Smith no longer was entitled to amend her complaint as of right after the dismissal of her claim, it was within the district court's discretion to grant her leave to amend. *See* *Newark Branch, NAACP, 907 F.2d at 1417*; *Kauffman, 420 F.2d at 1276*; *In re Sverica Acquisition Corp. v. Load Rite Trailers, Inc., 179 B.R. 457, 459 (E.D. Pa. 1995)*; *Fearon v. Community Fed. Sav. & Loan of Phila., 119 F.R.D. 13, 15 (E.D. Pa. 1988)* ***HN12***[] (plaintiff had no right to **[*190]** amend where both complaint and action dismissed, but could seek leave of court to do so). Thus, her motion to amend was not moot in the sense of being too late or being foreclosed by the dismissal.

HN13[] While "the grant or denial of an opportunity to amend is within the discretion of the District Court . . . outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of that discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962)*. On the other hand, a district court justifiably may deny leave to amend **[**29]** on grounds such as undue delay, bad faith, dilatory motive, and prejudice, as well as on the ground that an amendment would be futile. *See id.*; *In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1434*; *Massarsky v. General Motors Corp., 706 F.2d 111, 125 (3d Cir. 1983)*. An amendment is futile if the complaint, as amended, would not survive a motion to dismiss for failure to state a claim upon which relief could be granted. *See* *In re Burlington Coat Factory, 114 F.3d at 1434* (citing *Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996))*. In determining whether the amendment would be futile, the district court applies the same standard of legal sufficiency as under *Fed. R. Civ. P. 12(b)(6)*. *See id.*

Smith alleged facts in her proposed amended complaint which, if proven, would establish that the NCAA was a recipient of federal funds within the meaning of Title IX. Her motion states that she intended the amended complaint to cure any allegational defects, and the proposed amended complaint includes an allegation that the NCAA is an indirect recipient of federal funds. In particular, her proposed amended complaint alleges that "the NCAA is a recipient **[**30]** of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." App. at 98. This allegation plainly alleges that the NCAA receives dues from member institutions, which receive federal funds. As discussed above, this allegation would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss.

HN14[] If a district court concludes that an amendment is futile based upon its erroneous view of the law, it abuses its discretion in denying a plaintiff leave to amend to include a legally sufficient allegation. *See* *Centifanti v. Nix, 865 F.2d 1422, 1431 (3d Cir. 1989)* (holding that the district court, which erred in its conclusion that there was

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[8] However, Judge McKee would hold that Smith's original complaint sufficiently states that the NCAA receives federal financial assistance under the pleading requirements that we apply to pro se complaints. *See* *Zilich v. Lucht, 981 F.2d 694 (3d Cir. 1992)* ***HN10***[] ("When, as in this case, plaintiff is a pro se litigant, we have a special obligation to construe [her] complaint liberally.").

jurisdictional defect, abused its discretion in denying a plaintiff's motion for leave to amend his complaint because the proposed amendment would not cure the jurisdictional defect). Thus, if the district court denied Smith leave to amend because it viewed the proposed amendments as futile, it erred because the conclusion was based on an **[**31]** error of law. Furthermore, we see no basis to conclude that the district court justifiably could have denied the motion to amend on the grounds that Smith had acted in bad faith, with a dilatory motive, or had delayed unduly in bringing the motion or that granting the motion would prejudice the NCAA. Indeed, there is nothing in the record to support a conclusion that the district court denied the motion to amend on any of these grounds. Overall, therefore, we are satisfied that the district court abused its discretion in denying the motion to amend the complaint. [9]

IV. **[**32]** CONCLUSION

For the foregoing reasons, we will affirm the district court's dismissal of appellant's Sherman Act claim, vacate its dismissal of the Title IX claim, and reverse the district court's denial of her motion for leave to amend her complaint with respect to her Title IX claim. In light of this conclusion, we **[*191]** will remand to the district court for further proceedings consistent with this opinion and direct the district court to reinstate her state law contract claim, over which the district court declined to exercise jurisdiction pursuant to *28 U.S.C. § 1367(c)*. The parties will bear their own costs on this appeal.

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[9] We do not imply that we have any view of the merits of Smith's Title IX claim. The parties have not briefed the merits, and the district court will address those issues on remand if Smith can prove her allegations to support the applicability of Title IX to the NCAA. Thus, we emphasize that we merely hold that the amendment would not have been futile in the sense that it would not have pled adequately that the NCAA was subject to Title IX.

Mitel Corp. v. A&A Connections

United States District Court for the Eastern District of Pennsylvania

March 19, 1998, Decided ; March 20, 1998, Filed, Entered

CIVIL ACTION No. 97-cv-4205

Reporter

1998 U.S. Dist. LEXIS 3576 *; 1998-1 Trade Cas. (CCH) P72,120

MITEL CORPORATION; MITEL INC.; MITEL (FAR EAST) LIMITED, Plaintiffs, v. A&A CONNECTIONS INC., d/b/a TELEQ and d/b/a FRANZ TELECOM INVESTMENTS; ANDREW F. SILVERMAN, Defendants.

Disposition: **[*1]** Plaintiffs' motion to dismiss GRANTED in part and DENIED in part.

Core Terms

antitrust, authorized dealer, Dealership, allegations, tortious interference, counterclaims, distribution agreement, termination, products, monopolization, motion to intervene, motion to dismiss, Defendants', repair, Distributor, replacement, add-ons, dealers, contractual relationship, relevant market, main action, manufacturer, non-party, customer, upgrades

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[ ] **Regulated Practices, Private Actions**

A claim may be dismissed under *Fed. R. Civ. P. 12(b)(6)* only if it appears beyond a reasonable doubt that the plaintiff could prove no set of facts in support of the claim that would entitle him to relief. In considering such a motion, a court must accept all of the facts alleged in the complaint in the light most favorable to the plaintiff. Additionally, when reviewing antitrust claims the dismissal standard is elevated because motive and intent play leading roles; thus the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. Nonetheless, the court will not shy away from dismissing antitrust claims that are vague and conclusory in nature.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

Under the Sherman and Clayton Acts, individual harm is irrelevant: consumer protection is the primary concern. In antitrust cases, a plaintiff must prove injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. In other words, because ***antitrust law*** aims to protect competition, not competitors, a court must analyze the antitrust injury question from the viewpoint of the consumer. An antitrust plaintiff must prove that challenged conduct affected the prices, quantity, or quality of goods or services, not just his own welfare.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Sherman Act, Claims**

To establish a violation *§ 1* of the Sherman Act for unreasonable restraint of trade, a plaintiff must prove (1) concerted action by the defendants, (2) that produced anticompetitive effects within the relevant product and geographic markets, (3) that the concerted action was illegal, and (4) that the plaintiff was injured as a proximate result of the concerted action.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN4[] **Regulated Practices, Private Actions**

Courts recognize the procompetitive effects of limiting distribution of a product to company authorized dealers.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN5[] **Monopolies & Monopolization, Actual Monopolization**

The offense of monopoly under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historical accident. To state a claim for attempted monopolization, a plaintiff must allege that (1) a defendant had engaged in predatory conduct or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] **Regulated Practices, Market Definition**

The outer bounds of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. In certain limited situations, a product market may consist of only a single brand. In circumstances where the product or service is unique and therefore not interchangeable with other products or services, the single brand can constitute the relevant market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

International Trade Law > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN7[] **Tying Arrangements, Clayton Act**

Whether brought under *§ 1* of the Sherman Act or § 3 of the Clayton Act, the essential elements of a tying claim are the same. A "tying arrangement" is unlawful where (1) the scheme in question involves two distinct items and provides that one, the tying product, may not be obtained unless the other, the tied product, is also purchased; (2) the tying product possesses sufficient economic power to appreciably restrain competition in the tied product market; and (3) a "not insubstantial" amount of commerce must be affected by the arrangement. Finally, the United States Court of Appeals for the Third Circuit requires that the manufacturer of the tying product must garner some economic benefit from the tying arrangement.

Civil Procedure > Parties > Intervention > General Overview

HN8[] **Parties, Intervention**

Fed. R. Civ. P. 24(b) provides, in part, that upon timely application, anyone may be permitted to intervene in an action when applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN9[] **Intentional Interference, Elements**

To state a claim for tortious interference with contractual relations, a claimant must allege the following four elements: (1) a contractual relation, (2) a purpose or intent to harm the claimant by preventing that relationship from developing, (3) the absence of any privilege or justification on the part of the defendant, and (4) damage resulting from defendants' conduct.

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > Business Torts > General Overview

HN10[] **Contracts Law, Breach**

The key to a tortious interference with business relations claim is demonstration by plaintiff of defendant's intent to destroy plaintiff's good will and reputation. Where a defendant's breach of contract with the plaintiff has only an incidental consequence of affecting plaintiff's business relationships with third persons, an action lies only in contract for defendant's breaches.

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For A&A CONNECTIONS, INC, d/b/a TELEQ d/b/a FRANZ TELECOM INVESTMENTS, ANDREW F. SILVERMAN, DEFENDANTS: KELLY ANNE S. SHELTON, ROBERT W. HAYES, COZEN AND O'CONNOR, PHILA, PA USA.

For FRANZ TELECOM INVESTMENTS, INC., MOVANT: ROBERT W. HAYES, COZEN & O'CONNOR, PHILA, PA USA.

Judges: RONALD L. BUCKWALTER, J.

Opinion by: RONALD L. BUCKWALTER

Opinion

MEMORANDUM

BUCKWALTER, J.

March 19, 1998

Plaintiffs, Mitel Corporation and its distributors in the United States, Mitel Inc. ("Mitel-USA") and in the Far East, Mitel Far-East Limited ("Mitel-Far East", collectively "Mitel") have instituted this breach of contract/copyright infringement action against defendants A&A Connections Inc. ("A&A Connections"), d/b/a Teleq and d/b/a Franz Telecom Investments ("FTI") and its president Andrew F. Silverman (collectively "A&A"). Mitel's claims spring from circumstances surrounding termination of a dealership agreement between Mitel-Far **[*2]** East and FTI (the "Complaint"). In response A&A filed four antitrust and four state law counterclaims ("A&A's Complaint"). Presently before the court are Mitel's motion to dismiss A&A's Complaint and non-party Franz Telecom Investments, Inc.'s motion to intervene. Based on the following, Mitel's motion to dismiss is granted, in part, and Franz Telecom Investments Inc.'s motion to intervene is denied.

I. Background [1]

Mitel manufactures internal telephone systems for organizations with multiple telephone extensions, commonly known as private business exchanges ("PBX systems"). Including Mitel, there are approximately four major manufacturers of PBX systems in the United States. Unsurprisingly, Mitel distributes its PBX systems in the United States through Mitel-USA and in the Far East through Mitel-Far East. Mitel-USA operates through independently **[*3]** owned authorized dealers ("Authorized Dealers") who are each given designated territories.

[1] In response to Mitel's motion to dismiss A&A filed an amended complaint. Unless otherwise indicated, the above facts are derived from this amended version.

New Mitel PBX systems are sold by Authorized Dealers exclusively. Installation and repair service, PBX subsystems, add-ons, upgrades and replacement parts are sold on a non-exclusive basis and therefore, Authorized Dealers compete with independent service organizations in this regard.

A&A Connections is an independent broker/service organization of Mitel PBX products. A&A Connections purchases new and used Mitel products from Authorized Dealers, dealers in foreign countries, unauthorized dealers and end users and resells this equipment to end users. Additionally, A&A Connections services Mitel PBX systems. A&A Connections applied to become a Mitel Authorized Dealer but was turned down.

To expand into the new PBX systems market A&A Connections entered into a joint venture with a Vietnamese Company, Cua Viet ("Cua Viet") to market PBX systems in Vietnam. A&A Connections also entered into an agreement with PCS International ("PCS") under which PCS agreed to provide marketing support for the sale of PBX equipment in Vietnam. FTI was formed to acquire new PBX systems on behalf of A&A Connections. **[*4]** In January 1996 FTI entered into a dealership agreement ("Dealership Agreement") with Mitel-Far East for the primary purpose of obtaining new PBX systems to supply the joint venture in Vietnam. Section 2.1 of the Dealership Agreement stated "It is a fundamental condition of this Agreement that FTI will not sell any Product [new Mitel PBX systems] to customers outside of Vietnam." In early 1997 Mitel learned that, contrary to the limits of section 2.1, FTI was importing PBX systems purchased under the Dealership Agreement into the United States. Consequently, Mitel terminated the Dealership Agreement and commenced this litigation on June 23, 1997. (Complaint PP 30-41).

After termination of the Dealership Agreement, in June 1997, Mitel-Far East and PCS entered into a distribution agreement ("Distribution Agreement") under which PCS would distribute Mitel systems in Vietnam. [2] Section 2.7 of the Distribution Agreement contained the following restriction:

> "The Distributor [PCS] shall not sell the Products [PBX systems] to any customer which is outside the Territory [Vietnam] or within the Territory if to the knowledge of the Distributor that customer intends to resell **[*5]** the Products in any country which is outside of the Territory. . . should any Products be exported from Vietnam with the knowledge of Distributor (knowledge being defined as "knew or should have reasonably known under the circumstances") then the Distributor agrees to pay Mitel liquidated damages in the amount equal to 33% of the purchase price plus investigative costs an attorneys fees not to exceed US $ 25,000 for each violation. . . ."

Pursuant to the Distribution Agreement, PCS ordered four Mitel PBX systems and related equipment and paid to Mitel-Far East $ 149.063.50. A&A alleges that PCS's order was actually made on behalf of non-party Franz Telecom Investments, Inc. ("FTI, Inc.") and that FTI, Inc. prepaid PCS for the equipment. Before filling the order Mitel discovered PCS's plans to deliver the equipment to FTI, Inc. **[*6]** for resale in the United States. Based on this information, Mitel-Far East terminated the Distribution Agreement, refused to deliver the ordered equipment and retained $ 82,874.25 of PCS's payment. Nothing in the record or pleadings indicate that A&A Connections was affected by the Distribution Agreement.

II. Standard of Review

HN1[] A claim may be dismissed under *Rule 12(b)(6)* only if it appears beyond a reasonable doubt that the plaintiff could prove no set of facts in support of the claim that would entitle him to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. In considering such a motion, a court must accept all of the facts alleged in the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*. Additionally, when reviewing antitrust claims the dismissal standard is elevated because motive and intent play leading roles, thus the "proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. Nonetheless, this court **[*7]** has previously acknowledged that it will not shy away from

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[2] It is unclear whether at the time of execution of the Distribution Agreement Mitel was aware of any relationship among A&A Connections, PCS, FTI and Franz Telecom Investments, Inc.

dismissing antitrust claims that are vague and conclusory in nature. *See* *Rototherm v. Penn Linen & Uniform Service, Inc., 1997 U.S. Dist. LEXIS 10057, 1997 WL 419627* (E.D.Pa. Jul. 3, 1997)(citations omitted).

III. A&A's Antitrust Counterclaims

Counts I though IV are permissive counterclaims containing general allegations that Mitel's exclusive distribution practices in the United States violate federal antitrust laws. Mitel argues that all four antitrust claims must be dismissed as A&A has failed to adequately plead antitrust injury. Specifically, Mitel claims that A&A has alleged only individual harm, which is not protected under relevant ***antitrust law***.

It is clear that under those portions of ***HN2***[] the Sherman and Clayton Acts presently at issue, individual harm is irrelevant -- consumer protection is the primary concern. In antitrust cases, a plaintiff must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours and Co., 826 F.2d 1235, 1240 (3d Cir. 1987)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat,* ***[*8]*** *Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. In other words, because "***antitrust law*** aims to protect competition, not competitors, [a court] must analyze the antitrust injury question from the viewpoint of the consumer." *Alberta Gas, 826 F.2d 1235 at 1241*. "An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services," not just his own welfare. *Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 728 (3d Cir. 1991)*.

Mitel is correct, in part. A&A's allegations and argument focus on harm suffered by independent PBX brokers, specifically A&A Connections. However, P 157 of A&A's Complaint, alone, contains the requisite allegation of harm to consumers. Paragraph 157 alleges that as a result of Mitel's actions "the ultimate end-users of Mitel PBX systems have been injured by not being able to buy the replacement and/or add-on parts from independent brokers [e.g. A&A Connections] and by not being able to choose a service and/or maintenance provider other than Mitel authorized distributors." Accepting as true A&A's allegations and all reasonable inferences therefrom I conclude that these allegations **[*9]** are sufficient to survive a motion to dismiss because the exclusion alleged constitutes antitrust injury. *See* *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Company, 113 F.3d 405, 418 (3d Cir. 1997)*; *Brader v. Allegheny General Hospital, 64 F.3d 869, 876 (3d Cir. 1995)*(The existence of antitrust injury is not typically resolved through motions to dismiss). Thus, I turn to Mitel's specific arguments.

A. Count I: Unreasonable Restraint of Trade

A&A alleges that Mitel's practice of selling PBX equipment only through Authorized Dealers has unreasonably restrained trade in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. Specifically, that Mitel and its Authorized Dealers have conspired together to elevate unreasonably prices for replacement parts, add-on, and up-grades and thus exclude competitors such as A&A Connections from the Mitel PBX parts market within the United States.

HN3[] To establish a *§ 1* violation for unreasonable restraint of trade, a plaintiff must prove (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) **[*10]** that the plaintiff was injured as a proximate result of the concerted action. *See* *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1996)*(citations omitted).

Mitel counters that A&A's claim must be dismissed because the goal of their practice of using only to Authorized Dealers is "procompetitive." The company argues that the existence of a network of Mitel dealers who provide valuable service to end user increases goodwill among end users and makes Mitel more competitive. Mitel explains that its Authorized Dealers "employ skilled and fully trained technicians who are fully qualified to properly install and maintain Mitel brand PBX systems, and who adhere to strict industry and customer satisfaction standards."

Mitel is correct; ***HN4***[] courts have recognized the procompetitive effects of limiting distribution of a product to company authorized dealers. *See e.g.* *Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97*

S. Ct. 2549 (1977); Business Electronics v. Sharp Electronics, 485 U.S. 717, 721, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988) Yet, at this early stage, without the benefit of discovery, Mitel's mere allegations that its **[*11]** relationship with its Authorized Dealers is "procompetitive" is insufficient to refute A&A's claim of antitrust injury. A determination as to the nature of the effect Authorized Dealers have on the relevant market, namely whether they do, as Mitel suggests, actually increase customer satisfaction can only be made through discovery. Therefore, Mitel's motion, as it pertains to Count I, is denied.

B. Counts II and III: Monopolization or Attempted Monopolization

A&A claims that it competes with Mitel Authorized Dealers in the United States market for replacement Mitel PBX system parts, upgrades, repairs and add-ons and that Mitel has unlawfully monopolized (Count II) or attempted to unlawfully monopolize (Count III) such market.

HN5[] The offense of monopoly under *§ 2* of the Sherman Act, *15 U.S.C. § 2*, has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historical accident." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*(citations **[*12]** omitted). To state a claim for attempted monopolization, a plaintiff must allege that "(1) Defendant had engaged in predatory conduct or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power." *Ideal Dairy Farms Inc., v. John Labatt Ltd., 90 F.3d 737, 750 (3d Cir. 1996)*.

Mitel challenges the adequacy of A&A's relevant market description. Mitel claims that A&A's proposed market is too narrow because it is limited to only a single brand; replacement parts, upgrades, repair service and add-ons for Mitel PBX systems in the United States.

HN6[] The outer bounds of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. *Brown Shoe Co. v. U.S., 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. In certain limited situations a product market may consist of only a single brand. For example, in *Eastman Kodak*, the Supreme Court held that the market for repair parts and services for Kodak photocopiers was a valid relevant market because repair parts and services for Kodak machines were not interchangeable **[*13]** with the service and parts used to fix copiers. *Kodak, 504 U.S. at 482*. Thus, in circumstances where the product or service is unique and therefore not interchangeable with other products or services, the single brand can constitute the relevant market. *Id.*; *See also* *Queen City Pizza Inc., 124 F.3d at 439*. A&A alleges, and Mitel does not refute, that add-ons, upgrades, replacement parts for Mitel's PBX systems must be manufactured by Mitel. Other PBX parts are not compatible with Mitel's PBX systems. Therefore, for purposes of surviving Mitel's motion to dismiss A&A's market definition is sufficient and its claims of monopolization and attempted monopolization are adequately pled.

C. Count IV: Tying

A&A claims that as a precondition to purchase, consumers of Mitel PBX systems and parts are required to use only the installation, maintenance and repair services of Authorized Dealers. A&A states "Mitel and Mitel-USA have accordingly tied the sale of Mitel PBX systems, subsystems and component parts (the tieing products) to the use of its Authorized Dealers' installation and maintenance services (the tied products)."

HN7[] Whether brought under *§ 1* of the Sherman Act or **[*14]** § 3 of the Clayton Act, the essential elements of a tying claim are the same. *See* *Borschow Hospital & Medical v. Cesar Castillo, 96 F.3d 10, 17 n.5 (1st Cir. 1996)*; *Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1988)*. A "tying arrangement" is unlawful where (1) the scheme in question involves two distinct items and provides that one (the tying product) may not be obtained unless the other (the tied product) is also purchased. *Times-Picayune Publishing Co. v. U.S., 345 U.S. 594, 613-14, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; (2) the tying product possesses sufficient economic power to appreciably restrain competition in the tied product market. *Northern Pacific R. Co. v. United States, 356 U.S. 1, 6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1957)*; and (3) a "not insubstantial" amount of commerce, must be affected by the arrangement. *International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*. Finally, like many circuits, this circuit requires that the manufacturer of the tying product must garner some economic benefit from the tying arrangement. *Venzie Corp. v. United States Mineral Products Co. Inc., 521 F.2d 1309, 1317* ***[*15]*** *(3d Cir. 1975)*.

Mitel correctly notes that A&A fails to meet this final requirement. Absent from A&A's Complaint is any indication that Mitel, the manufacturer of the tying products, directly benefited from its dealers maintenance contracts. From the pleadings it is clear that only Mitel's Authorized Dealers received compensation for maintenance and repair services they performed. Therefore, because Mitel does not share in the profits derived from maintenance contracts that its dealers sell, it does not have a direct economic interest in the tied market as contemplated by *Venzie*. Consequently, A&A has failed to state a tying claim and Count IV of A&A's Complaint is dismissed.

IV. FTI, Inc.'s Motion to Intervene

Presently FTI, Inc. seeks to intervene for purposes of asserting four state law counterclaims against Mitel which have been included in A&A's Complaint. [3] A&A initially attempted to gain access into this lawsuit for FTI, Inc. by simply adding FTI, Inc.'s name to the caption of its state law counterclaims. Thus, because they were asserted, in part, by a non-party who had not intervened, Mitel sought dismissal of the claims. Consequently, FTI, Inc. filed this **[*16]** motion for intervention.

A&A's Complaint contains two state law claims brought on behalf of A&A and FTI, Inc., Count V: tortious interference with contractual relations and Count VI: tortious interference with business relations (the "tortious interference claims") and two state law claims brought by FTI, Inc. alone, Counts VII: breach of contract and Count VIII: conversion (the "contract claims").

Though FTI, Inc., references several rules of civil procedure (13, 19 and 20) it is evident that *Rule 24* governs its intervention request. FTI, Inc., admits as much as its motion is aptly captioned "Motion to Intervene Pursuant to *Federal Rule of Civil Procedure 24*." Furthermore, it is evident and FTI, Inc. makes no assertion otherwise, that section (b) of the rule, **[*17]** which allows for permissive intervention, is applicable.

HN8[] *Rule 24(b)* provides, in relevant part,

> "Upon timely application anyone may be permitted to intervene in an action . . . when applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Because FTI, Inc.'s counterclaims lack factual and legal commonality with the main action and/or would further confound an already complex matter, FTI, Inc.'s request for intervention is denied.

Despite vague and obscure wording the tortious interference claims revolve around termination of the Distribution and Dealership Agreements. The contract claims relate only to the Distribution Agreement. Circumstances surrounding termination of the Dealership Agreement are at issue in the main action. Therefore, insofar as the tortious interference claims relate to the Dealership Agreement common questions of law and fact exist. However, this commonality is irrelevant to FTI, Inc.'s present motion as FTI, Inc. has no connection with the **[*18]** Dealership Agreement. FTI, Inc. was not a party to the agreement (parties to the agreement were only FTI and Mitel-Far East) and has not alleged that it was in any way affected by enforcement or termination of the agreement.

All four counterclaims reference the Distribution Agreement, which has some facts in common with the main action (both involve contracts for PBX systems to which Mitel-Far East is a party). This commonality, however, is not

[3] FTI and FTI, Inc are two distinct entities. As evidenced by public corporate records attached to Mitel's opposition to intervention, FTI is a registered fictitious name under which A&A Connections does business and FTI, Inc. is a separate corporation.

dispositive. Intervention under 24(b) is discretionary and in this instance slight factual commonality does not outweigh the undue complication assertion of FTI, Inc.'s Distribution Agreement claims would create. *See* Vol 6 Moore's Federal Practice, § 24.00 *et*. *seq*. (Matthew Bender 3d ed. 1997). This litigation already involves issues of antitrust, copyright and patent law. Therefore, to add to this heap litigation over an extraneous contract, which has no bearing on disposition of the main action and does not even involve the main defendant, A&A Connections, would only further complicate an already complex matter. *See* Wright, Miller and Kane, 7C Federal Practice and Procedure 2d § 1913 (1986 & Supp. 1997)(In denying intervention, **[*19]** courts may take into account in exercising their discretion the complicating effect of additional issues). Accordingly, FTI, Inc.'s motion to intervene is denied. [4]

[*20] V. Remaining State Law Counterclaims

The only remaining claims to review are A&A's tortious interference counterclaims, Counts V and VI, both of which Mitel argues have been insufficiently pled. Neither party disputes that Pennsylvania law governs.

A. Count V: Tortious Interference with Contractual Relations

HN9[] To state a claim for tortious interference with contractual relations, a claimant must allege the following four elements: (1) a contractual relation; (2) a purpose or intent to harm the claimant by preventing that relationship from developing; (3) the absence of any privilege or justification on the part of the defendant; and (4) damage resulting from defendants' conduct. *Gundlach v. Reinstein, 924 F. Supp. 684, 693 (E.D.Pa. 1996)*.

A&A claims that Mitel intentionally interfered with its contractual relationship with nonpartys PCS and Cua Viet by terminating the Dealership Agreement with FTI without justification, thereby rendering FTI and A&A Connections unable to perform their contractual obligations to PCS and Cua Viet. A&A alleges that prior to the Dealership Agreement, Mitel gave FTI oral permission to resell systems parts in the United States **[*21]** and therefore Mitel's subsequent termination of Dealership Agreement was a "set-up" designed to disparage FTI's good name. As a

[4] Additionally, Mitel argues that as a general rule federal courts should deny permission to intervene when, as in FTI, Inc.'s case, the intervenor seeks only to assert counterclaims. Mitel's position is based on Judge Bechtle's decision in *Hubner v. Schoonmaker* which concluded that *Rule 24* was not designed to allow parties to interject affirmative interests into a lawsuit through counterclaims. *Hubner v. Schoonmaker, 1990 U.S. Dist. LEXIS 13035, 18 Fed. R. Serv. 3d (Callaghan) 741*; 1990 WL 149207 at *7 (E.D.Pa. 1990). In reaching this conclusion, Judge Bechtle relied on the following excerpt from chapter 24.17 of volume 3A of the second edition of Moore's Federal Practice:

> "The desire of the petitioner to present a counterclaim or to add new parties may be one reason for denying intervention if the right to intervene is only discretionary. The fact that the intervenor's 'position is essentially aggressive' . . . may be one reason for denying intervention. The addition of new issues and new parties may be considered contrary to orderly procedure. . . . The court may properly deny or limit permissive intervention where it feels that the interposition of counterclaims not related to the matters at issue between the plaintiff and defendant would unduly delay or complicate the determination of those issues."

Id. (citing 3A Moore's Federal Practice, § 24.17 (Matthew Bender 1987).

Though several other federal courts have also based denial of a motion to intervene on § 24.17, Moore's editors chose to omit the section from the third edition of Moore's Federal Practice which was published in 1997. *See Medd v. Westcott, 32 F.R.D. 25 (N.D.Iowa 1963)*; *Beard-Laney v. Pressley, 18 F.R.D. 162 (W.D.S.C. 1955)*; *Kauffman v. Kebert, 16 F.R.D. 225 (W.D.Pa. 1955)*; Vol.6 Moore's Federal Practice § 24.00 *et*. *seq*. (Matthew Bender 1997). Nevertheless, I find Judge Bechtle's decision sound and applicable.

Mitel also argues that litigation between Mitel Far-East and PCS over termination of the Distribution Agreement is currently underway in Hong Kong, therefore, it is more appropriate for FTI, Inc. to seek intervention in that suit. Without evidentiary support of such litigation I refrain from passing on what if any impact such litigation would have on FTI, Inc.'s current motion.

result A&A Connections and FTI have incurred damages. Based on the above I find that A&A has made the requisite bare bones allegations and therefore Count V survives Mitel's 12(b)(6) motion.

B. Count VI: Tortious Interference with Business Relations

HN10[] The key to a tortious interference with business relations claim is demonstration by plaintiff of defendant's intent to destroy plaintiff's good will and reputation. *Rototherm, 1997 U.S. Dist. LEXIS 10057*, *34, 1997 WL 419627 *14; *Chrysler Credit Corp. v. B.J.M., Jr., Inc., 834 F. Supp. 813, 843 (E.D.Pa. 1993)*. Where a defendant's breach of contract with the plaintiff has only an incidental consequence of affecting plaintiff's business relationships with third persons, an action lies only in contract for defendant's breaches. *Id*. (citations omitted).

A&A alleges, in relevant part, that Mitel "acted with the specific intent to harm [their] business reputation" and that "the willful and intentional actions of [Mitel] were calculated to cause damage. . . ." Taken together with its allegations regarding the "set up" of FTI, **[*22]** it is clear that A&A has pled the relevant elements of its claim and therefore Mitel's motion as it pertains to Count VI is denied.

An appropriate order follows.

ORDER

AND NOW, this 19th day of March 1998, upon consideration of:

(1) Plaintiffs' 12(b)(6) motion to dismiss (Docket No. 14); Defendants' response (Docket No. 17); Plaintiffs' reply (Docket No. 18); Defendants' sur-reply (Docket No. 19); Plaintiffs' response to Defendants' sur-reply (Docket No. 21) and Defendants' supplemental reply to Plaintiffs' response (Docket No. 23); and

(2) Non-party, Franz Telecom Investments, Inc.'s motion to intervene (Docket No. 20); Plaintiffs' response (Docket No. 22); Franz Telecom Investments, Inc.'s reply (Docket No. 24); it is hereby ordered that Plaintiffs' motion to dismiss is **GRANTED,** in part, and **DENIED**, in part. Accordingly, counterclaims IV, VII and VIII of Defendants' Amended Complaint (Docket No. 16) are dismissed. It is further ordered that Franz Telecom Investments, Inc.'s motion to intervene is **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.

Tampa Bay Storm v. Arena Football League

United States District Court for the Middle District of Florida, Tampa Division

March 19, 1998, Decided ; March 19, 1998, Filed

CASE NO. 96-29-CIV-T-17C

Reporter

1998 U.S. Dist. LEXIS 5211 *; 1998-1 Trade Cas. (CCH) P72,184; 11 Fla. L. Weekly Fed. D 673

TAMPA BAY STORM, INC., Plaintiff, vs. ARENA FOOTBALL LEAGUE, INC., Defendant.

Disposition: [*1] Defendant's Motion to Strike Portions of Plaintiff's Memorandum in Opposition and Alternative Motion for Leave to Amend (Dkt. 87) denied. Defendant's Motion for Summary Judgment (Dkt. 83) granted as to Counts I and II and denied as to Counts III and IV.

Core Terms

summary judgment, league, asserts, scheduling order, good cause, Antitrust, pleadings, alleges, unfair, team, bankruptcy court, treble damages, diminution, consumer, defenses, genuine issue of material fact, breach of contract, economic loss rule, anti trust law, leave to amend, depositions, enterprise, practices, Football, commerce, purchase price, deceptive, nonmoving, courts, Arena

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN1[] **Estoppel, Collateral Estoppel**

Fed. R. Civ. P. 8(c) states that a party shall set forth affirmatively res judicata and any other matter constituting an avoidance or affirmative defense. Collateral estoppel is treated as such an avoidance or affirmative defense within the meaning of the federal rules. Affirmative defenses must be set forth in a responsive pleading or be deemed waived.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN2[] Relief From Judgments, Altering & Amending Judgments

Fed. R. Civ. P. 16(b) requires district courts to limit the time to "amend the pleadings" in the scheduling order. *Fed. R. Civ. P. 16(b)(1)*. *Rule 16(b)* also mandates that a court's scheduling order shall not be modified except upon a showing of good cause. *Fed. R. Civ. P. 16(b)(6)*.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Pretrial Matters > Conferences > General Overview

HN3[] Relief From Judgments, Altering & Amending Judgments

Where a party files the motion to amend after the scheduling order's deadline, the party must first demonstrate good cause under *Fed. R. Civ. P. 16(b)* before the court will consider whether an amendment is proper under *Fed. R. Civ. P. 15(a)*. The good cause standard requires the party seeking an extension to show that the schedule cannot be met despite the diligence of the party seeking the extension. When a party seeking the extension is not diligent, the good cause inquiry ends.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN4[] Discovery, Methods of Discovery

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The moving party must state the basis for its motion and must identify the portions of the record that show the absence of a genuine issue of material fact. The burden can be discharged by showing that there is an absence of evidence to support the nonmoving party's case.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN5[] Discovery, Methods of Discovery

Once the moving party meets its summary judgment burden, the nonmoving party must go beyond the pleadings and designate specific facts in affidavits, or in the depositions, answers to interrogatories, and admissions, if any, that show a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6[] Entitlement as Matter of Law, Materiality of Facts

In summary judgment, issues of material fact are "genuine" only if a reasonable jury considering the evidence presented could find for the nonmoving party. Material facts are those that will affect the outcome of the trial under the governing substantive law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN7[] Entitlement as Matter of Law, Materiality of Facts

In determining whether a material fact exists for the purposes of summary judgment, the court must consider all evidence in the light most favorable to the nonmoving party. All reasonable doubts and all justifiable inferences are resolved in favor of the nonmoving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN8[] Entitlement as Matter of Law, Appropriateness

Although factual disputes preclude summary judgment, the mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the party seeking summary judgment. When a party's response consists of nothing more than a repetition of his conclusional allegations, summary judgment is not only proper but required.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN9[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See *Fla. Stat. ch. 772.103* (1977).

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Evidence > Burdens of Proof > Clear & Convincing Proof

HN10[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

To have a cause of action for treble damages, a plaintiff must prove by clear and convincing evidence that a defendant violated a provision of *Fla. Stat. ch. 772.103*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Fla. Stat. ch. 542.18*.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN12[] **Regulated Practices, Monopolies & Monopolization**

See Fla. Stat. ch. 452.19.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[] **Practices Governed by Per Se Rule, Boycotts**

Absent a claim for per se antitrust violations, such as price fixing, group boycotting, and customer allocation, a plaintiff must allege and prove three elements to establish an antitrust claim: (1) a specifically defined market, (2) that the defendant had the ability to affect the price or output, and (3) that the plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in the market. A plaintiff must allege more than injury to itself; there must be an allegation of harm to competition in general.

Antitrust & Trade Law > Regulated Industries > Sports > Football

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN14[] **Sports, Football**

Professional sports are subject to antitrust laws.

Antitrust & Trade Law > Regulated Industries > Sports > Football

Governments > Legislation > Interpretation

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN15[] **Sports, Football**

The antitrust statute broadly defines "trade or commerce" to include any economic activity of any type whatsoever involving any commodity or service whatsoever. *Fla. Stat. ch. 542.17(4)*. The statute also provides that it was the intent of the legislature to "liberally" construe this act. *Fla. Stat. ch. 542.16*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN16[] **Regulated Practices, Trade Practices & Unfair Competition**

Antitrust laws are for the protection of competition, not primarily for the protection of individual competitors. In ***antitrust law***, it is not enough to allege that the plaintiff was injured; there must be an allegation of harm to competition in general. In stating and proving an antitrust claim, it is necessary for the plaintiff to allege the market-wide anti-competitive effects of a defendant's acts.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN17[] **Trade Practices & Unfair Competition, State Regulation**

See *Fla. Stat. ch. 501.204(1)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN18[] **Regulated Practices, Trade Practices & Unfair Competition**

The stated purpose of Florida's Deceptive and Unfair Trade Practices Act is to provide as its central aim the protection of the consuming public at large and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or business. Fla. Stat. ch. 501.22(2).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN19[] **Public Enforcement, State Civil Actions**

The "trade or commerce" provision defines a protected transaction as the advertising, soliciting, providing, offering, or distributing, whether by sale, rental or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. *Fla. Stat. ch. 501.203(8)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN20[] **Consumer Protection, Deceptive & Unfair Trade Practices**

The definition of "consumer" includes individuals as well as various business organizations, including "corporations." *Fla. Stat. ch. 501.203(7)*.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Contracts Law > Breach > General Overview

HN21[] **Types of Damages, Compensatory Damages**

Under Florida law, contract principles are more appropriate than tort principles to resolve purely economic claims. The economic loss rule applies to prevent tort recovery when damages flow from a breach of contract unless the tort is independent of the breach of contract.

Contracts Law > Breach > Breach of Contract Actions > General Overview

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Contracts Law > Breach > General Overview

HN22[] **Breach, Breach of Contract Actions**

Where the facts surrounding a breach of contract action are indistinguishable from an alleged tort, and where the alleged tort does not cause harm distinct from that caused by the breach of contract, a plaintiff is barred from bringing a separate tort action. Claims are barred by the economic loss rule if claims are factually "interwoven" with the breach of contract claim. Accordingly, it is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such breach can constitute negligence.

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For ARENA FOOTBALL LEAGUE, INC., defendant: Kirsten Karin Ullman, Hinshaw & Culbertson, Tampa, FL.

For ARENA FOOTBALL LEAGUE, INC., defendant: Ronald J. Kurpiers, II, Law Office of Ronald J. Kurpiers II, Chicago, IL.

Judges: ELIZABETH A. KOVACHEVICH, United States District Judge.

Opinion by: ELIZABETH A. KOVACHEVICH

Opinion

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause is before the Court on Defendant's Motion for Summary Judgment (Dkt. 83), Plaintiff's Memorandum in Opposition (Dkt. **[*2]** 85), and Defendant's Motion to Strike Portions of Plaintiff's Memorandum in Opposition and in the Alternative Motion for Leave to Amend (Dkt. 87).

Dkt. 87 Motion for Leave to Amend

Defendant, Arena Football League, Inc. ("AFL"), has requested leave to amend its Answer, (Dkt. 11), to include the affirmative defenses of res judicata and collateral estoppel. These defenses were not pled in Defendant's original Answer. Plaintiff, Tampa Bay Storm, Inc. ("TBS"), contends Defendant waived these defenses by not pleading them in Defendant's answer and that Defendant's request for leave to amend is untimely.

Defendant also seeks to apply the economic loss rule to Count IV of Plaintiff's complaint. Because the economic loss rule is not a listed defense under *Federal Rule of Civil Procedure 8(c)*, and because Plaintiff has adequately responded to the merits of the economic loss rule's application to Count IV, the Court will address it on its merits in the Count IV discussion. As for res judicata and collateral estoppel, the Court dispenses with them now as the Court agrees with Plaintiff that Defendant's motion for leave to amend is untimely.

HN1[] *Federal Rule of Civil Procedure 8(c)* plainly **[*3]** states that "a party shall set forth affirmatively…res judicata…and any other matter constituting an avoidance or affirmative defense." Collateral estoppel has been treated as such "an avoidance or affirmative defense" within the meaning of the federal rules. *North Ga. Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 431 (11th Cir. 1993)*. Courts have routinely held that "affirmative defenses must be set forth in a responsive pleading or be deemed waived." *American Nat'l Bank of Jacksonville v. FDIC, 710 F.2d 1528, 1537 (11th Cir. 1983)* (quoting *Funding Sys. Leasing Corp. v. Pugh, 530 F.2d 91, 95 (5th Cir. 1976)*.

Ostensibly relying on *Rule 15(a)*, Defendant asserts, however, that leave to amend "shall be freely given when justice so requires." (Dkt. 87, P 8.) Defendant also asserts that "these amendments will not interfere with the time requirements established by the Court." (Dkt. 87, P 7.) The Court disagrees, and finds that Defendant's request interferes with the deadline to amend pleadings as established by the Case Management and Scheduling Order (Dkt. 23).

HN2[] *Federal Rule of Civil Procedure 16(b)* requires district courts to limit the time to "amend the pleadings" **[*4]** in the scheduling order. *Fed. R. Civ. P. 16(b)(1)*. This action's Case Management and Scheduling Order provides that "motions to amend any pleadings . . . filed after this Case Management and Scheduling Order[] are disfavored[] pursuant to Local Rules 3.05(C)(2)(E) and 3.05(C)(3)(D). (*Dkt. 23 P 8*.). These Local Rules echo the scheduling order's time limit to amend pleadings. Here, the Court issued the Case Management and Scheduling Order on December 6, 1996. Defendant filed its Motion for Leave to Amend(Dkt. 87) on December 29, 1997, more than a year after the Scheduling Order. Unlike *Rule 15*'s liberal amendment standard, the Court finds that *Rule 16* mandates that a court's scheduling order "shall not be modified except upon a showing of good cause . . . ." *Fed. R. Civ. P. 16(b)(6)*; *Payne v. Ryder Sys., Inc., 173 F.R.D. 537, 540 (M.D. Fla. 1997)* (holding the Eleventh Circuit has consistently held that absent a showing of good cause, "motions filed after a deadline imposed by a court should be denied as untimely"). It is therefore within this Court's discretion to enforce the time limit set forth in the Scheduling Order absent Defendant showing good cause.

The Eleventh Circuit **[*5]** has recently upheld a Florida district court's order denying a motion for leave to amend filed after the district court's scheduling order. *Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1418 (11th Cir. 1998)*. The *Sosa* Court found that ***HN3***[] where the party filed the motion to amend after the scheduling order's deadline, the party "must first demonstrate good cause under *Rule 16(b)* before [the court] will consider whether amendment is proper under *Rule 15(a)*." *Id. at 1419*. If federal courts considered only *Rule 15(a)*, the courts would "render scheduling orders meaningless and effectively would read *Rule 16(b)* and its good cause requirement out of the Federal Rules of Civil Procedure." *Id.* The good cause standard requires the party seeking extension to show that the "schedule cannot 'be met despite the diligence of the party seeking the extension.'" *Id.* (quoting *Fed. R. Civ. P. 16* advisory committee's note). When a party seeking the extension is not diligent, the good cause inquiry ends. *Sosa, 133 F.3d at 1418* (citing *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992)*.

The Court has already noted that Defendant filed its motion for leave to **[*6]** amend well past the scheduling order's deadline. In addition, even though Defendant's motion does not address *Rule 16*'s "good cause" standard, the Court finds that, based on Defendant's own Motion (Dkt. 87), Defendant cannot show good cause for Defendant's untimely amendment. Specifically, Defendant asserts that res judicata and collateral estoppel were obvious defenses in response to Plaintiff's complaint, which referred to a prior bankruptcy proceeding. (Dkt. 87, P 3.) Defendant's Motion also states "the issues in this lawsuit are identical to those raised by the Plaintiff in the bankruptcy court proceeding." (Dkt. 87, P 4.) Defendant goes so far as to cite documents created well before this litigation which Defendant believed showed the issues in both case were identical.

Although Defendant couched its motion in terms of the notice Plaintiff had at the time the complaint was filed with respect to potential res judicata and collateral estoppel defenses, it is also clear that Defendant enjoyed the same notice but failed to plead these defenses in its answer or a timely amendment. The Court concludes, therefore, that Defendant could not demonstrate "good cause" because if Defendant **[*7]** had exercised reasonable diligence, Defendant could have easily amended its answer to include the defenses prior to the scheduling order's deadline. Accordingly, the Court **denies** Defendant's Motion to Strike Portions of Plaintiff's Complaint and **denies** as untimely Defendant's Alternative Motion for Leave to Amend. The Court now turns to consideration of Defendant's remaining summary judgment motion.

STANDARD OF REVIEW

HN4[] Summary judgment is proper if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party must state the basis for its motion and must identify the portions of the record that show the absence of a genuine issue of material fact. The burden can be discharged by "showing . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*.

HN5[] Once the moving party meets its burden, the nonmoving party must go beyond the pleadings **[*8]** and designate specific facts in affidavits, or in the depositions, answers to interrogatories, and admissions, if any, that show a genuine issue of material fact. *Id. at 324*.

HN6[] Issues of material fact are "'genuine' only if a reasonable jury considering the evidence presented could find for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Material facts are those that will affect the outcome of the trial under the governing substantive law. *Id. at 248*.

HN7[] In determining whether a material fact exists, the court must consider all evidence in the light most favorable to the nonmoving party. *Sweat v. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983)*. All reasonable doubts and all justifiable inferences are resolved in favor of the nonmoving party. *Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993)*.

HN8[] Although factual disputes preclude summary judgment, the "mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the party seeking summary judgment." *Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir.* ***[*9]*** *1980)*. When a party's response consists of nothing "more than a repetition of his conclusional allegations," summary judgment is not only proper but required. *Morris v. Ross, 663 F.2d 1032, 1034 (11th Cir. 1981)*.

FACTS

Plaintiff, Tampa Bay Storm, Inc. ("TBS"), a Florida corporation, brought this action against Defendant, Arena Football League, Inc. ("AFL"), a Delaware corporation, alleging: Count I, Breach of Contract; Count II, violation of Florida's Antitrust Act; Count III, violation of Florida's Deceptive and Unfair Trade Practices Act; and Count IV, Tortious Diminution in Value. The Court finds that the parties are in general agreement with respect to the following facts relevant to this motion for summary judgment.

In or about 1991, Denver Dynamite, Ltd. ("Dynamite"), the owner of the Denver Dynamite Arena Football team, indicated to the AFL that it had insufficient capital to complete the season. In response to the Dynamite's financial situation, various league members, including Plaintiff, Tampa Bay Storm, Inc. ("TBS"), established the Denver Dynamite Partnership ("DDP") to financially assist the Dynamite. Plaintiff owns a 57% interest in the DDP. In February **[*10]** 1992, an original involuntary Chapter 7 bankruptcy proceeding against the Dynamite was converted to a Chapter 11 proceeding. In September 1992, the Dynamite filed an adversary proceeding against the DDP to determine ownership of the team assets and to avoid a lien.

On or about February 22, 1994, the adversary proceeding settled, and a voluntary stipulation was formed among the Dynamite, the DDP, and the AFL. On May 18, 1994, the bankruptcy court approved this settlement stipulation. On May 15, 1995, pursuant to the stipulation, the Dynamite found a purchaser and moved to sell the Denver license. On July 10, 1995, the bankruptcy court entered a judgment approving the sale without objection by any party. On September 15, 1995, the bankruptcy court granted Dynamite's motion for a formal order approving the sale. This order confirmed that the sale was to be completed pursuant to the terms in Dynamite's motion, which incorporated the terms of the February 22, 1994 stipulation. On or about August 7, 1995, the AFL board of directors approved the sale of the Denver assets to Hollis Godfrey ("Godfrey") for the price of $ 230,000.

On or about October 12, 1995, the sale was completed and the **[*11]** property left bankruptcy and was transferred to Godfrey. Objections to the sale were required to be filed no later than January 17, 1996. In December 1995, Plaintiff sued Defendant in state court. The case was subsequently removed from the Sixth Judicial Circuit, Pinellas County, Florida, to this Court. On March 4, 1996, the bankruptcy court's order confirmed the Dynamite's plan of reorganization.

DISCUSSION

Count I: Breach of Contract and Treble Damages

In Count I, Plaintiff alleges breach of contract and has demanded treble damages pursuant to Florida Statute § 772. Defendant has moved for summary judgment on the issue of treble damages, arguing Plaintiff alleges no criminal activity pursuant to § 772 to support a demand for treble damages. Plaintiff's Memorandum in Opposition, (Dkt. 85), does not rebut Defendant's assertion.

HN9[] Florida Statute § 772 provides that it is unlawful for any person:

> (1) Who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of criminal activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the **[*12]** proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.
> (2) Through a pattern of criminal activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.
> (3) Employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt.
> (4) To conspire or endeavor to violate any of the provisions of subsection (1), subsection (2), or subsection (3).

Fla. Stat. Ann. § 772.103 (West 1997).

HN10[] To have a cause of action for treble damages, Plaintiff must prove by clear and convincing evidence that Defendant violated a provision of *§ 772.103*. *Id.* § 772.104. Defendant asserts that, absent any criminal conduct pursuant to the statute, Plaintiff's sole breach of contract allegation, without more, is insufficient to substantiate a claim for treble damages. Having brought the absence of any criminal allegations to the Court's **[*13]** attention, the Court finds Defendant has discharged its burden on summary judgment by showing that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The burden now shifts to Plaintiff to go beyond the pleadings and designate specific facts in affidavits, or in the depositions, answers to interrogatories, and admissions, if any, that show a genuine issue of material fact. *Id. at 324*. Since Plaintiff's Memorandum in Opposition, (Dkt. 85), fails to bring forth any facts to show there is a genuine issue for trial, the Court must grant Defendant's Motion for Summary Judgment. Accordingly, Defendant's Motion for Summary Judgment as to Count I treble damages is granted.

Count II: Violation of Florida's Antitrust Act

Plaintiff has alleged violations of Florida Statute § 542 ("Florida's Antitrust Act"). The relevant provisions provide that ***HN11***[] "every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful. *Fla. Stat. Ann. § 542.18*. Plaintiff also alleges ***HN12***[] § 452.19, which states that "it is unlawful for any person to monopolize, **[*14]** attempt to monopolize, or combine to conspire with any other person or persons to monopolize any part of trade or commerce in this state."

HN13[] Absent a claim for per se antitrust violations, such as price fixing, group boycotting, and customer allocation, Florida courts have required plaintiffs to allege and prove three elements to establish an antitrust claim: 1) a specifically defined market, 2) that defendant had the ability to affect the price or output, and 3) that the plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in the market. *Greenberg v. Mount Sinai Med. Ctr., 629 So. 2d 252, 257 (Fla. 3d DCA 1993)*; *see also* *Parts Depot Co. v. Florida Auto Supply, Inc., 669 So. 2d 321, 326 (Fla. 3d DCA 1996)*. A plaintiff must allege more than injury to itself; "there must be an allegation of harm to competition in general." *Greenberg, 629 So. 2d at 257*.

1. Specifically Defined Market

Defendant argues there is no specifically defined market at issue. (Dkt. 83 at 13-14.) The Florida Supreme Court has recognized a number of United States Supreme Court decisions which have addressed the issue of whether various professional **[*15]** sports are exempt from antitrust laws. *Butterworth v. National League of Prof'l Baseball Clubs, 644 So. 2d 1021, 1023 (Fla. 1994)* (citing *Radovich v. National Football League, 352 U.S. 445, 451, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957)* (holding exemption from antitrust laws does not apply to football); *United States v.*

International Boxing Club, 348 U.S. 236, 99 L. Ed. 290, 75 S. Ct. 259 (1955) (stating boxing is not exempt from antitrust laws); *Haywood v. National Basketball Ass'n, 401 U.S. 1204, 1205, 28 L. Ed. 2d 206, 91 S. Ct. 672 (1971)* (finding basketball not exempt from antitrust laws)). Since these cases establish that ***HN14***[] professional sports are subject to antitrust laws, this Court finds no reason why the Arena Football League should not receive similar treatment.

HN15[] The antitrust statute itself broadly defines "trade or commerce" to include "any economic activity of any type whatsoever involving any commodity or service whatsoever." *Fla. Stat. Ann. § 542.17(4)*. The statute also provides that it was the intent of the legislature to "liberally" construe this act. *Id. § 542.16*. In applying this liberal interpretation, the Court finds that the Arena Football League **[*16]** falls within the scope of the Florida Antitrust Act. Plaintiff has satisfied the first element.

2. Defendant Possessed the Ability to Affect the Price

Defendant argues that the AFL did not posses the ability to affect the purchase price for the Denver Dynamite team. (Dkt. 83 at 14.) Deposition testimony offered by Defendant states that the two entities that approved the purchase price were "The Denver Dynamite, Limited" and "the Bankruptcy Court." (Graham Dep. at 43, lines 2-6.) Additional deposition testimony provided that "the [AFL] could not approve the purchase price because the league didn't own the membership." (Godfrey Dep. at 71, lines 20-25.) When asked again why the AFL approved the sale of the Denver Dynamite for a price of $ 285,000, Godfrey answered:

> I'm going to make it real abundantly apparent to you. The league did not approve the purchase price. The league had no control over what I paid for it. Only the federal bankruptcy court did. The league had--if I'd have wanted to give one dollar for it and the bankruptcy court would have approved it, the league could do nothing about it. They didn't control it. That's real simple. So you're asking me a **[*17]** question that the league had nothing to do with.

(*Id. 72*, lines 11-24.)

Based on this deposition testimony, Defendant asserts that there is no genuine issue of material fact relating to Defendant's ability to affect the purchase price. In its response, Plaintiff merely restates conclusory allegations that Defendant's actions affected the purchase price. (Dkt. 85 at 18.) Specifically, Plaintiff states that "this wrongful conduct by the league, which affected the price and availability of AFL memberships, is precisely the type of claim anticipated by the Florida Antitrust Act." (*Id. at 18-19*.) The Court notes, however, that Plaintiff has failed to go beyond the pleadings to bring forth facts in affidavits, depositions, answers to interrogatories, and admissions, if any, to show a genuine issue of material fact. Having not done so, the Court finds that Plaintiff has failed to meet its burden with respect to the second element.

3. Plaintiff's exclusion from the Market Affected or was Intended to Affect the Market

Defendant alleges that Plaintiff was not excluded from the market because Plaintiff's counsel was present when the bankruptcy court approved the sale. **[*18]** (Dkt. 83 at 14; Graham Dep. at 36-38.) In addition, Defendant asserts that the market was not affected: the price for an AFL team before the sale at issue ranged from $ 500,000 to $ 750,000. Prices for an AFL team during the sale at issue, and after, continued to increase with sale prices ranging from $ 950,000 to $ 1,000,000. (Dkt. 83 at 15.)

Plaintiff's response points to no specific facts in the record that indicate Defendant's actions affected the market. (Dkt. 85). Plaintiff's only response to this issue states that "the harm to the arena football market is established by the fact that the Plaintiff and various team purchasers, were financially damaged by the acts of the AFL when it approved the Denver sale." (*Id., at 18*.)

It is well settled that ***HN16***[] "antitrust laws are for the protection of competition, not primarily for the protection of individual competitors." *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028, 1047 (Fla. 3d DCA 1984)*. In ***antitrust law***, "it is not enough to allege that plaintiffs were injured; there must be an allegation of harm to competition in general." *Greenberg, 629 So. 2d at 257* (citing *Robert's Waikiki U-Drive, Inc.* ***[*19]*** *v. Budget Rent-A-Car Sys., Inc., 732 F.2d 1403, 1408 (9th Cir. 1984)*; *Manufacturing Research Corp. v. Greenlee Tool Co., 693 F.2d 1037, 1043 (11th Cir. 1982))*. In stating and proving an antitrust claim, it is necessary for the plaintiff to "allege the market-wide anti-competitive effects of defendant's acts." *Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 554 (7th Cir. 1980)*.

In this case, the Court finds Plaintiff's bald allegations of injury to its own franchise insufficient to constitute injury to the AFL market in general. In addition, Plaintiff's broad, vague, and conclusory allegation that various other "team purchasers" were financially damaged by Defendant's acts suffers from a similar lack of specificity and factual support. (Dkt. 85 at 18.) Because Plaintiff failed to go beyond the pleadings to bring forth specific facts in the record to rebut Defendant's assertions, the Court cannot find that a material question of fact exists to warrant an ultimate determination by the trier of fact. Plaintiff has failed to satisfy the third element.

The Court concludes that Plaintiff has not alleged sufficient facts to state a Florida antitrust claim. By failing to set **[*20]** forth specific facts to create a genuine issue of material fact with respect to the second and third elements, the Court concludes that Defendant's Motion for Summary Judgment, (Dkt. 83), is proper. Accordingly, Defendant's Motion for Summary Judgment as to Count II is **granted**.

Count III: Unfair and Deceptive Act and Practice

Plaintiff has alleged violation of Florida Statute § 501, Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"). This statute, in relevant part, provides: ***HN17***[] "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *Fla. Stat. Ann. § 501.204(1)*.

Defendant contends that because Plaintiff has been involved in the AFL, in various capacities, for a number of years, Plaintiff is not a "consumer" and the transaction did not qualify as a "consumer transaction" within the meaning of the FDUTPA. The Court notes, however, that the cases Defendant cites as authority were decided before the 1993 amendments to the FDUTPA.

In 1993, the Florida legislature amended ***HN18***[] the stated purpose of the FDUTPA to provide as its central aim **[*21]** the protection of "the consuming public at large and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or business." Fla. Stat. Ann. § 501.22(2). Prior to 1993, the same provision read, "[To protect consumers from suppliers who commit deceptive and unfair trade practices." *Id.* § 501.202(2) 1993 amendment history. Since 1993, it appears that the Florida legislature contemplated protecting "legitimate business enterprises" in addition to the consuming general public from deceptive or unfair trade practices. *Id.* § 501.202(3), codified as amended; *see also* *Suris v. Gilmore Liquidating, Inc., 651 So. 2d 1282 (Fla. 3d DCA 1995)* (citing the FDUTPA's new language including "business enterprises").

This shift in purpose is reflected in other provisions that were also amended in 1993. Specifically, the Definitions provision omitted the "consumer transaction" definition found prior to 1993, in favor of defining unlawful transactions as those concerning "trade or commerce." *Id.* *§ 501.203*. ***HN19***[] The "trade or commerce" provision defines a protected transaction **[*22]** as "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated." *Id.*, *§ 501.203(8)*; *see also* *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602, 609 (Fla. 2d DCA 1997)*. ***HN20***[] The definition of "consumer" in 1993 continued to include individuals as well as various business organizations, including "corporations." *Id.* *§ 501.203(7)*.

The facts here suggest that Plaintiff, as a Corporation incorporated under the laws of Florida, satisfies the FDUTPA definition of "consumer." Moreover, viewing the facts in the light most favorable to Plaintiff, the complained of activity falls within the ambit of possible protected activity under the broad "trade or commerce" definition. Specifically, Plaintiff's Complaint alleges Defendant "withheld any best efforts to comply with the criteria under the Contract by opting to deal with GODFREY as an insider because in doing so the Defendant was ensured to maximize its proceeds from the license sales to other buyers." (*Dkt. 3 P 43*.) Accordingly, the **[*23]** Court finds Plaintiff has stated a cause of action under the FDUTPA's 1993 amended definitions. Defendant's Motion to Dismiss Count III is **denied**.

Count IV: Tortious Diminution in Value

Plaintiff has alleged a common law tort of diminution in value. Defendant asserts that Plaintiff's claim is barred by the economic loss rule and, in the alternative, that Plaintiff cannot now complain of diminution in value since the stipulation at issue provided for a price below the actual sale price. (Dkt. 83 at 17.)

HN21[] Under Florida law, "contract principles are more appropriate than tort principles to resolve purely economic claims." *Airport Rent-A-Car v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995)*; *Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 900 (Fla. 1987)*. Florida courts apply the economic loss rule to prevent tort recovery "when damages flow from a breach of contract unless the tort is independent of the breach of contract." *Brass v. NCR Corp., 826 F. Supp. 1427, 1428 (S.D. Fla. 1993)*.

HN22[] Where the facts surrounding a breach of contract action are indistinguishable from an alleged tort, and where the alleged tort does not cause harm distinct **[*24]** from that caused by the breach of contract, a plaintiff is barred from bringing a separate tort action. *Serina v. Albertson's, Inc., 744 F. Supp. 1113, 1117-18 (M.D. Fla. 1990)*. This Court has recently addressed this issue based on a Florida Supreme Court decision which held that claims are barred by the economic loss rule if claims are factually "interwoven" with the breach of contract claim. *Florida College of Osteopathic Med., Inc. v. Dean Witter Reynolds, Inc., 982 F. Supp. 862, 862 (M.D. Fla. 1997)* (citing *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238 (Fla. 1996))*. Accordingly, it is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such breach can constitute negligence. *Serina, 744 F. Supp. at 1115*; *Electronic Sec. Sys. Corp. v. Southern Bell Tel. & Tel. Co., 482 So. 2d 518, 519 (Fla. 3d DCA 1986)*.

Here, Plaintiff asserts that the diminution in value allegation is independent from the stipulation agreement at issue and is therefore not precluded by the economic loss rule. (Dkt. 85 at 17-18.) After close examination, the Court finds the February 22, 1994 stipulation agreement between **[*25]** the Dynamite, the AFL, and the DDP, of which Plaintiff controlled fifty-seven percent of the stock, is void of any provision relating to Defendant's duty to procure workers compensation coverage. (Dkt. 83, Ex. A.) Accordingly, the Court finds that Plaintiff has alleged additional conduct sufficiently independent from the breach of contract claim to support an independent tort for diminution in value. Therefore, the Court **denies** Defendant's Motion for Summary Judgment based on the economic loss rule.

Defendant also asserts that because the stipulation agreement specifically addressed a potential sale of the Denver team for less than what the team actually sold for, Plaintiff cannot now allege diminution in value. (Dkt. 83 at 17.) In assessing this brief assertion in Defendant's Memorandum, the Court finds it difficult to grasp the complete gist of Defendant's argument without supporting case law or a more detailed analysis. The Court's best response would be to reiterate Plaintiff's assertions, which allege that the diminution in value allegation is distinct from the stipulation agreement and any sale price contemplated within that agreement. (Dkt. 83 at 18.). The contemplated **[*26]** sale prices, and distribution of proceeds from an eventual sale, were based on compliance with the stipulation agreement. (Dkt. 83, Ex. A PP 9-10.) Plaintiff here alleges conduct that goes beyond the stipulation agreement. This additional conduct is alleged as an independent tort, which Plaintiff claims had an independent effect on the actual sale price. Defendant's Motion for Summary Judgment as to Count IV is **denied**. Accordingly, it is

ORDERED that Defendant's Motion to Strike Portions of Plaintiff's Memorandum in Opposition and Alternative Motion for Leave to Amend, (Dkt. 87), is **denied**. Defendant's Motion for Summary Judgment(Dkt. 83), as to: 1) Count I, treble damages, is **granted**; 2) Count II, is **granted**; Counts III and IV, is **denied**.

DONE AND ORDERED in Chambers, in Tampa, Florida, on this 19th day March, 1998.

ELIZABETH A. KOVACHEVICH

United States District Judge

Nobelpharma AB v. Implant Innovations, Inc.

United States Court of Appeals for the Federal Circuit

March 20, 1998, Decided

96-1463

Reporter

141 F.3d 1059 *; 1998 U.S. App. LEXIS 5564 **; 46 U.S.P.Q.2D (BNA) 1097 ***; 1998-1 Trade Cas. (CCH) P72,100

NOBELPHARMA AB, Plaintiff/Counterclaim Defendant-Appellant, and NOBELPHARMA USA, INC., Counterclaim Defendant-Appellant, and PER INGVAR BRANEMARK and INSTITUTE FOR APPLIED BIOTECHNOLOGY, Counterclaim Defendants, v. IMPLANT INNOVATIONS, INC., Defendant Counterclaimant-Appellee.

Subsequent History: **[**1]** Rehearing Denied and Suggestion for Rehearing In Banc Declined April 29, 1998, Reported at: *1998 U.S. App. LEXIS 9290*. Certiorari Denied October 5, 1998, Reported at: *1998 U.S. LEXIS 5694*.

Prior History: Appealed from: United States District Court for the Northern District of Illinois. Judge Duff.

This Opinion Substituted on Grant of Rehearing for Withdrawn Opinion of November 18, 1997, Previously Reported at: *1997 U.S. App. LEXIS 32277*.

Disposition: AFFIRMED.

Core Terms

patent, invalid, district court, implants, invention, best mode, misrepresentation, fraudulent, antitrust, counterclaim, anti trust law, inequitable conduct, infringement, omission, antitrust liability, patent application, micropits, baseless, immunity, new trial, patentee, inventor, argues, sham, bring suit, case-in-chief, unenforceable, motion for a new trial, patent infringement, practicing

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Standards of Review, De Novo Review**

The appellate court reviews a district court's grant of a motion for judgment as a matter of law under *Fed. R. Civ. P. 50(a)(1)* de novo by reapplying the standard applicable at the district court. Under that standard, the appellate court examines the record in the light most favorable to the non-movant and affords it the benefit of all reasonable inferences. Accordingly, the appellate court may affirm only if the judgment entered was the only one possible under the controlling law.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[] Trials, Judgment as Matter of Law

Fed. R. Civ. P. 50(a)(1) provides, in part, that if a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. Thus, the verdict may be directed after the plaintiff's case is presented, when it is clear that completion of the trial is unnecessary in that the only sustainable verdict could be in favor of the defendant.

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN3[] Patent Invalidity, Presumption of Validity

By statute, patents are presumed to be valid. 35 U.S.C.S. § 282.

Patent Law > ... > Defenses > Patent Invalidity > Fact & Law Issues

Patent Law > ... > Specifications > Best Mode > General Overview

Patent Law > ... > Specifications > Best Mode > Fact & Law Issues

Patent Law > Invention Date & Priority > General Overview

HN4[] Patent Invalidity, Fact & Law Issues

The patent statute requires that a patent specification shall set forth the best mode contemplated by the inventor of carrying out his invention. 35 U.S.C.S. § 112, P1. Determining whether a patent fails to comply with the best mode requirement and is thus invalid involves two factual inquiries. First, the fact-finder must determine whether at the time an applicant filed an application for patent, he or she had a best mode of practicing the invention, which is a subjective determination. Second, if the inventor had a best mode of practicing the invention, the fact-finder must determine whether the best mode was disclosed in sufficient detail to allow a skilled artisan to practice it without undue experimentation, which is an objective determination.

Evidence > Burdens of Proof > Allocation

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Summary Judgment > General Overview

HN5[] **Burdens of Proof, Allocation**

Normally, evidence presented by a patentee-plaintiff will not support a grant of a motion for judgment as a matter of law (JMOL) invalidating a patent. That is because the burden is on an accused infringer to show by clear and convincing evidence facts supporting the conclusion that the patent is invalid. Accordingly, grant of a motion for JMOL in favor of a party bearing the burden of proof may be granted only where (1) the movant has established its case by evidence that the jury would not be at liberty to disbelieve and (2) the only reasonable conclusion is in the movant's favor. However, in unusual cases, an admission made by a plaintiff's witness can be sufficient to support entry of a JMOL in favor of a defendant after the close of the plaintiff's case-in-chief, even where the defendant bears the burden of proof on the decided issue.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Patent Law > Infringement Actions > Summary Judgment > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN6[] **Standards of Review, De Novo Review**

The appellate court reviews a district court's denial of a post-trial motion for judgment as a matter of law under *Fed. R. Civ. P. 50(b)*, de novo by reapplying the standard applicable at the district court. Thus, the appellate court must determine whether there exists evidence of record upon which a jury might properly have returned a verdict in the non-movant's favor when the correct legal standard is applied. If there is not, the movant was entitled to have the question removed from the jury and decided as a matter of law.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Patent Law > Infringement Actions > Summary Judgment > General Overview

HN7[] **Standards of Review, De Novo Review**

On appeal after denial of a motion for judgment JNOV, the appellant must prove that the record lacks substantial evidence to support the jury's verdict. In applying that standard, the appellate court must view the evidence in the light most favorable to the nonmoving party.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Appeals > Standards of Review > General Overview

HN8[] **Standards of Review, Abuse of Discretion**

The appellate court reviews a district court's denial of a motion for a new trial for an abuse of discretion. Accordingly, the appellate court may reverse the district court if, inter alia, the district court prejudiced the movant's substantive rights by abusing its discretion in admitting or excluding evidence, or by giving legally erroneous jury instructions.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Appeals > Standards of Review > General Overview

HN9[] **Jurisdiction, Exclusive Jurisdiction**

As a general proposition, when reviewing a district court's judgment involving federal ***antitrust law***, the appellate court is guided by the law of the regional circuit in which that district court sits. However, the appellate court applies its own law, not regional circuit law, to resolve issues that clearly involve its exclusive jurisdiction.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Criminal Law & Procedure > Jurisdiction & Venue > General Overview

Patent Law > Infringement Actions > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN10[] **Jurisdiction, Exclusive Jurisdiction**

Whether conduct in the prosecution of a patent is sufficient to strip a patentee of its immunity from the antitrust laws is one of those issues that clearly involves the appellate court's exclusive jurisdiction over patent cases. It follows that whether a patent infringement suit is based on a fraudulently procured patent impacts the appellate court's exclusive jurisdiction.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Patent Law > Infringement Actions > General Overview

HN11[] **Inequitable Conduct, Anticompetitive Conduct**

An antitrust claim premised on stripping a patentee of its immunity from the antitrust laws is typically raised as a counterclaim by a defendant in a patent infringement suit.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Patent Law > Infringement Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN12[] **Jurisdiction, Exclusive Jurisdiction**

Whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law. That conclusion applies equally to all antitrust claims premised on the bringing of a patent infringement suit. *Therefore, Cygnus Therapeutic Sys. V. ALZA Corp., 92 F.3d 1153, 39 U.S.P.Q.2D (BNA) 1666 (Fed. Cir. 1996)*, Loctite corp. v. *Ultraseal Ltd., 781 F.2d 861, 228 U.S.P.Q. (BNA) 90 (Fed. Cir. 1985)*, and *Atari, Inc. v. JS&A Group, Inc., 747 F.2d 1422, 223 U.S.P.Q. (BNA) 1074 (Fed. Cir. 1984)*, are expressly overruled to the extent they hold otherwise. However, the Federal Circuit continues to apply the law of the appropriate regional circuit to issues involving other elements of ***antitrust law*** such as relevant market, market power, and damages, as those issues are not unique to patent law, which is subject to the Federal Circuit's exclusive jurisdiction.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

HN13[] Regulated Practices, Intellectual Property

A patentee who brings an infringement suit may be subject to antitrust liability for the anti-competitive effects of that suit if the alleged infringer, the antitrust plaintiff, proves (1) that the asserted patent was obtained through knowing and willful fraud or (2) that the infringement suit was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > General Overview

HN14[] Inequitable Conduct, Anticompetitive Conduct

In order to strip a patentee of its exemption from the antitrust laws because of its attempting to enforce its patent monopoly, an antitrust plaintiff is first required to prove that the patentee obtained the patent by knowingly and willfully misrepresenting facts to the Patent and Trademark Office. The plaintiff in the patent infringement suit must also have been aware of the fraud when bringing suit.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN15[] Inequitable Conduct, Anticompetitive Conduct

Inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support an antitrust counterclaim.

Criminal Law & Procedure > Criminal Offenses > Lesser Included Offenses > Fraud

Governments > Courts > Common Law

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

HN16[] Lesser Included Offenses, Fraud

Inequitable conduct in fact is a lesser offense than common law fraud, and includes types of conduct less serious than knowing and willful fraud.

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN17[] **Criminal Offenses, Acts & Mental States**

The concept of fraud is most often used by the courts, in general, to refer to a type of conduct so reprehensible that it could alone form the basis of an actionable wrong; that is, the common law action for deceit. Because severe penalties are usually meted out to the party found guilty of such conduct, technical fraud is generally held not to exist unless the following indispensable elements are found to be present: (1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN18[] **Inequitable Conduct, Burdens of Proof**

Regarding inequitable conduct, the courts look at the equities of the particular case and determines whether the conduct before them was still so reprehensible as to justify the court's refusing to enforce the rights of the party guilty of such conduct.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN19[] **Bad Faith, Fraud & Nonuse, Fraud**

Inequitable conduct is an equitable defense in a patent infringement action and serves as a shield, while a more serious finding of fraud potentially exposes a patentee to antitrust liability and thus serves as a sword.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Patent Law > ... > Damages > Collateral Assessments > General Overview

HN20[] **Inequitable Conduct, Anticompetitive Conduct**

Antitrust liability can include treble damages. In contrast, the remedies for inequitable conduct, while serious enough, only include unenforceability of the affected patent or patents and possible attorney fees. *35 U.S.C.S. §§ 282*, *285*. Simply put, fraud is a more serious offense than inequitable conduct.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

HN21[] **Bad Faith, Fraud & Nonuse, Fraud**

If the evidence shows that the asserted patent was acquired by means of either a fraudulent misrepresentation or a fraudulent omission and that the party asserting the patent was aware of the fraud when bringing suit, such conduct can expose a patentee to liability under the antitrust laws. A fraudulent omission can be just as reprehensible as a fraudulent misrepresentation. In addition, in order to find liability, the necessary additional elements of a violation of the antitrust laws must be established.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

HN22[] **Inequitable Conduct, Anticompetitive Conduct**

To establish fraud, a misrepresentation or omission must evidence a clear intent to deceive the examiner and thereby cause the Patent and Trademark Office to grant an invalid patent. The fact misrepresented must be the efficient, inducing, and proximate cause, or the determining ground of the action taken in reliance thereon.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN23[] **Inequitable Conduct, Burdens of Proof**

A conclusion of inequitable conduct may be based on evidence of a lesser misrepresentation or an omission, such as omission of a reference that would merely have been considered important to the patentability of a claim by a reasonable examiner.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN24[] **Inequitable Conduct, Anticompetitive Conduct**

A finding of fraud for purposes of establishing an antitrust counterclaim requires higher threshold showings of both intent and materiality than does a finding of inequitable conduct. Moreover, unlike a finding of inequitable conduct, a finding of fraud may not be based upon an equitable balancing of lesser degrees of materiality and intent. Rather, it must be based on independent and clear evidence of deceptive intent together with a clear showing of reliance, that is, that the patent would not have issued but for the misrepresentation or omission. Therefore, for an omission such as a failure to cite a piece of prior art to support a finding of fraud, the withholding of the reference must show evidence of fraudulent intent. A mere failure to cite a reference to the Patent and Trademark Office will not suffice.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN25[] **Bad Faith, Fraud & Nonuse, Fraud**

Irrespective of the patent applicant's conduct before the Patent and Trademark Office, an antitrust claim can also be based on an allegation that a suit is baseless; in order to prove that a suit was within the "sham" exception to immunity, an antitrust plaintiff must prove that the suit was both objectively baseless and subjectively motivated by a desire to impose collateral, anti-competitive injury rather than to obtain a justifiable legal remedy.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN26[] **Inequitable Conduct, Anticompetitive Conduct**

In order to prove that a lawsuit is within the sham exception to immunity, first, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under that second part of the definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN27[] **Inequitable Conduct, Anticompetitive Conduct**

Even a plaintiff who defeats the defendant's claim to antitrust immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

HN28[] **Bad Faith, Fraud & Nonuse, Bad Faith**

A sham suit must be both subjectively brought in bad faith and based on a theory of either infringement or validity that is objectively baseless. Accordingly, if a suit is not objectively baseless, an antitrust defendant's subjective motivation is immaterial. In contrast with a fraud claim, a patentee's activities in procuring the patent are not necessarily at issue. It is the bringing of the lawsuit that is subjectively and objectively baseless that must be proved.

Counsel: Donald R. Dunner, Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P., of Washington, D.C., argued for the plaintiff/counterclaim defendant-appellant and counterclaim defendant-appellant. With him on the brief were Robert D. Bajefsky and David A. Manspeizer. Of counsel on the brief were Robert A. Bourque, Kathleen M. Scanlon, and Lawrence M. Young, Simpson, Thacher & Bartlett, of New York, New York, and Alan I. Becker, Burditt & Radzius, Chartered, of Chicago, Illinois.

D. Dennis Allegretti, Burns & Levinson, LLP, of Boston, Massachusetts, argued for the defendant counterclaimant-appellee. With him on the brief were Stephen G. Rudisill, Arnold, White & Durkee, and Edward L. Foote and Peter C. McCabe, III, Winston & Strawn, of Chicago, Illinois.

Judges: Before RICH, PLAGER, and LOURIE, Circuit Judges.

Opinion by: LOURIE

Opinion

[*1098]** **[*1061]** LOURIE, Circuit Judge.

Nobelpharma AB and Nobelpharma USA, Inc. (collectively, NP) appeal from **[**2]** the **[***1099]** judgment of the United States District Court for the Northern District of Illinois holding that (1) U.S. Patent 4,330,891 is invalid under *35 U.S.C. § 112*, P 1 (1994), for failure to disclose the best mode of carrying out the invention, (2) Implant Innovations, Inc. (3I) did not infringe the '891 patent, and (3) NP was not entitled to JMOL or, in the alternative, a new trial following the jury verdict in favor of 3I on its antitrust counterclaim against NP, Dr. Per-Ingvar Branemark, and the Institute for Applied Biotechnology. See *Nobelpharma **[*1062]** AB v. Implant Innovations, Inc., 930 F. Supp. 1241 (N.D. Ill. 1996)*. We conclude that the district court did not err in granting judgment that the patent is invalid as a matter of law at the close of NP's case-in-chief, and that it did not err in denying NP's motion for JMOL or a new trial on the antitrust counterclaim. Accordingly, the decision of the district court is affirmed. [1]

[3]** BACKGROUND

Drs. Branemark and Bo-Thuresson af Ekenstam are the named inventors on the '891 patent, the application for which was filed in 1980 and claimed priority from a Swedish patent application that was filed in 1979. The patent claims "an element intended for implantation into bone tissue." This "element," when used as part of a dental implant, is placed directly into the jawbone where it acts as a tooth root substitute. The implants described and claimed in the patent are preferably made of titanium and have a network of particularly-sized and particularly-spaced "micropits." These micropits, which have diameters in the range of about 10 to 1000 nanometers or, preferably, 10 to 300 nanometers, allow a secure connection to form between the implant and growing bone tissue through a process called "osseointegration."

Branemark is also one of the authors of a book published in 1977, entitled "Osseointegrated Implants in the Treatment of the Edentulous Jaw Experienced from a 10-Year Period" (hereinafter "the 1977 Book"). As its title suggests, this book describes a decade-long clinical evaluation of patients who had received dental implants. The 1977 Book includes a single page **[**4]** containing four scanning electron micrographs (SEMs) of titanium implants that exhibit micropits. The caption describing these SEMs reads, in part: "Irregularities are produced during manufacturing in order to increase the retention of the implants within the mineralized tissue." 3I determined, based on measurements and calculations that it presented to the trial court, that the micropits shown in the 1977 Book have diameters within the range claimed in the '891 patent. However, the 1977 Book does not specifically refer to "micropits."

In preparing to file the Swedish patent application, af Ekenstam submitted a draft written description of the invention to the inventors' Swedish patent agent, Mr. Barnieske. This draft referred to the 1977 Book in the following translated passage:

> In ten years of material pertaining to titanium jaw implants in man, Branemark et al. [in the 1977 Book] have shown that a very high frequency of healing, as stated above, can be achieved by utilizing a carefully developed surgical technique and adequately produced implants.

However, Barnieske deleted all reference to the 1977 Book from the patent application that was ultimately filed **[**5]** in Sweden. Similarly, the 1977 Book is not mentioned in the U.S. patent application filed by Barnieske on behalf of Branemark and af Ekenstam.

In June 1980, while the U.S. patent application was pending, Branemark entered into an exclusive license agreement with NP covering the claimed technology. [2] Barnieske kept NP informed of the prosecution of the U.S. patent application and received assistance from NP's U.S. patent agent. The '891 patent issued in 1982; NP has since asserted it in at least three patent infringement suits.

In July 1991, while Branemark was a member of NP's Board of Directors, NP brought this suit alleging that certain of 3I's dental implants infringed the '891 patent. 3I defended on the grounds of invalidity, unenforceability, and non-infringement. **[**6]** 3I also brought an antitrust counterclaim, based in part on the assertion that NP attempted to enforce a patent that it knew was invalid and unenforceable. Specifically, 3I alleged that when NP brought suit, NP was aware that the inventors' intentional failure to disclose **[***1100]** **[*1063]** the 1977 Book to the U.S. Patent and Trademark Office (PTO) would render the '891 patent unenforceable.

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[1] Following the filing of a combined petition for rehearing and suggestion for rehearing in banc, the panel has reconsidered and modified its decision in this case. Accordingly, the earlier-issued decision is hereby vacated and the opinion, reported at *129 F.3d 1463, 44 U.S.P.Q.2D (BNA) 1705*, is hereby withdrawn.

[2] The district court indicated that Branemark and af Ekenstam assigned the '891 patent to NP prior to NP's bringing this suit. 3I has not challenged NP's standing to bring this patent infringement claim without joining Branemark and af Ekenstam.

During its case-in-chief, NP introduced portions of a deposition of Branemark that apparently was conducted several years before this trial began in connection with a lawsuit involving neither NP nor 3I. NP also introduced into evidence portions of that deposition that were counter-designated for introduction by 3I. Branemark's deposition testimony included his admissions that one "could consider" the procedure used to manufacture the micropitted surface a trade secret, and "it might be" that there are details "important to making" the micropitted surface that are not disclosed in the patent. At the close of NP's case-in-chief, the district court granted 3I's motion for JMOL of invalidity and non-infringement. The court held that the patent was invalid under *§ 112*, P 1, for failure to disclose the best mode and **[**7]** that NP had failed to prove infringement. The court then denied NP's motion for JMOL on 3I's antitrust counterclaim, proceeded to inform the jury that the court had held the patent invalid, and allowed 3I to present the counterclaim to the jury.

After trial limited to the antitrust issue, the jury found in special verdicts, inter alia, that 3I had proven that (1) "the inventors or their agents or attorneys obtained the '891 patent through fraud," (2) NP "had knowledge that the '891 patent was obtained by fraud at the time this action was commenced against 3I," and (3) NP "brought this lawsuit against 3I knowing that the '891 patent was either invalid or unenforceable and with the intent of interfering directly with 3I's ability to compete in the relevant market." The jury awarded 3I approximately $ 3.3 million in compensatory damages, an amount the court trebled pursuant to section 4 of the Clayton Act, *15 U.S.C. § 15 (1994)*. The court declined to rule on whether the patent was unenforceable for inequitable conduct, concluding that its judgment of invalidity rendered the issue of enforceability moot. *Nobelpharma AB v. Implant Innovations, Inc., 875 F. Supp. 481, 34 U.S.P.Q.2D (BNA) **[**8]** 1090 (N.D. Ill. 1995)*.

The court then denied NP's renewed motion for JMOL on the counterclaim or, in the alternative, for a new trial on both the counterclaim and the infringement claim. *Nobelpharma AB, 930 F. Supp. at 1246*. In denying NP's post-verdict motion for a new trial on the issue of infringement, the district court again concluded that the patent was invalid for failure to disclose the best mode. *Id. at 1247-49*. The court also concluded that NP was not entitled to JMOL on the counterclaim because, inter alia, "NP, as the assignee of the patent, maintained and enforced the patent with knowledge of the patent's fraudulent derivation." *Id. at 1257*. The court denied NP's motion for a new trial on the counterclaim, holding, inter alia, that it did not err in its evidentiary rulings or in refusing to instruct the jury that in order to impose antitrust liability against NP, it must find NP's lawsuit "objectively baseless." *Id. at 1264*.

NP appealed to this court, challenging the district court's grant of 3I's motion for JMOL of invalidity and non-infringement and its denial of the post-verdict motion for JMOL or a new trial. We have jurisdiction pursuant **[**9]** to *28 U.S.C. § 1295(a)(1) (1994)*.

DISCUSSION

A. Invalidity

At the close of NP's case-in-chief, the district court granted 3I's motion for judgment of invalidity under *§ 112*, P 1, as a matter of law for failure to disclose the best mode of practicing the invention. NP then filed a motion for reconsideration, which was denied, in order to reopen the evidence and offer proof regarding its compliance with *§ 112*, P 1. After the jury returned its verdict in favor of 3I on its antitrust counterclaim, NP moved for a new trial, again arguing that the court had erred in granting 3I's motion for JMOL. In reaffirming its decision to grant 3I's motion for JMOL, the district court held that Branemark's own testimony "demonstrates that when [he] filed his patent application, he contemplated a best mode of practicing his invention, but his disclosures were inadequate to enable one skilled in the art to practice that best mode." *930 F. Supp. at 1248*. The district court also explicitly **[*1064]** noted that its decision was not based on Branemark's purported "non-disclosure" of NP's later-developed manufacturing procedure. Id.

On appeal, NP again argues that the district court erred in granting **[**10]** JMOL on the invalidity issue because in doing so the court drew improper, unsupported inferences against NP and erroneously imposed on NP the burden of proving validity. NP also argues that the grant of JMOL denied it due process because the court had mandated a "natural order of proof" at trial and thus had effectively barred NP from introducing any evidence to show that it had satisfied the best mode requirement during its case-in-chief.

In response, 3I argues that Branemark's own unequivocal admissions indicate that he had developed and tested a preferred method **[***1101]** of making the claimed implants when the patent application was filed. 3I also argues that Branemark admitted that the patent does not contain a disclosure adequate to enable one of ordinary skill in the art to practice this method. Finally, 3I argues that NP was not denied due process because NP had sufficient opportunity to offer evidence in opposition to 3I's motion for JMOL of invalidity and failed to do so. We agree with 3I that the court did not err in its grant of the motion for JMOL and therefore that the court did not err in denying NP's motion for a new trial on its infringement claim.

HN1[] We review a district court's **[**11]** grant of a motion for JMOL under *Fed. R. Civ. P. 50(a)(1)* de novo by reapplying the standard applicable at the district court. See *Allied Colloids Inc. v. American Cyanamid Co., 64 F.3d 1570, 1573, 35 U.S.P.Q.2D (BNA) 1840, 1841 (Fed. Cir. 1995)*. Under that standard, we examine the record in the light most favorable to the non-movant, which in this case is NP, and afford it the benefit of all reasonable inferences. Id. Accordingly, "we may affirm only if the judgment entered was the only one possible under the controlling law." *Burroughs Wellcome Co. v. Barr Lab., Inc., 40 F.3d 1223, 1227, 32 U.S.P.Q.2D (BNA) 1915, 1919 (Fed. Cir. 1994)*, cert. denied, *516 U.S. 1070, 116 S. Ct. 771, 516 U.S. 1071, 133 L. Ed. 2d 724 (1996)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (prohibiting JMOL "if reasonable minds could differ as to the import of the evidence.")).

HN2[] *Rule 50(a)(1)* provides, in relevant part, that if

> a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that **[**12]** party and may grant a motion for judgment as a matter of law [JMOL] against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a). "Thus, the verdict may be directed after the plaintiff's case is presented, when it is clear that completion of the trial is unnecessary in that the only sustainable verdict could be in favor of the defendant." *Allied Colloids, 64 F.3d at 1573, 35 U.S.P.Q.2D (BNA) at 1841*.

HN3[] By statute, patents are presumed to be valid. *35 U.S.C. § 282 (1994)*. Thus, 3I had the burden of establishing by clear and convincing evidence facts supporting the conclusion that the '891 patent is invalid. See *Transco Prods. Inc. v. Performance Contracting, Inc., 38 F.3d 551, 560, 32 U.S.P.Q.2D (BNA) 1077, 1084 (Fed. Cir. 1994)*. ***HN4***[] The patent statute requires that a patent specification "shall set forth the best mode contemplated by the inventor of carrying out his invention." *35 U.S.C. § 112*, P 1 (1994). Determining whether a patent fails to comply with the best mode requirement and is thus invalid involves two factual inquiries. First, the fact-finder must determine **[**13]** whether at the time an applicant filed an application for patent, he or she had a best mode of practicing the invention, which is a subjective determination. Second, if the inventor had a best mode of practicing the invention, the fact-finder must determine whether the best mode was disclosed in sufficient detail to allow a skilled artisan to practice it without undue experimentation, which is an objective determination. See *United States Gypsum Co. v. National Gypsum Co., 74 F.3d 1209, 1212, 37 U.S.P.Q.2D (BNA) 1388, 1390 (Fed. Cir. 1996)*.

[*1065] For whatever reason, NP introduced as part of its own case-in-chief all of the portions of Branemark's deposition that were counter-designated by 3I. [3] These included Branemark's statements, introduced by and unchallenged by NP, that (1) "there were some minor details that were not included [in the patent] and which proved to be quite important," (2) other skilled artisans would have to be "lucky" to obtain a suitable micropitted implant "by cutting a piece of titanium at a speed less than twenty meters per minute," the cutting speed disclosed

[3] NP suggests that it introduced the portions counter-designated "as a matter of convenience and efficiency" during its own case-in-chief. At oral argument, NP also suggested that it introduced these portions "as a courtesy" to 3I. While such motives are commendable, they do not change the significance and meaning of this evidence.

in the patent, and (3) "any of the small detailed recipes that I discussed but did not specify" in the patent **[**14]** "can cause you to fail to get micropitting even though you were cutting the metal at less than twenty meters per minute." The record also unambiguously indicates that when he filed his patent application, Branemark was aware that a variety of undisclosed machining parameters were critical to the production of a functional implant, i.e., one that would allow for osseointegration. Moreover, the research on which the 1977 Book was based also indicates that Branemark possessed a preferred mode of making the claimed implants by the time the U.S. patent application was filed in 1980. Thus, the evidence at trial leads to only one reasonable conclusion: Branemark possessed **[***1102]** a preferred method of making the claimed invention and failed to disclose it sufficiently to enable those skilled in the art to practice that method.

[15]** ***HN5***[]

Normally, evidence presented by a patentee-plaintiff will not support a grant of a JMOL invalidating a patent. That is because the burden is on an accused infringer to show by clear and convincing evidence facts supporting the conclusion that the patent is invalid. See generally 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2535, at 325 (2d ed. 1994) ("Courts often caution that granting a [JMOL] for the party bearing the burden of proof is reserved for extreme cases."). Accordingly, grant of JMOL in favor of a party bearing the burden of proof may be granted only where (1) the movant "has established [its] case by evidence that the jury would not be at liberty to disbelieve" and (2) "the only reasonable conclusion is in [the movant's] favor." *Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 499 (10th Cir. 1984)*. However, in unusual cases, an admission made by a plaintiff's witness can be sufficient to support entry of a JMOL in favor of a defendant after the close of the plaintiff's case-in-chief, even where the defendant bears the burden of proof on the decided issue. See, e.g., *Falco Lime, Inc. v. Tide Towing Co., 29 F.3d* ***[**16]*** *362, 365-66 (8th Cir. 1994)* (holding that JMOL was properly granted after the close of plaintiff's case in view of the admissions of plaintiff's chief witness regarding a contract that established defendant's affirmative defense). Given Branemark's admissions, we conclude that this is one of those "extreme" cases in which it was not improper to grant JMOL in favor of a defendant on an issue regarding which it bore the burden of proof.

Contrary to NP's arguments, the district court did not draw adverse inferences against NP to support its judgment. Rather, it properly relied on a co-inventor's statements "that the jury would not be at liberty to disbelieve." *Hurd, 734 F.2d at 499*. Similarly, the district court did not place the burden of proving validity on NP; NP's own evidence was clear and convincing that the patent is invalid. This evidence led to "the only reasonable conclusion." Id.

We also agree with 3I that NP was not denied due process. When NP was confronted with 3I's motion for JMOL, it was not unfairly surprised. 3I had consistently alleged that the '891 patent was invalid under *§ 112*, P 1. Moreover, NP had an opportunity to oppose 3I's motion, but it failed **[**17]** to do so adequately. After the court's grant of JMOL, NP responded by offering evidence and argument only concerning NP's later-developed manufacturing procedure. However, as noted above, the district court's ultimate decision did not rely on the "non-disclosure" **[*1066]** of NP's later-developed manufacturing processes. Likewise, in affirming the decision of the district court, we do not rely on that evidence. Rather, we rely only on the clear and convincing evidence that Branemark failed to disclose his best mode of practicing the claimed invention when he filed his patent application. NP failed to present any evidence or argument to undermine the import of that evidence, even though it knew that the best mode issue was before the court; it thus had ample opportunity to prepare and present evidence and argument. Whatever disadvantage NP may have suffered when the JMOL was granted was rectified by the opportunity it had after the judgment was rendered. Any error was thus harmless. NP was therefore not denied due process.

Accordingly, we affirm the judgment that the '891 patent is invalid as a matter of law under *§ 112*, P 1, for failure to disclose the best mode of practicing the invention. **[**18]** Because we affirm the district court's decision holding the patent invalid, we need not consider NP's arguments concerning infringement. See *B.F. Goodrich Co. v. Aircraft Braking Sys. Corp., 72 F.3d 1577, 1583, 37 U.S.P.Q.2D (BNA) 1314, 1319 (Fed. Cir. 1996)*.

B. Antitrust Liability

I.

After the jury returned its verdict in favor of 3I on its counterclaim that NP violated the antitrust laws by bringing suit against 3I, the court denied NP's motion for JMOL or, in the alternative, for a new trial under *Fed. R. Civ. P. 50(b)*. In denying NP's motion, the district court held that the verdict was supported, inter alia, by the jury's factual findings that the patent was obtained through "NP's knowing fraud upon, or intentional misrepresentations to, the [PTO]" and that "NP maintained and enforced the patent with knowledge of the patent's fraudulent derivation" and with the intent of interfering directly with 3I's ability to compete in the relevant market. *930 F. Supp. at 1257*. The court further held, based on these findings, that the jury need not have considered whether NP's suit was "objectively baseless." *Id. at 1264*.

In support of its position that the court erred in denying **[**19]** its renewed motion for JMOL, NP argues that there was a lack of **[***1103]** substantial evidence to support the jury's findings that the patent was obtained through "fraud" and that NP was aware of that conduct when it brought suit against 3I. NP also argues that these findings, even if supported by substantial evidence, do not provide a legal basis for the imposition of antitrust liability. Finally, NP argues that it is entitled to a new trial because the court failed to instruct the jury that bringing a lawsuit cannot be the basis for antitrust liability if that suit is not "objectively baseless."

3I responds that the jury's explicit findings that the patent was procured through fraudulent conduct and that NP knew of that conduct when it brought suit were supported by substantial evidence, and that these findings provide a sound basis for imposing antitrust liability on NP. Responding to NP's arguments for a new trial, 3I argues that an "objectively reasonable" or "objectively baseless" jury instruction was not necessary because the district court required that 3I prove that NP had actual knowledge of the fraud when it brought suit and that even if such an instruction had been necessary, NP **[**20]** waived this argument by failing to propose a jury instruction relating to an "objectively baseless" standard. We agree with 3I that the court did not err in denying NP's motion for JMOL because substantial evidence supports the jury's findings that the patent was fraudulently obtained and that NP sought to enforce the patent with knowledge of its fraudulent origin. Similarly, the court did not err in denying NP's motion for a new trial because NP was not prejudiced by any legally erroneous jury instruction.

HN6[] We review a district court's denial of a post-trial motion for JMOL under *Fed. R. Civ. P. 50(b)* de novo by reapplying the standard applicable at the district court. Thus, this court

> must determine whether there exists evidence of record upon which a jury might properly have returned a verdict in [the non-movant's] favor when the correct legal standard is applied. If there is not, [the **[*1067]** movant] was entitled to have the question removed from the jury and decided as a matter of law.

Markman v. Westview Instruments, Inc., 52 F.3d 967, 975, 34 U.S.P.Q.2D (BNA) 1321, 1326 (Fed. Cir. 1995) (in banc) (quoting *Jamesbury Corp. v. Litton Indus. Prods., Inc., 756 F.2d **[**21]** 1556, 1560, 225 U.S.P.Q. (BNA) 253, 257 (Fed. Cir. 1985))*, aff'd, *517 U.S. 370, 116 S. Ct. 1384, 38 U.S.P.Q.2D (BNA) 1461, 134 L. Ed. 2d 577 (1996)*; see also *Deimer v. Cincinnati Sub-Zero Prods., Inc., 58 F.3d 341, 343 (7th Cir. 1995)*; *Shearing v. Iolab Corp., 975 F.2d 1541, 1544, 24 U.S.P.Q.2D (BNA) 1133, 1136 (Fed. Cir. 1992)* ("***HN7***[] On appeal after denial of a motion for JNOV, the appellant must prove that the record lacks substantial evidence to support the jury's verdict."). In applying this standard, we must also "view the evidence in the light most favorable to the nonmoving party," which in this case is 3I. *Deimer, 58 F.3d at 343*.

HN8[] We review a district court's denial of a motion for a new trial for an abuse of discretion. *Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1512, 220 U.S.P.Q. (BNA) 929, 936 (Fed. Cir. 1984)*. Accordingly, we may reverse the district court if, inter alia, the district court prejudiced NP's substantive rights by abusing its discretion in admitting or excluding evidence, see *Munoz v. Strahm Farms, Inc., 69 F.3d 501, 36 U.S.P.Q.2D (BNA) 1499, 1501 (Fed. Cir. 1995)*, or by giving legally erroneous jury instructions, see Jamesbury, 756 F.2d at 1558, 225 U.S.P.Q.2D (BNA) at 255. **[**22]** See generally 12 McLaughlin et al., *Moore's Federal Practice § 59.20* to 59.25, at 59-27 to 59-47 (3d ed. 1997).

II.

HN9[] As a general proposition, when reviewing a district court's judgment involving federal ***antitrust law***, we are guided by the law of the regional circuit in which that district court sits. See *Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 875, 228 U.S.P.Q. (BNA) 90, 99 (Fed. Cir. 1985)* ("We must approach a federal antitrust claim as would a court of appeals in the circuit of the district court whose judgment we review.") (citing *Atari, Inc. v. JS&A Group, Inc., 747 F.2d 1422, 1438-40, 223 U.S.P.Q. (BNA) 1074, 1086-87 (Fed. Cir. 1984)* (in banc)); see also *Cygnus Therapeutic Sys. v. ALZA Corp., 92 F.3d 1153, 1161, 39 U.S.P.Q.2D (BNA) 1666, 1672 (Fed. Cir. 1996)* (citing Loctite). However, we apply our own law, not regional circuit law, to resolve issues that clearly involve our exclusive jurisdiction. See *Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc., 75 F.3d 1568, 1574-75, 37 U.S.P.Q.2D (BNA) 1626, 1631 (Fed. Cir. 1996)* (holding as a matter of Federal Circuit law that an allegation of inequitable conduct in the prosecution of a patent application cannot support a federal **[**23]** unfair competition claim) (citing *Chrysler Motors Corp. v. Auto Body Panels, Inc., 908 F.2d 951, 953 15 U.S.P.Q.2D (BNA) 1469, 1470 (Fed. Cir. 1990))*. See generally *Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850, **[***1104]** 855-58, 20 U.S.P.Q.2D (BNA) 1252, 1256-59 (Fed. Cir. 1991)*.

HN10[] Whether conduct in the prosecution of a patent is sufficient to strip a patentee of its immunity from the antitrust laws is one of those issues that clearly involves our exclusive jurisdiction over patent cases. It follows that whether a patent infringement suit is based on a fraudulently procured patent impacts our exclusive jurisdiction.

Moreover, *HN11*[] an antitrust claim premised on stripping a patentee of its immunity from the antitrust laws is typically raised as a counterclaim by a defendant in a patent infringement suit. See *Argus Chem. Corp. v. Fibre Glass-Evercoat Co., 812 F.2d 1381, 1383, 1 U.S.P.Q.2D (BNA) 1971, 1973 (Fed. Cir. 1987)* ("Walker Process, like the present case, was a patent infringement suit in which an accused infringer filed an antitrust counterclaim."). [4] **[**26]** **[*1068]** Because most cases involving these issues will therefore be appealed to this court, we conclude that we should decide these issues as a matter **[**24]** of Federal Circuit law, rather than rely on various regional precedents. We arrive at this conclusion because we are in the best position to create a uniform body of federal law on this subject and thereby avoid the "danger of confusion [that] might be enhanced if this court were to embark on an effort to interpret the laws" of the regional circuits. *Forman v. United States, 767 F.2d 875, 880 n.6 (Fed. Cir. 1985)*. Accordingly, we hereby change our precedent and hold that *HN12*[] whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law. [5] This conclusion applies equally to all antitrust claims premised on the bringing of a patent infringement suit. Therefore, *Cygnus, 92 F.3d at 1161, 39 U.S.P.Q.2D (BNA) at 1672*, *Loctite, 781 F.2d at 875, 228 U.S.P.Q. (BNA) at 99*, and *Atari, 747 F.2d at 1438-40, 223 U.S.P.Q. (BNA) at 1086-87*, are expressly overruled to the extent they hold otherwise. However, we will continue to apply the law of the appropriate regional

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[4] Compare *Tank Insulation Int'l, Inc. v. Insultherm, Inc., 104 F.3d 83, 88* & n.5, 41 U.S.P.Q.2D (BNA) 1545, 1549 & n.5 (5th Cir.), cert. denied, ***139 L. Ed. 2d 191, 118 S. Ct. 265 (1997)***, and *Hydranautics v. FilmTec Corp., 70 F.3d 533, 536-37, 36 U.S.P.Q.2D (BNA) 1773, 1775 (9th Cir. 1995)* ("A claim that patent infringement litigation violated an antitrust statute is a permissive, not a mandatory, counterclaim in a patent infringement case, and is not barred in a subsequent suit by failure to raise it in the infringement suit." (citing *Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 669-71, 60 U.S.P.Q. (BNA) 21, 26-27, 88 L. Ed. 376, 64 S. Ct. 268 (1944)))* with *Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 389, 217 U.S.P.Q. (BNA) 662, 668 (4th Cir. 1982)* (stating that Mercoid "has been read narrowly in this respect, and its continuing validity is open to serious question." (citing ***United States v. Eastport S.S. Corp., 255 F.2d 795, 805 (2d Cir. 1958)***; *Martino v. McDonald's Sys., Inc., 432 F. Supp. 499, 505 (N.D.Ill.1977)*, aff'd, *598 F.2d 1079 (7th Cir. 1979)))*, and *USM Corp. v. SPS Techs., Inc., 102 F.R.D. 167, 170-71, 225 U.S.P.Q. (BNA) 715, 717 (N.D. Ill. 1984)* ("Notwithstanding Mercoid, the majority of courts, when faced with this issue, have held that antitrust claims are compulsory counterclaims under Rule 13(a) if the antitrust claim arises out of the same transaction or occurrence as the original claim. The Seventh Circuit has expressly refused to decide the issue." (citations omitted)).

[5] Because precedent may not be changed by a panel, see *South Corp. v. United States, 690 F.2d 1368, 1370 n.2, 215 U.S.P.Q. (BNA) 657, 658 n.2 (Fed. Cir. 1982)* (in banc), the issue of "choice of circuit" law set forth in this Section B.II. has been considered and decided unanimously by an in banc court consisting of MAYER, Chief Judge, RICH, NEWMAN, MICHEL, PLAGER, LOURIE, CLEVENGER, RADER, SCHALL, BRYSON, and GAJARSA, Circuit Judges.

circuit to issues involving other elements of ***antitrust law*** such as relevant market, market power, damages, etc., as those issues are **[**25]** not unique to patent law, which is subject to our exclusive jurisdiction. See, e.g., *Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860, 872-73, 45 U.S.P.Q.2D (BNA) 1225, 1234-35 (Fed. Cir. 1997)* (applying Fourth Circuit law on antitrust injury).

III.

HN13[] A patentee who brings an infringement suit may be subject to antitrust liability for the anti-competitive effects of that suit if the alleged infringer (the antitrust plaintiff) proves (1) that the asserted patent was obtained through knowing and willful fraud within the meaning of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 147 U.S.P.Q. (BNA) 404, 407, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)*, or (2) that the infringement suit was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor," *Eastern R.R. Presidents Conference v. Noerr **[**27]** Motor Freight, Inc., 365 U.S. 127, 144, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)* (holding that Noerr "governs the approach of citizens or groups of them . . . to courts, the third branch of Government"). See *Professional **[***1105]** Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 62 n.6, 26 U.S.P.Q.2D (BNA) 1641, 1646-47 n.6, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)* (PRE) (declining to decide "whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations").

In Walker Process, the Supreme Court held that ***HN14***[] in order "to strip [a patentee] of its exemption from the antitrust laws" because of its attempting to enforce its patent monopoly, an antitrust plaintiff is first required to prove that the patentee "obtained the patent by knowingly and willfully misrepresenting facts [6] to the [PTO]." 382 U.S. at 177, **[*1069]** 147 U.S.P.Q.2D (BNA) at 407. The plaintiff in the patent infringement suit must also have been aware of the fraud when bringing suit. *Id. at 177* & n.6, 147 U.S.P.Q.2D (BNA) at 407 **[**28]** & n.6. The Court cited prior decisions that involved the knowing and willful misrepresentation of specific facts to the Patent Office: *Precision Instrument Manufacturing v. Automotive Maintenance Machinery Co., 324 U.S. 806, 65 U.S.P.Q. (BNA) 133, 89 L. Ed. 1381, 65 S. Ct. 993 (1945)* (misrepresenting that the inventor had conceived, disclosed, and reduced to practice the invention on certain dates); *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 61 U.S.P.Q. (BNA) 241, 88 L. Ed. 1250, 64 S. Ct. 997 (1944)* (misrepresenting that a widely known expert had authored an article praising the invention); and *Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 78 L. Ed. 293, 54 S. Ct. 146 (1933)* (involving an agreement to suppress evidence in the course of litigation). These cases indicate the context in which the Court established the knowing and willful misrepresentation test.

[29]** Justice Harlan, in a concurring opinion, emphasized that to "achieve a suitable accommodation in this area between the differing policies of the patent and antitrust laws," a distinction must be maintained between patents procured by "deliberate fraud" and those rendered invalid or unenforceable for other reasons. *Walker Process, 382 U.S. at 179-80, 147 U.S.P.Q. (BNA) at 408*. He then stated:

> To hold, as we do not, that private antitrust suits might also reach monopolies practiced under patents that for one reason or another may turn out to be voidable under one or more of the numerous technicalities attending the issuance of a patent, might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits. Hence, this private antitrust remedy should not be deemed available to reach [Sherman Act] § 2 monopolies carried on under a nonfraudulently procured patent.

Id. at 180, 147 U.S.P.Q. (BNA) at 408.

[6] The alleged misrepresentation in that case involved the patentee's sworn statement "that it neither knew nor believed that its invention had been in public use in the United States more than one year prior to filing its patent application when, in fact, [it] was a party to prior use within such time." *Walker Process, 382 U.S. at 174, 147 U.S.P.Q. (BNA) at 406*. The PTO does not currently require inventors to file a sworn statement regarding such knowledge or belief. See *35 U.S.C § 115 (1994)*; *37 C.F.R. § 1.63 (1996)*.

Consistent with the Supreme Court's analysis in Walker Process, as well as Justice Harlan's concurring opinion, we have distinguished "inequitable conduct" from Walker Process fraud, **[**30]** noting that ***HN15***[] inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a Walker Process counterclaim. See, e.g., *Hewlett-Packard Co. v. Bausch & Lomb Inc., 882 F.2d 1556, 1563, 11 U.S.P.Q.2D (BNA) 1750, 1756 (Fed. Cir. 1989)*; *FMC Corp. v. Manitowoc Co., 835 F.2d 1411, 1417-18, 5 U.S.P.Q.2D (BNA) 1112, 1117 (Fed. Cir. 1987)*; *Argus Chem., 812 F.2d at 1384-85, 1 U.S.P.Q.2D (BNA) at 1973-74*; *J.P. Stevens & Co. v. Lex Tex Ltd., 747 F.2d 1553, 1559, 223 U.S.P.Q. (BNA) 1089, 1092 (Fed. Cir. 1984)* ("Conduct before the PTO that may render a patent unenforceable is broader than common law fraud."). ***HN16***[] Inequitable conduct in fact is a lesser offense than common law fraud, and includes types of conduct less serious than "knowing and willful" fraud.

In *Norton v. Curtiss, 57 C.C.P.A. 1384, 433 F.2d 779, 792-94* & n.12, *167 U.S.P.Q. (BNA) 532, 543-45 & n.12 (CCPA 1970)*, our predecessor court explicitly distinguished inequitable conduct from "fraud," as that term was used by the Supreme Court in Walker Process. The court noted that

> ***HN17***[] the concept of "fraud" has most often been used by the courts, in general, to refer to a type of conduct so reprehensible that it could alone **[**31]** form the basis of an actionable wrong (e.g., the common law action for deceit.) . . . . Because severe penalties are usually meted out to the party found guilty of such conduct, technical fraud 7 is generally held not to exist unless the following indispensable elements are found to be present: (1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless **[***1106]** as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon **[*1070]** the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation. See, e.g., W. Prosser, Law of Torts, §§ 100-05 (3d ed. 1964); 37 C.J.S. Fraud § 3 (1943).

433 F.2d at 792-93, 167 U.S.P.Q. (BNA) at 543; see also *J.P. Stevens, 747 F.2d at 1559, 223 U.S.P.Q. (BNA) at 1092* (citing Norton). The court then contrasted such independently actionable common law fraud with lesser misconduct, including what we now refer to as inequitable conduct, which "fails, for one reason or another, to satisfy all the elements of the technical offense." **[**32]** Norton, 433 F.2d at 793, 167 U.S.P.Q. (BNA) at 543. ***HN18***[] Regarding such misconduct, "the courts appear to look at the equities of the particular case and determine whether the conduct before them . . . was still so reprehensible as to justify the court's refusing to enforce the rights of the party guilty of such conduct." Id.

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We understand from the enumeration of elements that the term "technical fraud" was used by the court to mean common law fraud.

HN19[] Inequitable conduct is thus an equitable defense in a patent infringement action and serves as a shield, while a more serious finding of fraud potentially exposes a patentee to antitrust liability and thus serves as a sword. See *Korody-Colyer Corp. v. General Motors Corp., 828 F.2d 1572, 1578, 4 U.S.P.Q.2D (BNA) 1203, 1207 (Fed. Cir. 1987)*; see also Norton, 433 F.2d at 796, 167 U.S.P.Q. (BNA) at 546 ("Where fraud is committed, injury to the public through a weakening of the Patent System is manifest."). ***HN20***[] Antitrust liability can include treble damages. See *15 U.S.C. § 15(a) (1994)*. **[**33]** In contrast, the remedies for inequitable conduct, while serious enough, only include unenforceability of the affected patent or patents and possible attorney fees. See *35 U.S.C. §§ 282*, *285 (1994)*. Simply put, Walker Process fraud is a more serious offense than inequitable conduct.

In this case, the jury was instructed that a finding of fraud could be premised on "a knowing, willful and intentional act, misrepresentation or omission before the [PTO]." This instruction was not inconsistent with various opinions of the courts stating that omissions, as well as misrepresentations, may in limited circumstances support a finding of Walker Process fraud. See, e.g., *Rolite, Inc. v. Wheelabrator Envtl. Sys., Inc., 958 F. Supp. 992, 1006 (E.D. Pa. 1997)* (finding an allegation of "fraud by omission" in a Walker Process claim sufficient to overcome defendant's motion to dismiss); *United States v. Ciba-Geigy Corp., 508 F. Supp.*

1157, 1170, 211 U.S.P.Q. (BNA) 529, 542 (D.N.J. 1979) (stating, in the context of Walker Process: "A misrepresentation is material if the patent would not have issued 'but for' the omission"). We agree that **HN21**[] if the evidence shows that the asserted **[**34]** patent was acquired by means of either a fraudulent misrepresentation or a fraudulent omission and that the party asserting the patent was aware of the fraud when bringing suit, such conduct can expose a patentee to liability under the antitrust laws. We arrive at this conclusion because a fraudulent omission can be just as reprehensible as a fraudulent misrepresentation. In addition, of course, in order to find liability, the necessary additional elements of a violation of the antitrust laws must be established. See Walker Process, 382 U.S. at 178, 147 U.S.P.Q.2D (BNA) at 407.

Such **HN22**[] a misrepresentation or omission must evidence a clear intent to deceive the examiner and thereby cause the PTO to grant an invalid patent. See 433 F.2d at 794, 167 U.S.P.Q. (BNA) at 544 ("The fact misrepresented must be 'the efficient, inducing, and proximate cause, or the determining ground' of the action taken in reliance thereon.") (quoting 37 C.J.S. Fraud § 18 (1943)). In contrast, **HN23**[] a conclusion of inequitable conduct may be based on evidence of a lesser misrepresentation or an omission, such as omission of a reference that would merely have been considered important to the patentability of a claim by a reasonable **[**35]** examiner. See *J.P. Stevens, 747 F.2d at 1559, 223 U.S.P.Q. (BNA) at 1092*. 8 **HN24**[] A finding of Walker Process fraud requires higher threshold showings of both intent and materiality **[*1071]** than does a finding of inequitable conduct. Moreover, unlike a finding of inequitable conduct, see, e.g., *Molins PLC v. Textron, Inc., 48 F.3d 1172, 1178-79, 33 U.S.P.Q.2D (BNA) 1823, 1826-27 (Fed. Cir. 1995)*, a finding of Walker Process fraud may not be based upon an equitable balancing of lesser degrees of materiality and intent. Rather, it must be based on independent and clear evidence of deceptive intent together with a clear showing of reliance, i.e., that the patent would not have issued but for the misrepresentation or omission. Therefore, for an omission such as a failure to cite a piece of prior art to support a finding of Walker Process fraud, the withholding of the reference must show evidence **[***1107]** of fraudulent intent. A mere failure to cite a reference to the PTO will not suffice.

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We recognize that this criterion reflects an older PTO rule in effect at the time the instant patent was prosecuted and that the current PTO rule defines materiality differently. See *Critikon, Inc. v. Balston Dickinson Vascular Access, Inc., 120 F.3d 1253, 1257, 43 U.S.P.Q.2D (BNA) 1666, 1669-70 (Fed. Cir. 1997)* (quoting *37 C.F.R. § 1.56 (b)(2)(ii) (1996)*).

[36]**

IV.

The district court observed that the Supreme Court, in footnote six of its PRE opinion, "left unresolved the issue of how 'Noerr applies to the ex parte application process,' and in particular, how it applies to the Walker Process claim." *930 F. Supp. at 1253* (quoting James B. Kobak, Jr., Professional Real Estate Investors and the Future of Patent-Antitrust Litigation, 63 Antitrust L.J. 185, 186 (1994)). The court also accurately pointed out that we have twice declined to resolve this issue. See *FilmTec Corp. v. Hydranautics, 67 F.3d 931, 939 n.2, 36 U.S.P.Q.2D (BNA) 1410, 1415 n.2 (Fed. Cir. 1995)*, cert. denied, *136 L. Ed. 2d 24, 117 S. Ct. 62 (1996)*; *Carroll Touch, Inc. v. Electro Mechanical Sys., Inc., 15 F.3d 1573, 1583 n.10, 27 U.S.P.Q.2D (BNA) 1836, 1845 n.10 (Fed. Cir. 1993)*. Therefore, after reviewing three opinions from the Ninth and District of Columbia Circuit Courts of Appeals, see *Hydranautics v. FilmTec Corp., 70 F.3d 533, 537-38, 36 U.S.P.Q.2D (BNA) 1773, 1777 (9th Cir. 1995)*; *Whelan v. Abell, 310 U.S. App. D.C. 396, 48 F.3d 1247, 1255 (D.C. Cir. 1995)*; *Liberty Lake Invs., Inc. v. Magnuson, 12 F.3d 155, 158-60 (9th Cir. 1993)*, the district court made **[**37]** its own determination that PRE's two-part test for a sham is inapplicable to an antitrust claim based on the assertion of a patent obtained by knowing and willful fraud. See *930 F. Supp. at 1253*. We do not agree with that determination. PRE and Walker Process provide alternative legal grounds on which a patentee may be stripped of its immunity from the antitrust laws; both legal theories may be applied to the same conduct. Moreover, we need not find a way to merge these decisions. Each provides its own basis for depriving a patent owner of immunity from the antitrust laws; either or both may be applicable to a particular party's conduct in obtaining and enforcing a patent. The Supreme Court saw no need to merge these separate lines of cases and neither do we.

Consequently, if the above-described elements of Walker Process fraud, as well as the other criteria for antitrust liability, are met, such liability can be imposed without the additional sham inquiry required under PRE. That is because Walker Process antitrust liability is based on the knowing assertion of a patent procured by fraud on the PTO, very specific conduct that is clearly reprehensible. **[**38]** On the other hand, ***HN25***[] irrespective of the patent applicant's conduct before the PTO, an antitrust claim can also be based on a PRE allegation that a suit is baseless; in order to prove that a suit was within Noerr's "sham" exception to immunity, an antitrust plaintiff must prove that the suit was both objectively baseless and subjectively motivated by a desire to impose collateral, anti-competitive injury rather than to obtain a justifiable legal remedy. PRE, 508 U.S. at 60-61, 26 U.S.P.Q.2D (BNA) at 1646. As the Supreme Court stated:

> ***HN26***[] First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships **[**39]** of a competitor," through the "use [of] the governmental process--as opposed **[*1072]** to the outcome of that process--as an anticompetitive weapon." . . . Of course, ***HN27***[] even a plaintiff who defeats the defendant's claim to Noerr immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Id. (footnotes and internal citations omitted). Thus, under PRE, ***HN28***[] a sham suit must be both subjectively brought in bad faith and based on a theory of either infringement or validity that is objectively baseless. Accordingly, if a suit is not objectively baseless, an antitrust defendant's subjective motivation is immaterial. Id. In contrast with a Walker Process claim, a patentee's activities in procuring the patent are not necessarily at issue. It is the bringing of the lawsuit that is subjectively and objectively baseless that must be proved.

V.

As for the present case, we conclude that there exists substantial evidence upon which a reasonable **[**40]** fact finder could strip NP of its immunity from antitrust liability. In particular, there exists substantial evidence that the 1977 Book was fraudulently kept from the PTO during patent prosecution. 9 **[***1108]** The jury could reasonably have found that the 1977 Book was fraudulently withheld and that it disclosed the claimed invention. First, the jury could reasonably have concluded that Branemark, through his Swedish patent agent, Barnieske, withheld the 1977 Book with the requisite intent to defraud the PTO. The initial disclosure to Barnieske, provided by Branemark's co-inventor, af Ekenstam, indicated that the studies described in the 1977 Book verified the utility of the claimed invention. While Barnieske did testify that he did not recall his thoughts during the prosecution of the patent and that he would have submitted the 1977 Book to the PTO if he had considered it relevant, the jury was free to disbelieve him. Barnieske could not explain, even in retrospect, why he deleted all reference to the 1977 Book. Importantly, the 1977 Book was thought by at least one inventor to be relevant, as evidenced by the initial disclosure to the patent agent, but it was inexplicably not later disclosed **[**41]** to the PTO. Also, as the author of the 1977 Book and an inventor, Branemark presumably knew of the book's relevance to the invention and could have directed Barnieske not to disclose the book to the PTO. Thus, the jury could properly have inferred that Branemark had the requisite intent to defraud the PTO based on his failure to disclose the reference to the PTO. Such a scheme to defraud is the type of conduct contemplated by Walker Process.

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Because we consider the conduct relating to the 1977 Book sufficient to uphold the jury's finding of fraud, we need not discuss 3I's allegations that Branemark fraudulently misrepresented the causal relationship between the claimed micropitted surface and osseointegration and fraudulently concealed the best mode of making and using the claimed invention from the PTO.

Second, substantial evidence upon which a reasonable jury could have relied also indicates that the 1977 Book was sufficiently material to justify a finding of fraud. 3I's expert witness, Dr. Donald Brunette, **[**42]** testified that the SEMs of the 1977 Book depict dental implants having all the elements of the claims asserted by NP. Specifically, he explained how he had determined that the SEMs depict a "biologically flawless material" suitable for use as a dental implant. He also explained how he determined that the depicted micropits have diameters within the claimed range of approximately 10 to 1000 nanometers. Even Branemark, in this deposition testimony, conceded that it would not have been difficult to calculate the size of the micropits depicted in the 1977 Book, given the magnification factors provided in the captions to the SEMs. Accordingly, a reasonable jury could have found, based on the unambiguous claim language, that the 1977 Book anticipated the patent and that the examiner would not have granted the patent if he had been aware of the 1977 Book.

Third, the record indicates that a reasonable jury could have found that NP brought suit against 3I with knowledge of the applicants' fraud. A reasonable jury could have found that two of NP's then-officers, Dr. Ralph Green, Jr. and Mr. Mats Nilsson, were **[*1073]** aware of the fraud based on Green's testimony that Nilsson told him: "If the Patent **[**43]** Office did not receive a copy of [the 1977 Book], and if that were true, then we would have a larger problem and that was fraud." Green's testimony also indicates that NP was aware that the 1977 Book was highly material and, in fact, likely rendered the patent invalid. Green testified that he, Nilsson, and Mr. George Vande Sande obtained a legal opinion from NP's attorney, Mr. David Lindley, who indicated that if "we were to sue anyone on the patent we would lose in the first round. . . . There was prior art, not the least of which was this textbook [the 1977 Book] that would invalidate the patent."

Regarding NP's motion for a new trial, we have concluded that the court's instructions to the jury regarding fraud, to which NP did not object, substantially comport with the law. Specifically, the court emphasized to the jury that to strip NP of its immunity from the antitrust laws, 3I "must prove that the *'891* patent was fraudulently . . . obtained by clear and convincing evidence." The court also pointed out that only "knowing, willful and intentional acts, misrepresentations or omission" may support a finding of fraud and that the jury should approach such a finding with "great **[**44]** care." As to reliance, the court instructed the jury that "materiality is shown if but for the misrepresentation or omission the *'891* patent would not have been issued." These instructions were not legally erroneous.

Because we conclude that the finding of Walker Process fraud was supported by substantial evidence and was based upon a jury instruction that was not legally erroneous or prejudicial, we affirm the denial of NP's motion for JMOL. NP was properly deprived of its immunity from the antitrust laws under Walker Process, and it could not have benefited from additional jury instructions regarding PRE or Noerr. The court's refusal to so instruct the jury therefore does not require a new trial. **[***1109]**

We have also considered NP's alternative arguments in support of its motion for a new trial, including its assertions that the district court erred in permitting Green to testify, in prohibiting Dr. Hodosh and Messrs. Vande Sande and Martens from testifying, in allowing 3I to present a theory of joint venture liability to the jury, and in impugning the credibility of NP's arguments before the jury. We do not find these arguments persuasive. The district court did not **[**45]** abuse its discretion or misapply the law of attorney-client privilege in making its evidentiary rulings, nor did it prejudice NP's substantive rights by allowing the jury to consider a joint venture theory of liability or by commenting on NP's arguments during the trial. Accordingly, the court did not abuse its discretion in denying NP's motion for a new trial.

CONCLUSION

The district court did not err in holding the *'891* patent invalid as a matter of law at the close of NP's case-in-chief because NP itself introduced evidence that was fatal to the patent's validity. Likewise, the district court did not err in denying NP's motion for JMOL or a new trial on 3I's antitrust counterclaim. A reasonable jury, applying the correct law, could have found that the facts of this case were sufficient to constitute fraud within the meaning of Walker Process.

AFFIRMED

LABORERS v. PHILIP MORRIS, INC.

United States District Court for the Southern District of New York

March 25, 1998, Decided ; March 26, 1998, Filed

97 Civ. 4550 (SAS) rel. 97 Civ. 4676, 97 Civ. 7346, 97 Civ. 8462, 97 Civ. 9395, 97 Civ. 9396, 97 Civ. 9397, 97 Civ. 9398, 97 Civ. 9399, 97 Civ. 9400, 97 Civ. 9401, 97 Civ. 9402

Reporter
7 F. Supp. 2d 277 *; 1998 U.S. Dist. LEXIS 3578 **; 1998-1 Trade Cas. (CCH) P72,132

LABORERS LOCAL 17 HEALTH & BENEFIT FUND and THE TRANSPORT WORKERS UNION NEW YORK CITY PRIVATE BUS LINES HEALTH BENEFIT TRUST, Plaintiffs, v. PHILIP MORRIS, INC., R.J. REYNOLDS TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., B.A.T. INDUS. P/L/C/. LORILLARD TOBACCO CO., INC., LIGGETT & MYERS INC., THE AMERICAN TOBACCO CO., UNITED STATES TOBACCO CO., THE COUNCIL FOR TOBACCO RESEARCH-USA, INC., THE TOBACCO INSTITUTE, INC., SMOKELESS TOBACCO COUNCIL, INC, and HILL & KNOWLTON, INC., Defendants.

Disposition: [1]** Defendants' motions to dismiss granted in part and denied in part. Claims in Count VII (strict liability), Count VIII (negligence) and Count IX (breach of express and implied warranties) dismissed without prejudice.

Core Terms

plaintiffs', defendants', tobacco, proximate cause, injuries, motion to dismiss, tobacco-related, subrogation, remote, alleges, unjust enrichment, slip opinion, special duty, expenses, disease, costs, preempted, promises, tobacco product, advertising, concealed, damages, smoking, targets, anti trust law, fraudulent, courts, antitrust violation, common law claim, personal injury

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN1[] **Subject Matter Jurisdiction, Federal Questions**

Federal courts have subject matter jurisdiction over an action pursuant to *28 U.S.C.S. §§ 1331*, *1337*, where counts of the complaint raise questions of federal law. Supplemental jurisdiction over state claims is asserted where the federal and state claims both derive from a common nucleus of operative fact.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN2[] Motions to Dismiss, Failure to State Claim

In deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must accept all material facts alleged in the complaint as true and must draw all reasonable inferences in the nonmovant's favor. The court may not grant the motion merely because recovery seems remote or unlikely. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Torts > ... > Causation > Proximate Cause > General Overview

HN3[] Causation, Proximate Cause

As fundamental principles of proximate cause dictate, plaintiffs may only recover for injuries that they have suffered.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Compensatory Damages > Types of Losses > Medical Expenses

Torts > ... > Elements > Causation > General Overview

HN4[] Causation, Proximate Cause

In general terms, the concept of "proximate cause" prevents a recovery from a party for remote and derivative injuries to a plaintiff resulting from that party's conduct toward another. Under the common law, therefore, one who pays the medical expenses of another may not recover those expenses from the third-party tortfeasor who caused the damage.

Torts > ... > Elements > Causation > Intervening Causation

Torts > ... > Elements > Causation > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN5[] Causation, Intervening Causation

The law arbitrarily declines to trace a series of events beyond a certain point. That point is reached when the connection between the defendants' negligence and the claimants' damages becomes too tenuous and remote to permit recovery. While a variety of factors may be relevant in assessing legal proximate cause, in order to plead a prima facie case, a plaintiff is generally required to show that the defendant's negligence was a substantial cause of the events that produced the injury. If such a showing is made, no intervening acts will break the causal connection if such acts are a reasonably foreseeable result of the defendants' negligence.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > Intentional Torts > General Overview

Torts > Intentional Torts > Defenses > Intent

Torts > ... > Elements > Causation > General Overview

HN6[] **Causation, Proximate Cause**

Factors that courts may consider when determining proximate cause in intentional tort cases include: 1) the defendant's intent to do harm, 2) the degree of moral wrong involved, and 3) the seriousness of the harm originally intended. These factors are considered because the greater the intent to harm, the more foreseeable it is that harm will result.

Torts > ... > Damages > Collateral Source Rule > General Overview

HN7[] **Damages, Collateral Source Rule**

Health plan participants who bring personal injury actions may not recover expenses that the plan has already reimbursed. *N.Y. C.P.L.R. 4545(c)* (1992).

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Torts > Remedies > Damages > General Overview

HN8[] **Burdens of Proof, Ultimate Burden of Persuasion**

The fact that plaintiffs may not be able to sustain their burden of proof on damages does not mean, that they should not be allowed to make the attempt.

Torts > ... > Causation > Proximate Cause > General Overview

HN9[] **Causation, Proximate Cause**

Proximate cause is ordinarily a question for the fact finder to resolve.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN10[] **Motions to Dismiss, Failure to State Claim**

The issue on a motion to dismiss is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. A pleading will survive a motion to dismiss if it alleges a set of facts that would entitle the plaintiff to relief if proven.

Contracts Law > Third Parties > Subrogation

Insurance Law > Claim, Contract & Practice Issues > Subrogation > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

HN11[] Third Parties, Subrogation

In general, subrogation is a legal device that enables one party, the "subrogee," to put itself in the place of a party who has sustained an injury in order to obtain recovery. Subrogation may be available either through statute or private agreement.

Contracts Law > Third Parties > Subrogation

Insurance Law > Claim, Contract & Practice Issues > Subrogation > General Overview

HN12[] Third Parties, Subrogation

Where there is no statute establishing subrogation as plaintiffs' exclusive remedy and instead, plaintiffs' subrogation rights were created by private contracts, such rights cannot limit plaintiffs' ability to recover from those not party to the agreements. Thus, if plaintiffs have stated valid causes of action, the fact that they may also be entitled to sue in subrogation would not extinguish them.

Antitrust & Trade Law > Consumer Protection > Tobacco Products > Federal Cigarette Labeling & Advertising Act

Communications Law > ... > Regulated Practices > Content Regulation > Advertising

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Consumer Protection > Tobacco Products > General Overview

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

HN13[] Tobacco Products, Federal Cigarette Labeling & Advertising Act

The Cigarette Labeling and Advertising Act, *15 U.S.C.S. §§ 1331-40* mandates certain uniform warning labels on cigarette packaging and preempts all state regulation of tobacco advertising.

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

Antitrust & Trade Law > Consumer Protection > Tobacco Products > General Overview

HN14[] Tobacco Products, State Regulation

See *15 U.S.C.S. § 1334(b)*.

Antitrust & Trade Law > Consumer Protection > Tobacco Products > Federal Cigarette Labeling & Advertising Act

Communications Law > ... > Regulated Practices > Content Regulation > Advertising

Torts > Procedural Matters > Preemption > General Overview

Antitrust & Trade Law > Consumer Protection > Tobacco Products > General Overview

HN15[] **Tobacco Products, Federal Cigarette Labeling & Advertising Act**

Common law rules impose requirements or prohibitions within the meaning of the Cigarette Labeling and Advertising Act (Act), *15 U.S.C.S. §§ 1331-40* because they are premised on the existence of a legal duty. The Act, therefore, applies to common law claims. To determine whether a particular claim is preempted, a court must ask whether the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking and health imposed under state law with respect to advertising or promotion, giving that clause a fair but narrow reading.

Antitrust & Trade Law > Consumer Protection > Tobacco Products > Federal Cigarette Labeling & Advertising Act

Communications Law > ... > Regulated Practices > Content Regulation > Advertising

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Consumer Protection > Tobacco Products > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

Torts > Procedural Matters > Preemption > General Overview

HN16[] **Tobacco Products, Federal Cigarette Labeling & Advertising Act**

The Cigarette Labeling and Advertising Act, *15 U.S.C.S. §§ 1331-40* preempts fraudulent misrepresentation claims that merely allege that cigarette companies should have included additional or more clearly stated warnings in their advertisements. Claims of fraud by intentional misstatement are not preempted because they are predicated not on a duty based on smoking and health but rather on a more general obligation: the duty not to deceive.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Warranties

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

Antitrust & Trade Law > Consumer Protection > Tobacco Products > General Overview

Antitrust & Trade Law > Consumer Protection > Tobacco Products > Federal Cigarette Labeling & Advertising Act

Communications Law > ... > Regulated Practices > Content Regulation > Advertising

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Torts > Procedural Matters > Preemption > General Overview

HN17[] **Types of Contracts, Express Warranties**

A common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a requirement imposed under state law. The predicate duty is imposed not by the state, but by the party assuming the obligation. Claims based on voluntarily assumed obligations, then, are not preempted because they do not fall within the language of the Cigarette Labeling and Advertising Act, *15 U.S.C.S. §§ 1331-40*.

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

Communications Law > ... > Regulated Practices > Content Regulation > Advertising

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Consumer Protection > Tobacco Products > General Overview

Torts > Procedural Matters > Preemption > General Overview

HN18[] **Tobacco Products, State Regulation**

A fair but narrow reading of the Cigarette Labeling and Advertising Act, *15 U.S.C.S. §§ 1331-40*, reveals that a claim of unjust enrichment is not within the statute's reach for preemption purposes.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > General Overview

HN19[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act authorizes private civil actions by any person injured in his business or property by reason of, *18 U.S.C.S. § 1964(c)*, a pattern of racketeering activity, *18 U.S.C.S. § 1962*, such as fraud or obstruction of justice. *18 U.S.C.S. § 1961*.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Governments > Legislation > Interpretation

HN20[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

In an action brought pursuant to the Racketeer Influenced and Corrupt Organizations Act, standing requires more than mere causation: There is also the issue of statutory intent. To satisfy the requirement, the plaintiffs must show both that they are within the class the statute sought to protect and that the harm done was one that the statute was meant to prevent.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN21[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

Only the direct targets of a racketeering scheme have standing as intended beneficiaries of the Racketeer Influenced and Corrupt Organizations Act.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN22[] Private Actions, Remedies

Federal ***antitrust law*** authorize private civil actions by any person injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15*. Those laws forbid every contract, combination, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN23[] Private Actions, Remedies

New York ***antitrust law*** prohibits every contract, agreement, arrangement or combination whereby competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service is or may be restrained. Donnelly Act, N.Y. Gen. Bus. Law § 340.1 (1988).

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN24[] Private Actions, Remedies

An antitrust violation is an agreement in restraint of trade that causes injury of the type the antitrust laws were intended to prevent. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN25[] Private Actions, Standing

Antitrust claims must be dismissed because plaintiffs are not within that area of the economy endangered by the breakdown of competitive conditions. The Second Circuit has adopted a "target area" test for determining antitrust standing: the plaintiff must either be the direct target of the alleged antitrust violation or fall within its target area. The target area is that sector of the economy endangered by a breakdown of competitive conditions in the particular industry.

Evidence > Burdens of Proof > Clear & Convincing Proof

Governments > Fiduciaries

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN26[] **Burdens of Proof, Clear & Convincing Proof**

Common law fraud may consist of either fraudulent misrepresentation or fraudulent concealment. To prove fraudulent misrepresentation under New York law, a plaintiff must show: 1) a material false representation, 2) intent to defraud the plaintiff thereby, 3) reasonable reliance on the representation, and 4) damage resulting from such reliance. Each element must be shown by clear and convincing evidence. To establish fraudulent concealment, a plaintiff must prove all of the above elements, and must show by clear and convincing evidence that the defendant had a duty to disclose the material information concealed as well. That duty may arise from the need to complete or clarify a partial or ambiguous statement, or from a fiduciary or confidential relationship between the parties. It may also arise where one party has superior knowledge of certain information, not readily available to the other party, and knows that the second party is acting on the basis of mistaken knowledge.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN27[] **Business Torts, Fraud & Misrepresentation**

New York follows a two-tier standard in determining whether reliance is reasonable. When matters are held to be peculiarly within defendant's knowledge, a plaintiff may rely on the defendant's statements without further investigation, as it has no independent means of ascertaining the truth. When misrepresentations concern matters not peculiarly within the defendant's knowledge, New York courts have often found no justifiable reliance, holding that if a plaintiff has the means of knowing, by the exercise of ordinary intelligence, the truth it must make use of those means.

Torts > ... > Duty > Affirmative Duty to Act > Failure to Act

Torts > ... > Elements > Duty > General Overview

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN28[] **Affirmative Duty to Act, Failure to Act**

Under certain circumstances the law imposes a duty of care on one who acts for the benefit of another, even in the absence of a contractual relationship. One who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all. If a duty of care exists, then a tort may result as well from acts of omission as of commission. Existence of a duty is a question of law for the court to decide.

Torts > ... > Elements > Duty > General Overview

HN29[] **Elements, Duty**

One who undertakes to render services to another that he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Torts > ... > Elements > Duty > General Overview

Torts > ... > Types of Damages > Property Damages > General Overview

HN30[] **Elements, Duty**

Economic loss or damage to property may give rise to an action for breach of an assumed duty.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN31[] **Federal & State Interrelationships, Erie Doctrine**

A federal court should not restrict a common law cause of action in a manner that the state courts have not required.

Torts > ... > Elements > Duty > General Overview

HN32[] **Elements, Duty**

An assumed duty arises once a person undertakes a certain course of conduct upon which another relies. In deciding whether a duty was assumed under New York law, the question is whether defendant's conduct placed plaintiff in a more vulnerable position than plaintiff would have been in had defendant done nothing.

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

Torts > ... > Elements > Duty > General Overview

HN33[] **Affirmative Duty to Act, Voluntary Assumption of Duty**

While plaintiffs may recover for breach of any duty that defendants assumed on their behalf, they may not recover for breach of a duty assumed to another. A duty directly assumed for the benefit of a particular person or entity does not extend to third parties who were not the intended beneficiaries of the subject undertaking. Neither may plaintiffs recover for breach of a duty voluntarily assumed on behalf of the public generally. It is the responsibility of the courts to fix the orbit of duty within the limits dictated by both policy and logic.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN34[] **Types of Contracts, Quasi Contracts**

Liability for unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. A claim for unjust enrichment is available when the acts of the parties or others have placed in the possession of one person money under such circumstances that in equity and good conscience he ought not to retain it.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN35[] Types of Contracts, Quasi Contracts

To recover for unjust enrichment, plaintiffs must show that services were performed for the defendants resulting in unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery.

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Judges: Shira A. Scheindlin, U.S.D.J.

Opinion by: Shira A. Scheindlin

Opinion

[*282] OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. Background

Plaintiffs are labor union health and welfare trust funds (the "Funds") that supplement employers' basic medical benefits by providing death, disability and prescription drug benefits and related services. Defendants are tobacco companies and tobacco public relations firms. Plaintiffs allege that defendants have **[**7]** engaged in a conspiracy to deceive the general public, including plaintiffs, as to the health risks associated with smoking, the addictiveness of nicotine, and the levels of nicotine in their products. As a result, plaintiffs allege, they have spent millions of dollars more than they otherwise would have to provide medical benefits to health plan participants. The Funds have brought this action "to recover money expended . . . to provide medical treatment to their participants and beneficiaries who have suffered and are suffering from tobacco-related illnesses and to obtain appropriate injunctive relief." Class Action Complaint and Demand for Jury Trial P 7, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., No. 97 Civ. 4550 (S.D.N.Y. filed June 19, 1997) [hereinafter Compl.]. [1] Plaintiffs allege RICO and antitrust violations, and assert common law claims for fraud, breach of special duty, and unjust enrichment.

[8]** Defendants have moved to dismiss the action under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim. They contend that plaintiffs have no direct claim against defendants for three reasons: 1) as a matter of law, the chain of causation between plaintiffs' injuries and defendants' alleged acts is too attenuated to support a verdict for plaintiffs, because the alleged injuries are only remotely connected to defendants' alleged acts, 2) plaintiffs' sole remedy is by subrogation to their participants' claims, and 3) the federal Cigarette Labeling and Advertising Act preempts all of plaintiffs' common law claims. Defendants also raise additional count-specific objections to each of plaintiffs' claims.

II. Jurisdiction

HN1[] This Court has subject matter jurisdiction over the action pursuant to *28 U.S.C. §§ 1331*, *1337 (1994)* because Counts I-III of the complaint raise questions of federal law. Supplemental jurisdiction over the state claims raised in Counts IV-X is asserted because the federal and state claims both derive from "a common nucleus of operative fact." *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*; *Promisel v. First Am. **[**9]** Artificial Flowers, Inc., 943 F.2d 251, 254 (2d Cir. 1991)*; *28 U.S.C. § 1367(a) (1994)*.

III. Legal Standard for Motion to Dismiss

HN2[] In deciding a motion to dismiss under *Rule 12(b)(6)*, the court must accept all material facts alleged in the complaint as true and must draw all reasonable inferences in the nonmovant's favor. See *Kaluczky v. City of White*

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[1] Defendants presented their substantive arguments in memoranda filed in United Federation of Teachers Welfare Fund v. Philip Morris, Inc., No. 97-4676 (S.D.N.Y. filed June 25, 1997). Defendants' papers in Laborers Local 17 incorporate those arguments by reference. The reverse is true for plaintiffs. Accordingly, this opinion will refer to defendants' UFT opening and reply memoranda and to plaintiffs' Laborers Local 17 opposition brief. See Memorandum in Support of Defendants' Motion to Dismiss the Complaint for Failure to State a Claim, United Federation of Teachers Welfare Fund v. Philip Morris, Inc., No. 97-4676 (S.D.N.Y. filed June 25, 1997) (dated Oct. 17, 1997) [hereinafter Defs.' Mem.]; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., No. 97 Civ. 4550 (S.D.N.Y. filed June 19, 1997) (dated Dec. 5, 1997) [hereinafter Pls.' Mem.]; Memorandum in Support of Defendants' Motion to Dismiss the Complaint for Failure to State a Claim, United Federation of Teachers Welfare Fund v. Philip Morris, Inc., No. 97-4676 (S.D.N.Y. filed June 25, 1997) (dated Jan. 27, 1998) [hereinafter Reply].

Plains, 57 F.3d 202, 206 (2d Cir. 1995). The court may not grant the motion merely because recovery seems remote or unlikely. *Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996)* (quoting *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974))*. A complaint should not be dismissed for failure to state a claim unless "it **[*283]** appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957))*.

IV. Discussion

In recent months, state and federal courts have seen an explosion of civil actions arising from the use, marketing or sale of tobacco products. To date over forty states have filed suit, as have cities, counties, and private third-party **[**10]** payors, all attempting to recover the cost of treating tobacco-related diseases. See Proposed Tobacco Industry Settlement, Preamble, P 22 (June 20, 1997). All of these cases address common questions: If in fact the tobacco industry is liable for the cost of tobacco-related disease, to whom should it be held responsible?

As the contents of the tobacco industry's internal research and marketing documents become increasingly available to the general public, some have become convinced that the tobacco industry should be held liable for the entire cost of tobacco-related disease, however that cost was incurred. [2] Whether an industry should be penalized for successfully marketing a legal product is certainly an interesting question, but it is beyond the scope of any single lawsuit. Policymaking on such a scale is ordinarily left to the legislature; in fact, there are various proposals before Congress that would "mandate a total reformation and restructuring of how tobacco products are manufactured, marketed, and distributed in this country." Proposed Tobacco Industry Settlement, Preamble P 1. [3] The issue addressed here, in contrast, is much more limited: to determine whether and **[**11]** how defendants should be held responsible to these particular plaintiffs.

As a result, allegations that the defendants have marketed their products to children, that these products are unreasonably dangerous, or that they have inflicted harm on individual smokers are not relevant here. Nor are claims of harm to society or to plaintiffs as members of the general public. Rather, ***HN3***[] as fundamental principles of **[**12]** proximate cause dictate, plaintiffs may only recover for injuries that they have suffered. If those injuries were caused by defendants, then defendants should indeed be held responsible. But plaintiffs have no standing to vindicate the public's rights. When stripped to the basics, the issues in this litigation are relatively simple: To the extent that plaintiffs have alleged that defendants have harmed them *directly*, they have stated a claim on which relief may be granted.

A. Do plaintiffs have a direct claim against defendants?

Because the issue of proximate cause is central to the disposition of this case, I will discuss it in some detail before addressing plaintiffs' state and federal claims individually.

1. Proximate Cause

Defendants' fundamental argument is that plaintiffs have no direct claim against them because they did not proximately cause plaintiffs' injuries. ***HN4***[] In general terms, the concept of "proximate cause" prevents a recovery from a party for remote and derivative injuries to a plaintiff resulting from that party's conduct toward another. See, e.g., *Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 268-69, 117 L. Ed. 2d 532, **[**13]** 112 S. Ct. 1311 (1992)*; *Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 758-59, 24 L. Ed. 580 (1877)*. Under the common law, therefore, one who pays the medical expenses of another may not recover those expenses from the third-party

[2] See, e.g., Blue Cross Blue Shield of Minnesota, Tobacco Web Site (visited Mar. 19, 1998) <*www.mnbluecrosstobacco.com*> (publishing trial exhibits in State by Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. filed Aug. 17, 1994)).

[3] See also Tobacco Sales to Minors Prevention, S. 1713, 105th Cong. (1997); Public Health Service Act, S. 1648, 105th Cong. (1997); Tobacco Products vs. Children, S. 1638, 105th Cong. (1997); Tobacco Quota Fluctuations, H.R. 3264, 105th Cong. (1997); Federal Fund Expenditure Under Tobacco Settlements, H.R.J. Res. 109, 105th Cong. (1997).

tortfeasor who caused the damage. See, e.g., *Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 532 n.25, 74 L. Ed. 2d 723, 103 S. Ct. 897 [*284] (1983)* (citing 1 J. Sutherland, Law of Damages 55-56 (1882)); *Anthony v. Slaid, 52 Mass. 290, 291 (1846)* (plaintiff who undertook to support town paupers could not recover from tortfeasor who assaulted pauper, increasing plaintiff's expenses, as damages were too remote). Plaintiffs have alleged that defendants deceived them about the dangers of tobacco, inhibiting plaintiffs' ability to minimize health-care expenses, and shifting the cost of tobacco-related disease to the plaintiffs. See, e.g., Compl. PP 269-74. Defendants maintain that plaintiffs' claims are no different from those rejected in Anthony v. Slaid, and that the alleged injuries, though worded as direct claims, are equally remote.

The question of when an alleged injury becomes too remote to allow **[**14]** recovery is often difficult. "Because of convenience, of public policy, of a rough sense of justice, ***HN5***[] the law arbitrarily declines to trace a series of events beyond a certain point." *Palsgraf v. Long Island R. Co., 248 N.Y. 339, 352, 162 N.E. 99 (1928)* (Andrews, J. dissenting). [4] That point is reached when "the connection between the defendants' negligence and the claimants' damages [becomes] too tenuous and remote to permit recovery." *Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 824-25 (2d Cir. 1968)*. While "a variety of factors may be relevant in assessing legal [proximate] cause," in order to plead a prima facie case, a plaintiff is generally required to "show that the defendant's negligence was a substantial cause of the events which produced the injury." *Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980)*; accord *Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 520, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980)*. If such a showing is made, no intervening acts -- for example, the decision of plan participants to smoke -- will break the causal connection if such acts are a reasonably foreseeable result of the **[**15]** defendants' negligence. *Derdiarian, 51 N.Y.2d at 315*; *Stephenson by Coley v. S.C. Johnson & Son, Inc., 168 Misc. 2d 528, 638 N.Y.S.2d 889, 892 (Sup. Ct. N.Y. Co. 1996)*, aff'd, *239 A.D.2d 402, 658 N.Y.S.2d 636* (2nd Dep't 1997).

HN6[] Other factors that courts may consider when determining proximate cause in intentional tort cases include: 1) the defendant's intent to do harm, 2) the degree of moral wrong involved, and 3) the seriousness of the harm originally intended. *Restatement (Second) of Torts § 435B* (1965). These factors are considered because the greater the intent to harm, the more foreseeable it is that harm will result.

These general principles govern all common-law claims, including the intentional torts alleged in the complaint. **[**16]** They also apply to plaintiffs' statutory claims. Congress intended that antitrust litigation "would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation[,]" including rules defining proximate cause. *Associated Gen. Contractors, 459 U.S. at 533*. New York's antitrust statute, the Donnelly Act, has been interpreted similarly. *Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 335, 525 N.Y.S.2d 816, 520 N.E.2d 535 (1988)* (Donnelly Act "should generally be construed in light of Federal precedent"); *Van Dussen-Storto Motor Inn, Inc. v. Rochester Tel. Corp., 63 A.D.2d 244, 407 N.Y.S.2d 287, 293* (4th Dep't 1978) (defining proximate cause under Donnelly Act by citing to federal precedent); see also *Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V., 1992 U.S. Dist. LEXIS 15232, 1992 WL 296314*, at *6 (S.D.N.Y. 1992), aff'd, *17 F.3d 38 (2d Cir. 1994)* (citing Van Dussen-Storto Motor Inn) (proximate cause under Donnelly Act). The same proximate cause constraints apply to RICO claims. *Holmes, 503 U.S. at 268*; *Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23-24 (2d Cir. 1990)* (RICO violations "proximately cause a plaintiff's injury **[**17]** if they are a substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence.").

[*285] The purpose of requiring a direct relationship between defendants' conduct and plaintiffs' injury is threefold. First, the more remote the injury, the more difficult it is to ascertain the amount of damages attributable to the defendants' acts, rather than to some other factor. *Holmes, 503 U.S. at 269*. Second, allowing indirectly injured

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While not part of the majority opinion, the Andrews dissent is often quoted in discussions of proximate cause. See, e.g., *Associated Gen. Contractors, 459 U.S. at 537 n.34*; *Blue Shield of Va. v. McCready, 457 U.S. 465, 478 n.13, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*.

plaintiffs to proceed creates the risk of multiple recoveries. Id. Third, those who are directly injured are in a better position to "vindicate the law as private attorneys general," without any of the problems found in suits based on more remote injuries. *Id. at 269-70*.

If all of plaintiffs' allegations regarding defendants' knowledge and intent are true -- and I must assume as much for the purposes of this motion -- then a jury could reasonably find that plaintiffs' injuries were foreseeable, and that defendants' behavior was a substantial cause of those injuries. For example, plaintiffs maintain that defendants knew how to manufacture a less harmful cigarette but did not **[**18]** do so because it would have compromised their litigation strategy. Compl. PP 125-39. One direct consequence of such a decision would be to limit plaintiffs' ability to reduce their health care costs by encouraging their participants to use less harmful tobacco products. The next step, then, is to analyze the policy factors enunciated in Holmes to determine whether plaintiffs' injuries are too remote for recovery as a matter of law.

First, are there other parties better suited to act as "private attorneys general"? Individual smokers and public agencies have an incentive equal to that of the plaintiffs' to "prosecute" defendants for deceiving the public about the dangers of tobacco. None, however, would have a strong interest in vindicating the harm to plaintiffs -- their reduced ability to minimize health-care expenses and their assumption of the financial burden of tobacco-related disease among plan participants. There is a substantial risk that those harms will go unremedied if this action is not allowed to continue.

Next, is there a risk of multiple recoveries for the same harm? Plaintiffs are correct in arguing that there is not. No other party may recover for harm to the **[**19]** Funds' infrastructure, financial stability, or ability to project costs. To the extent that the harm took the form of increased expenses for medical care, those costs will only be recovered once. ***HN7***[] Plan participants who bring personal injury actions against the defendants may not recover expenses that the Funds have already reimbursed. *N.Y. C.P.L.R. 4545(c)* (McKinney 1992). Conversely, as defendants' briefs discuss at length, plaintiffs may not recover for the personal injuries of their participants. Because costs borne only by the Funds are recoverable only by the Funds, there can be no risk of multiple recoveries.

Finally, will it be difficult to ascertain the damages caused by the defendants? Plaintiffs face a significant burden in the damages phase of litigation. Not only will they have to translate intangible concepts such as "reduced ability to minimize health-care expenses" into monetary figures, but they will have to propose a plausible method of separating damages caused by defendants from damages caused by other factors. Ultimately, ***HN8***[] plaintiffs may not be able to sustain their burden of proof. That does not mean, however, that they should not be allowed to make the attempt. **[**20]** See Texas v. American Tobacco Co., No. 5-96-CV-91, slip op. at 17 (difficulty in and of itself does not bar action).

HN9[] Proximate cause is ordinarily a question for the fact finder to resolve. *Derdiarian, 51 N.Y.2d at 314-15*; *Nallan, 50 N.Y.2d at 520*. "Obviously there is a substantial difference between alleging something and proving it." Arizona v. American Tobacco Co., Inc., No. CV-96-14769, slip op. at 2 (Ariz. Super. Ct. May 27, 1997) (order denying motion to dismiss and holding that proximate cause was not precluded by the "very nature" of claimed damages). ***HN10***[] Nonetheless, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*. A pleading will survive a motion to dismiss if it alleges a set of facts that would entitle the plaintiff to relief if proven. See *id. at 236*; **[*286]** *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. Plaintiffs have stated a prima facie case for several of their claims, as discussed in part IV.B below. While these claims may be difficult to prove, plaintiffs' **[**21]** claims of injury are not so remote as to warrant dismissal at this stage.

2. Subrogation

Defendants maintain that because plaintiffs' claims are indirect, their only remedy is by suing as subrogees of any plan participants harmed by the defendants. ***HN11***[] In general, subrogation is a legal device that enables one party (the "subrogee") to put itself in the place of a party who has sustained an injury in order to obtain recovery.

Subrogation may be available either through statute or private agreement. Plaintiffs here have no statutory right to subrogation; however, many of their employee benefit plan contracts contain subrogation provisions. See, e.g., Defs.' Mem. at 2 (quoting benefit plan for participants in the United Federation of Teachers Welfare Fund). As subrogees, plaintiffs would "stand in the shoes" of the injured participants, and their claims would be subject to the same affirmative defenses, such as assumption of risk, as would apply in actions brought by the harmed individuals.

Some courts in other tobacco-related cases have held that subrogation is the exclusive remedy against these defendants. However, in each of those cases, the right of subrogation **[**22]** arose by statute, not by private contract. Iowa v. R.J. Reynolds, No. CL71048 (Iowa Dist. Ct. Aug. 26, 1997); Maryland v. Philip Morris Inc., 1997 WL 540913 (Md. Cir. Ct. 1997); McGraw v. American Tobacco Co., No. 94-C1707 (W.Va. Cir. Ct. Mar. 31, 1997) (orders denying motions to dismiss on subrogation grounds). Iowa, Maryland, and West Virginia sued tobacco companies to recover the cost of providing health care to their citizens. In each case, the court relied on the principle that where there is a statutory remedy, that remedy is exclusive unless the statute indicates otherwise. Each court concluded that the applicable state Medicaid statute, which created a right of subrogation, was intended to provide an exclusive remedy for the State. Iowa, No. CL71048, slip op. at 6-7; Maryland, 1997 WL 540913 at *3; McGraw, No. 94-C1707, slip op. at 5. Courts applying other statutes have reached the opposite conclusion on the ground that the language in their State Medicaid statutes created a cumulative, rather than an exclusive remedy. Texas v. American Tobacco Co., No. 5-96CV-91, slip op. at 10-11 (E.D. Tex. Sept. 8, 1997) (statutory remedy does not extinguish prior **[**23]** common law cause of action unless it does so explicitly); Illinois v. Philip Morris, Inc., No. 96L13146, slip op. at 5 (Ill. Cir. Ct. Nov. 13, 1997) (nothing in the statute limits the State to subrogation) (orders partially granting motions to dismiss). Neither analysis is directly applicable here, as New York's Medicaid statute does not apply to these plaintiffs.

HN12[] There is no statute establishing subrogation as plaintiffs' exclusive remedy. Instead, plaintiffs' subrogation rights were created by private contracts with plan participants. Such rights cannot limit the Funds' ability to recover from those not party to the agreements. Thus, if plaintiffs have stated valid causes of action, the fact that they may also be entitled to sue in subrogation would not extinguish them.

3. Preemption

Defendants argue in the alternative that plaintiffs' common law claims have been preempted by the federal Cigarette Labeling and Advertising Act. *15 U.S.C. §§ 1331-40 (1994)* [hereinafter "the Act"]. ***HN13***[] The Act mandates certain uniform warning labels on cigarette packaging and preempts all State regulation of tobacco advertising: ***HN14***[] "No statement or prohibition based on smoking and health **[**24]** shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." Id. *§ 1334(b)*. Defendants contend that this language preempts plaintiffs' fraud, breach of special duty, and unjust enrichment claims, which are New York common law causes of action.

The controlling decision addressing the scope of the preemption provision is *Cipollone **[*287]** v. Liggett Group, Inc., 505 U.S. 504, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)* (plurality opinion). Cipollone held that ***HN15***[] common law rules impose "requirements or prohibitions" within the meaning of the Act because they are "premised on the existence of a legal duty." *Id. at 522*. The Act, therefore, applies to common law claims. *Id. at 523* (Scalia and Thomas, JJ., concurring in relevant part). To determine whether a particular claim is preempted, the court must "ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to advertising or promotion,' giving that clause a fair but narrow **[**25]** reading." *Id. at 523-24*.

Count V of the complaint alleges that defendants intentionally "misrepresented, failed to disclose and concealed material facts" about the hazards of tobacco use. Compl. P 265. ***HN16***[] The Act preempts fraudulent misrepresentation claims that merely allege that defendants should have included additional or more clearly stated warnings in their advertisements. *Cipollone, 505 U.S. at 524*. Plaintiffs, however, allege intentional fraud, both by false representation and by concealment of material facts. Cipollone expressly held that claims of fraud by intentional misstatement are not preempted because they "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation: the duty not to deceive." *Id. at 528-29* (Blackmun, Kennedy, and Souter, JJ., concurring in the judgment in relevant part); see also State by Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Feb. 2, 1998); DaSilva v. American Tobacco Co., 1997 WL 810807 at *3 (Sup. Ct. N.Y. Co. 1997); *Small v. Lorillard Tobacco Co., Inc., 175 Misc. 2d 294, 668 N.Y.S.2d 307 (Sup. Ct. N.Y. Co. 1997)* (denying motions to dismiss on preemption grounds). **[**26]** The Act, therefore, does not bar plaintiffs' fraud claims.

Count VI states that defendants voluntarily assumed a special duty to protect the public health and to provide information about the effects of tobacco use. Compl. P 279. Cipollone did not discuss preemption of special duty claims. In the related context of express warranties, however, the Court concluded that ***HN17***[] "a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under State law.'" *Cipollone, 505 U.S. at 526* (quoting *15 U.S.C. § 1334(b)*). The predicate duty is imposed not by the State, but by the party assuming the obligation. *Id. at 525*. Claims based on voluntarily assumed obligations, then, are not preempted because they do not fall within the language of the Act. *Id. at 525-26* (Blackmun, Kennedy, and Souter, JJ., concurring in the judgment in relevant part); State by Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Feb. 2, 1998) (order finding no preemption). Count VI is not preempted because the special duty that it alleges is one that would have been voluntarily assumed by defendants rather than one imposed by the State. **[**27]**

Plaintiffs' final common law claim is for unjust enrichment. Compl. PP 308-15. Plaintiffs allege that by paying their participants' tobacco-related medical costs, they have conferred a benefit on the defendants that the defendants should repay. Compl. PP 313-14. Payment of medical costs is unrelated to the "advertising and promotion" of tobacco. Assuming for the moment that plaintiffs' payments created a valid unjust enrichment claim, ***HN18***[] a "fair but narrow reading" of the Act, *Cipollone, 505 U.S. at 524*, reveals that such a claim is not within the statute's reach. Accordingly, the Cigarette Labeling and Advertising Act does not preempt any of plaintiffs' common law claims.

B. Have plaintiffs stated a prima facie case for each claim?

In addition to urging the court to dismiss the entire complaint on remoteness grounds, defendants raise count-specific objections to each of plaintiffs' federal and state claims. I will address each of these in turn.

[*288] 1. RICO

HN19[] RICO authorizes private civil actions by "any person injured in his business or property by reason of," *18 U.S.C. § 1964(c) (1994)*, "a pattern of racketeering activity" id. *§ 1962*, such as fraud **[**28]** or obstruction of justice. See id. *§ 1961*. As discussed above, plaintiffs' showing of factual and proximate cause is sufficient to survive a motion to dismiss. ***HN20***[] In an action brought pursuant to statute, however, standing requires more than mere causation: There is also the issue of statutory intent. To satisfy the requirement, "the plaintiff[s] must show both that [they are] within the class the statute sought to protect and that the harm done was one that the statute was meant to prevent." *Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 237 (2d Cir. 1996)*.

Counts I and II describe the sort of "pernicious commercial practices" that RICO was intended to prevent. See *Ehrich v. B.A.T. Indus. P.L.C., 964 F. Supp. 164, 166-67 (D.N.J. 1997)* (quoting *Cuzzupe v. Paparone Realty Co., 596 F. Supp. 988, 991 (D.N.J. 1984)* (RICO designed to eliminate commercial practices, not personal injuries)). In Count I, plaintiffs allege that the defendant tobacco companies violated *§ 1962(c)* by conducting certain enterprises through a pattern of racketeering activity, including mail and wire fraud, perjury, and obstruction of justice. Compl. PP 212-25. Two or more of these acts constitute **[**29]** "racketeering" if they occur often enough to comprise a pattern of activity. [5] The enterprises identified are the Tobacco Institute, the Council for Tobacco Research, and a "public relations enterprise" that amounted to an association-in-fact in which all defendants participated. Plaintiffs'

[5] Defendants do not dispute the adequacy of plaintiffs' allegations regarding the "pattern" element.

RICO Statement at 38-39, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., No. 97 Civ. 4550 (S.D.N.Y. filed June 19, 1997) (dated Sept. 15, 1997) [hereinafter RICO Statement]. Count II alleges that defendants used income derived from that pattern of racketeering activity to acquire and operate the Tobacco Institute and the Council for Tobacco Research, in violation of *§ 1962(a)*. Compl. PP 226-33. The complaint also alleges a RICO conspiracy. [6] See *18 U.S.C. § 1962(d)*.

[30]** The question, then, is whether plaintiffs fall within RICO's protected "zone-of-interests." See *Holmes, 503 U.S. at 287* (Scalia, J., concurring). ***HN21***[] Only the direct targets of a racketeering scheme have standing as intended beneficiaries of the RICO laws. *Abrahams, 79 F.3d at 238* (plaintiff's injuries "did not flow from the harms that the predicate acts . . . were intended to cause and the laws against them were intended to prevent"); *In re American Exp. Co. Shareholder Litigation, 39 F.3d 395, 400 (2d Cir. 1994)* (shareholders harmed by public exposure of RICO violations aimed at competitor not intended targets of violations); *Hecht, 897 F.2d at 24* (salesman had no RICO claim where employer's fraud drove potential customers away); cf. *Standardbred Owners Assoc. v. Roosevelt Raceway Assoc., 985 F.2d 102, 104 (2d Cir. 1993)* (plaintiffs were direct targets of fraudulent schemes). Plaintiffs maintain that they, along with their participants and others, were among the direct targets of the fraud alleged. In support of that statement, they claim that defendants made "deliberate efforts . . . to give Plaintiffs . . . the materially false impression that there are no negative **[**31]** health consequences to tobacco use, . . . that nicotine is not addictive and that the Tobacco Companies are not manipulating the nicotine levels in their products." Compl. P 211; RICO Statement at 35-36. An alleged object of defendants' conduct "was the avoidance and shifting of tobacco-related health care costs onto others, including Plaintiffs." Compl. P 224; accord RICO Statement at 33, 46. Because these allegations demonstrate that plaintiffs do have standing, their RICO claims are sufficient to withstand a motion to dismiss.

Defendants argue that, causation issues aside, plaintiffs' RICO claims must be dismissed as a matter of law because "all of the **[*289]** Funds' claimed injuries result from alleged personal injuries to their participants," rather than injuries to business or property. Defs.' Mem. at 13. They particularly rely on the holding in *City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130 (N.D. Cal. 1997)* [hereinafter San Francisco I], in which local governments sought to recover the cost of treating indigent residents suffering from tobacco-related diseases. There, the court dismissed the RICO claim with leave to amend, finding that **[**32]** plaintiffs' claims were "wholly derivative" of those of the individual smokers. [7] *Id. at 1139*. As a result, plaintiffs' injuries consisted only of the economic consequences of personal injuries, which are not compensable under RICO, and that plaintiffs therefore had failed to meet the proximate cause requirements outlined in Holmes. *Id. at 1138*.

When defendants argue that plaintiffs' claims are derived from personal injuries, they are simply repeating their argument that plaintiffs' injuries are too remote. By determining that plaintiffs have adequately alleged proximate cause, I have already concluded that plaintiffs' claims are not based on the personal injuries of their participants. See part IV.A.2. Instead, they **[**33]** are based on the harm to plaintiffs' infrastructure and financial stability caused by defendants' alleged attempts to deceive the plaintiffs. As a result, they do allege an injury to business or property, as the statute requires. Thus, defendants' motion to dismiss Counts I and II is denied.

2. Antitrust

HN22[] Federal ***antitrust law*** authorizes private civil actions by "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws[.]" *15 U.S.C. § 15 (1994)*. Those laws forbid "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations[.]" Id. *§ 1*. ***HN23***[] New York ***antitrust law*** prohibits "every contract, agreement, arrangement or

[6] See *Salinas v. United States, 522 U.S. 52, 118 S. Ct. 469, 477-78, 139 L. Ed. 2d 352 (1997)* (RICO conspiracy exists if alleged conspirator knew of conspiracy's goals and agreed to facilitate them).

[7] Plaintiffs did not pursue the RICO claim in their Second Amended Complaint. City and County of San Francisco v. Philip Morris, Inc., No. C-26-2090 (N.D. Cal. Mar. 3, 1998) (order denying motion to dismiss second amended complaint) [hereinafter San Francisco II].

combination whereby . . . competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service . . . is or may be restrained." Donnelly Act, N.Y. Gen. Bus. Law § 340.1 (McKinney 1988). As discussed in part IV.B.1 above, I have already concluded that plaintiffs, claims are for injuries to business or property that are not so remote as to prevent recovery. Standing **[**34]** thus depends on whether defendants' alleged acts constitute an antitrust violation and on whether plaintiffs are within the class the antitrust laws seek to protect. *McCready, 457 U.S. at 473*; see also *Abrahams, 79 F.3d at 237*.

HN24[] An antitrust violation is an agreement in restraint of trade that causes "injury of the type the antitrust laws were intended to prevent . . . . The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; see also *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)* (injury should be "the type of loss that the claimed violations of the antitrust laws would be likely to cause.").

In Count III, plaintiffs allege that defendants conspired to restrain trade in the market for tobacco products by agreeing to eliminate competition in the research, development, production and marketing of safer alternative tobacco products. Compl. PP 240-41. [8] Conduct suppressing product innovation and development has an anticompetitive **[**35]** effect. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*; *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)* (refusal of standard-setting organizations to approve new products was anticompetitive); cf. Associated **[*290]** *Gen. Contractors, 459 U.S. at 528* ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions . . . ."). In this respect, Count III alleges a violation of the type the antitrust laws are intended to prevent. [9]

[36]** Although plaintiffs have alleged an antitrust violation, their ***HN25***[] antitrust claims must be dismissed because plaintiffs are not "within that area of the economy . . . endangered by [that] breakdown of competitive conditions." *McCready, 457 U.S. at 480* (quoting *In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129 (9th Cir. 1973))*. The Second Circuit has adopted a "target area" test for determining antitrust standing: the plaintiff must either be the "direct target" of the alleged antitrust violation or fall within its "target area." *Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 292 (2d Cir. 1983)* (citing *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971)*; *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970))*. The target area is that sector of the economy endangered by a breakdown of competitive conditions in the particular industry. Id. Plaintiffs have not alleged that they were a direct target of defendants' acts, or that they are within the target area of those acts.

Plaintiffs allege that defendants agreed to forego the development of safer alternative tobacco products. **[**37]** The direct targets of such an agreement, if it exists, are obviously consumers of tobacco products. The target area is the tobacco sector of the economy in that the unlawful agreement to suppress development would result in a market where neither demand nor prices would be governed by market forces. Plaintiffs claim that as a result of defendants' conduct, medical costs for their participants with tobacco-related diseases have increased. This is not an injury created by endangering competition in the target area. In fact, it is not clear that plaintiffs' interests would be served by enhanced competition in the tobacco market. See *Associated Gen. Contractors, 459 U.S. at 539*.

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[8] Count IV restates the allegations in Count III in the context of New York law.

[9] Other activities alleged in Count III, while possibly unlawful, do not constitute antitrust violations. Plaintiffs claim that defendants suppressed information that would otherwise have affected consumer behavior in the market for tobacco products, causing price inflation and increasing the demand for tobacco products. Compl. PP 238, 241. Creating increased demand for a product is not an anticompetitive activity. There can be no antitrust violation when the effect of an agreement is to increase competition, even if that agreement is unlawful for some other reason. *Brunswick, 429 U.S. at 488*; see also *McCready, 457 U.S. at 482*. Plaintiffs also claim that defendants restrained research and withheld information from participants in the market for health care. Compl. PP 248-49, 254. Such activities are not antitrust violations because they do not restrict competition among health care providers. ***Antitrust law*** forbids agreements in restraint of the flow of commerce, not the flow of information.

While stifled product innovation may have increased the number of participants with tobacco-related disease, plaintiffs also allege that anticompetitive pressures have increased the price of tobacco products, an effect which would tend to reduce the number of tobacco consumers. Therefore, as they were not targets of the anticompetitive activity alleged, plaintiffs do not have standing to pursue the claimed antitrust violation. Accordingly, defendants' motion to dismiss Counts III and IV is granted.

[38] 3. Fraud**

HN26[] Common law fraud may consist of either fraudulent misrepresentation or fraudulent concealment. Plaintiffs' fraud claim alleges both. To prove fraudulent misrepresentation under New York law, a plaintiff must show: 1) a material false representation, 2) intent to defraud the plaintiff thereby, 3) reasonable reliance on the representation, and 4) damage resulting from such reliance. Banque Arabe et *Internationale D'Investissement v. Maryland Nat'l Bank, 57 F.3d 146, 153 (2d Cir. 1995)*; *Mallis v. Bankers Trust Co., 615 F.2d 68, 80 (2d Cir. 1980)*. Each element must be shown by clear and convincing evidence. Banque Arabe, 57 F.3d at 153. To establish fraudulent concealment, a plaintiff must prove all of the above elements, and must show by clear and convincing evidence that the defendant had a duty to disclose the material information concealed as well. Id. That duty may arise from **[*291]** "the need to complete or clarify [a] partial or ambiguous statement, or from a fiduciary or confidential relationship between the parties." *Id. at 155* (citations omitted). It may also arise where one party has superior knowledge of certain information, not readily available **[**39]** to the other party, and knows that the second party is acting on the basis of mistaken knowledge. Id.

Count V alleges that plaintiffs relied on statements in which defendants promised to disclose all material information discovered about the effects of tobacco on human health. Compl. PP 274-75. Plaintiffs charge that despite that promise, defendants intentionally "misrepresented, failed to disclose and concealed material facts about the human health hazards of tobacco use." *Id. P 265*. They allegedly misrepresented those facts by making partial and incomplete statements concerning the health effects of smoking, *id. P 267*, and fraudulently concealed material facts by burying the results of secret tobacco research not readily available to the public, *id. P 266*. Plaintiffs claim that because they accepted the information they received from the defendants as true, they did not take action as quickly or as thoroughly as they otherwise would have. Instead, they depended on false and incomplete information when deciding what actions to take to reduce tobacco use among their participants. This reliance ultimately led to an increase in their health care costs. *Id. PP 269, **[**40]** 274*.

For the purposes of this motion, I must accept as true plaintiffs' allegations that defendants have been conducting secret research into the dangers of tobacco and that they have intentionally suppressed the negative results of that research. If so, then defendants have had superior knowledge of material information not readily available to the plaintiffs, and their public statements regarding the health effects of smoking have been, at best, incomplete. Under these circumstances, defendants would have had a duty to disclose the results of their research, as plaintiffs were conducting their business on the basis of incomplete knowledge of the dangers of tobacco.

Defendants argue that if plaintiffs relied on defendants' representations, that reliance was not justifiable because plaintiffs were sophisticated parties with access to many other sources of information. ***HN27***[] New York follows a two-tier standard in determining whether reliance is reasonable. When matters are held to be "peculiarly within defendant's knowledge," a plaintiff may rely on the defendant's statements without further investigation, "as [it] has no independent means of ascertaining the truth." *Mallis, 615 **[**41]** F.2d at 80*; *Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1542 (2d Cir. 1997)*. "Indeed some cases have imposed liability in situations in which plaintiff could have determined the truth with relatively modest investigation." *Mallis, 615 F.2d at 80*. When misrepresentations concern matters not peculiarly within the defendant's knowledge, New York courts have often found no justifiable reliance, holding that if a plaintiff "has the means of knowing, by the exercise of ordinary intelligence, the truth . . . [it] must make use of those means." *Mallis, 615 F.2d at 80-81*; Banque Arabe, 57 F.3d at 156; *Lazard Freres, 108 F.3d at 1542*. Such decisions have generally involved plaintiffs who were "placed on guard or practically faced with the facts." *Mallis, 615 F.2d at 81*.

In the cases pending here, a jury could reasonably conclude that the truth about the health effects of tobacco was peculiarly within the defendants' knowledge. Plaintiffs maintain that defendants assumed responsibility for conducting and reporting tobacco research, and that they took steps to ensure that the public would not be able to obtain the negative results. Compl. PP 109-24. **[**42]** A jury accepting those allegations could find that it was justifiable for plaintiffs to accept the defendants' statements about tobacco as true without conducting an independent investigation. These are questions of fact that cannot be decided at this stage of the proceedings. For the same reason, it is not yet appropriate to reach the question of whether plaintiffs relied to their detriment on defendants' statements -- i.e., whether their costs would have been reduced had they known of the concealed information. Plaintiffs have set forth "circumstances constituting fraud" with sufficient particularity. See *Fed. R. Civ. P. 9(b)*. Whether they will be able to **[*292]** prove their claim is a matter reserved for the trier of fact. See San Francisco II, slip op. at 14-15 (order denying motion to dismiss fraud claim as pleaded in second amended complaint). Consequently, defendants' motion to dismiss Count V is denied.

4. Breach of Special Duty

HN28[] Under certain circumstances the law imposes a duty of care on one who acts for the benefit of another, even in the absence of a contractual relationship. "One who assumes to act, even though gratuitously, may thereby become subject to **[**43]** the duty of acting carefully, if he acts at all." *Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 275 (1922)* (citations omitted); see also *Nallan, 50 N.Y.2d at 522* (quoting *Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 167-68, 159 N.E. 896 (1928))*. If a duty of care exists, then "a tort may result as well from acts of omission as of commission." *Moch, 247 N.Y. at 167*. Existence of a duty is a question of law for the court to decide. *Gerdowsky v. Crain's N.Y. Business, 188 A.D.2d 93, 593 N.Y.S.2d 514, 515* (1st Dep't 1993).

In Count VI, plaintiffs contend that defendants assumed a duty to "those who advance the public health" by promising to assist in research efforts and to provide complete information about smoking and health. Compl. PP 278-79. They allege that defendants' subsequent conduct demonstrated a lack of reasonable care in the performance of that duty. *Id. P 281*. Finally, they claim that they delayed taking action to reduce costs associated with tobacco-related disease because they relied on defendants' promises. *Id. PP 280-82*. As discussed above, a jury could reasonably conclude that defendants were in the best position to discover the truth **[**44]** about the health effects of tobacco. See pt. IV.B.4. Having done so, it could then reasonably find that it was justifiable for plaintiffs to rely on defendants' promises to seek out and publicize that information.

The Restatement (Second) of Torts summarizes the breach of special duty doctrine as follows:

> ***HN29***[] One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965). Defendants argue that Count VI does not state a claim because plaintiffs have not alleged that they suffered physical harm. Compare Illinois v. Philip Morris, Inc., No. 96L13146, slip op. at 17-18 (Ill. Cir. Ct. Nov. 13, 1997); Iowa v. R.J. Reynolds, No. CL71048, slip op. at 11 (Iowa Dist. Ct. Aug. 26, 1997); Washington v. American Tobacco Co., No. 96-2-15056-8-SEA, slip op. at 4 (Wash. Super. **[**45]** Ct., June 10, 1997) (special duty claims dismissed because no physical harm alleged) with *San Francisco I, 957 F. Supp. at 1143*; San Francisco II, slip op. at 21 (physical harm not required). New York has not adopted the Restatement's physical harm requirement. On the contrary, New York courts have recognized that ***HN30***[] economic loss or damage to property may give rise to an action for breach of an assumed duty. *Glanzer, 233 N.Y. 236, 135 N.E. 275* (defendant who negligently certified weight of shipment of beans liable for resulting economic loss); *Moch, 247 N.Y. 160, 159 N.E. 896* (no liability for property damage because no proximate cause found). While these cases predate the Restatement by several decades, no court has overruled them. It is likely that a New York court, if presented with the question, would hold that New York continues to recognize such causes of action. ***HN31***[] A federal court should not restrict a common law cause of action in a manner that the state courts have not required. Accordingly, plaintiffs are not required to allege that defendants have caused them physical harm.

The remaining issue to be decided is whether defendants assumed a duty of care to the **[**46]** plaintiffs. ***HN32***[] An assumed duty arises "once a person undertakes a certain course of conduct upon which another relies." **[*293]** *Heard v. City of New York, 82 N.Y.2d 66, 72, 603 N.Y.S.2d 414, 623 N.E.2d 541 (1993)*; *Nallan, 50 N.Y.2d at 522*. In deciding whether a duty was assumed under New York law, "the question is whether defendant's conduct placed plaintiff in a more vulnerable position than plaintiff would have been in had defendant done nothing." *Heard, 82 N.Y.2d at 72*; *Nallan, 50 N.Y.2d at 522*; *Jansen v. Fidelity & Casualty Co. of New York, 165 A.D.2d 223, 566 N.Y.S.2d 962, 964* (3rd Dep't 1991), aff'd, *79 N.Y.2d 867, 581 N.Y.S.2d 156, 589 N.E.2d 379 (1992)*; see also *Moch, 247 N.Y. at 168* ("The query always is whether the purported wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument of good.").

The allegations in Count VI, when assumed to be true, indicate that defendants voluntarily assumed a duty to the plaintiffs. Relying on defendants' promises to "aid and assist the research effort into all phases of tobacco use and health," Compl. P 279, plaintiffs **[**47]** made decisions that negatively affected the financial health of their businesses. That negative impact was the direct result of defendants' promise to act on plaintiffs' behalf. Had defendants fully kept those promises, plaintiffs would have been alerted to the full cost of tobacco-related disease. Had defendants remained silent, plaintiffs would likely have obtained that information from other sources. By assuming to act, defendants thereby become subject to the duty of acting carefully, if at all. See *Glanzer, 233 N.Y. at 239*.

HN33[] While plaintiffs may recover for breach of any duty that defendants assumed on their behalf, they may not recover for breach of a duty assumed to another. "[A] duty directly assumed for the benefit of a particular person or entity does not extend to third parties who were not the intended beneficiaries of the subject undertaking." [10] *Jansen, 566 N.Y.S.2d at 964*. Neither may plaintiffs recover for breach of a duty voluntarily assumed on behalf of the public generally. It is the responsibility of the courts to "fix the orbit of duty" within the limits dictated by both policy and logic. *Jansen, 566 N.Y.S.2d at 965*. If any member of the public could **[**48]** allege a special duty on the basis of general public statements, liability would be "unduly and indeed indefinitely extended by this enlargement of the zone of duty". See *Moch, 247 N.Y. at 168*. Taken to this extreme, the special duty doctrine would displace negligence-based tort law entirely. To recover, therefore, plaintiffs will have to show that defendants made promises directly to health care providers such as the plaintiffs. With that caveat, defendants' motion to dismiss Count VI is denied.

5. Unjust Enrichment

HN34[] Liability for unjust enrichment rests on the equitable principle that a person "shall not be allowed to enrich himself unjustly at the expense of another." *Miller v. Schloss, 218 N.Y. 400, 407, 113 N.E. 337 (1916)*; *Manufacturers Hanover Trust Co. v. Chemical Bank, 160 A.D.2d 113, 559 N.Y.S.2d **[**49]** 704, 707* (1st Dep't 1990). A claim for unjust enrichment is available when "the acts of the parties or others have placed in the possession of one person money under such circumstances that in equity and good conscience he ought not to retain it." *Miller, 218 N.Y. at 407*; *Manufacturers Hanover Trust, 559 N.Y.S.2d at 707*. In Count X, plaintiffs allege that by paying the medical expenses of their participants for treatment of tobacco-related diseases, they "expended sums which Defendants had . . . a duty to pay" because the expenses were consequences of defendants' unlawful activities. Compl. PP 311-13. They argue that defendants have been unjustly enriched as a result.

HN35[] To recover for unjust enrichment, plaintiffs must show that "services were performed for the defendant[s] resulting in . . . unjust enrichment." *Kapral's Tire Service, Inc. v. Aztek Tread Corp., 124 A.D.2d 1011, **[*294]** 508 N.Y.S.2d 777, 778* (4th Dep't 1986). "It is not enough that the defendant received a benefit from the activities of the plaintiff . . . ; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery." *Kagan v. K-Tel Entertainment, **[**50]** Inc., 172 A.D.2d 375, 568 N.Y.S.2d 756, 757* (1st

[10] Plaintiffs are not alleging that they were the intended third party beneficiaries of promises made to their participants. See *Restatement (Second) of Torts § 324A* (1965).

Dep't 1991); see also *Schuckman Realty, Inc. v. Marine Midland Bank, N.A., 244 A.D.2d 400, 664 N.Y.S.2d 73, 74* (2nd Dep't 1997); *Kapral's Tire Service, 508 N.Y.S.2d at 778*. The expenses that plaintiffs incurred were paid at the behest of their participants. They did not confer a benefit on the defendants. The simple assertion that without those payments "defendants would have been liable for lawsuits by individual smokers seeking to recover the cost of their medical care," Pls.' Br. at 49, is too speculative to constitute a benefit accepted by the defendants. See Maryland v. Philip Morris Inc., 1997 WL 540913 at *16 (Md. Cir. Ct. 1997). Under these circumstances, the plaintiffs cannot establish that their actions unjustly enriched the defendants. Defendants' motion to dismiss Count X is therefore granted.

V. CONCLUSION

Defendants' motion to dismiss the RICO claims stated in Counts I and II is denied.

Defendants' motion to dismiss the antitrust claims stated in Counts III and IV is granted.

Defendants' motion to dismiss the fraud claim stated in Count V is denied.

Defendants' motion to dismiss the breach of special duty claim **[**51]** stated in Count VI is denied.

The claims alleged in Count VII (strict liability), Count VIII (negligence), and Count IX (breach of express and implied warranties) are dismissed without prejudice with plaintiffs' consent.

Defendants' motion to dismiss the unjust enrichment claim stated in Count X is granted.

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

March 25, 1998

End of Document

Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n

United States Court of Appeals for the Eleventh Circuit

March 26, 1998, Decided

No. 97-2334.

Reporter

137 F.3d 1293 *; 1998 U.S. App. LEXIS 5903 **; 1998-1 Trade Cas. (CCH) P72,103; 11 Fla. L. Weekly Fed. C 1170

BANKERS INSURANCE CO., Plaintiff-Appellant, v. FLORIDA RESIDENTIAL PROPERTY AND CASUALTY JOINT UNDERWRITING ASSOCIATION, James W. Newman, Jr., et al., Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Middle District of Florida. (No. 96-785-CIV-T-25A), Henry Lee Adams, Jr., Judge.

Disposition: AFFIRMED.

Core Terms

anticompetitive, antitrust, entity, immunity, political subdivision, bid, district court, pleadings, articulated, conspire, insurers, policies

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews a district court's grant of judgment on the pleadings de novo.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN2[] **Pretrial Judgments, Judgment on Pleadings**

Judgment on the pleadings is appropriate when material facts are not in dispute and judgment can be rendered by looking at the substance of the pleadings and any judicially noticed facts. For these purposes, the United States

Court of Appeals for the Eleventh Circuit accepts the facts alleged in a complaint as true and draws all inferences that favor the nonmovant.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

Purely unilateral action does not violate the Sherman Antitrust Act § 1; therefore, agents and employees of a single entity cannot conspire to restrain trade as a matter of law.

Governments > Local Governments > Claims By & Against

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN4[] Local Governments, Claims By & Against

Out of federal deference to state sovereignty, states are immune from federal ***antitrust law*** for their actions as sovereign. Three rules limit this immunity according to the antitrust defendant's status. First, state legislatures and courts are completely immune from antitrust liability. Second, political subdivisions such as municipalities are immune from antitrust liability if their anticompetitive acts follow a clearly articulated and affirmatively expressed state policy. Third, private actors benefit from state immunity only if they act pursuant to a clearly articulated and affirmatively expressed state policy, and the state actively supervises the anticompetitive conduct.

Governments > State & Territorial Governments > Claims By & Against

HN5[] State & Territorial Governments, Claims By & Against

The United States Court of Appeals for the Eleventh Circuit has found hospital and transit authorities to be political subdivisions. Other circuits have conferred political-subdivision status on a state bar organization, a transportation authority, and a rural electric cooperative.

Governments > State & Territorial Governments > Claims By & Against

HN6[] State & Territorial Governments, Claims By & Against

Factors favoring political-subdivision treatment include open records, tax exemption, exercise of governmental functions, lack of possibility of private profit, and the composition of the entity's decisionmaking structure. The presence or absence of attributes such as these tells whether or not the nexus between the state and the entity is sufficiently strong that there is little real danger that the entity is involved in a private anticompetitive arrangement. The more public the entity looks, the less the United States Court of Appeals for the Eleventh Circuit worries that it represents purely private competitive interests and the less need there is for active state supervision to ensure that the entity's anticompetitive actions are indeed state actions and not those of an alliance of interests that properly should be competing.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

A state anticompetitive action is pursuant to a clearly articulated policy when the action is both authorized by statute, and its anticompetitive effect is an intended (meaning foreseeable) result of this authorization.

Insurance Law > ... > Property Insurance > Coverage > Natural Phenomena

HN8[] **Coverage, Natural Phenomena**

See *Fla. Stat. ch. 627.351(6)(c)(1)*.

Counsel: ATTORNEY(S) FOR APPELLANT(S): John F. Rudy, II, BUSH ROSS GARDNER WARREN & RUDY, P.A., Richard K. Fueyo, Tampa FL.

For FL. RESIDENTIAL PROPERTY & CASUALTY JOINT UNDERWRITING, Defendant - Appellee: A. Margaret Hesford, COLODNY, FASS & TALENFELD, P.A., Ft. Lauderdale, FL. Hugh N. Smith, SMITH & FULLER, P.A., Tampa, FL. Joel S. Fass, COLODNY, FASS & TALENFELD, Ft. Lauderdale, FL. Herbert T. Schwartz, CROWLEY & DOUGLAS, Houston, Texas.

Judges: Before COX and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

Opinion

[*1294] PER CURIAM:

Bankers Insurance Company sued the Florida Residential Property and Casualty Joint Underwriting Association (the Association) and several of its officers and counsel, alleging a conspiracy to restrain trade in violation of federal and Florida ***antitrust law***. The district court granted the Association judgment on the pleadings. Bankers appeals, and we affirm.

I. Background

Florida's legislature reacted to Florida's post-Hurricane Andrew insurance crisis by creating an involuntary association of all Florida **[**2]** residential-property insurers. *See Fla. Stat. § 627.351(6)(a)*. This association, the Florida Residential Property and Casualty Joint Underwriting Association, is directed **[*1295]** to write policies for citizens who are unable to obtain property and casualty insurance on the "voluntary" insurance market. *Id.* The insurers required to participate in the Association make up the Association's losses pro rata, according to each insurer's market share. *See id. § 627.351(6)(b)(3)*.

The Association is authorized to contract for the servicing of policies it has written. *See Fla. Stat. § 627.351(6)(c)*. Bankers, a Florida insurer, provided a substantial part of these services from the Association's inception in 1993. In 1995, the Association announced competitive bidding for servicing contracts. The Association ultimately accepted three of the ten bids; Bankers was one of the disappointed bidders. Bankers alleges that the rejection of its bid was unjustifiable because the Association revised bid standards in mid-review and because the Association disregarded the preferences of the independent insurance agents who sell the Association's policies.

After Bankers' bid was refused, Bankers **[**3]** pursued its administrative remedies. When those failed, it sued the Association and the committee that controlled the bidding process for violations of the Sherman Antitrust Act and

Florida Antitrust Act of 1980, *Fla. Stat. § 542.15 et seq.* Bankers makes no monopoly- or monopsony-related claims under § 2 of the Sherman Antitrust Act; it claims only that the Association and the four individual defendants conspired to restrain trade in violation of § 1 of that Act.

The district court granted the defendants judgment on the pleadings. It reasoned that the Association was protected by the *Parker* doctrine, *see Parker v. Brown,* [1] which excludes from the Sherman Act's scope anticompetitive conduct by a state as sovereign, or by state political subdivisions under certain circumstances. Alternatively, the district court ruled that the Association and its agents could not conspire to restrain trade as a matter of law under the doctrine of *Copperweld Corp. v. Independence Tube Co.* [2] because they lack the requisite diversity of interests. Bankers appeals. It contends that the district court erred in treating the Association as a political subdivision of the state and in viewing **[**4]** the Association as a single entity incapable of conspiring with itself. [3] ***HN1***[] We review the district court's grant of judgment on the pleadings de novo. *See Slagle v. ITT Hartford, 102 F.3d 494, 497 (11th Cir.1996)*.

II. Discussion

HN2[] Judgment on the pleadings is appropriate when material facts are not in dispute and judgment can be rendered by looking at the substance of the pleadings and any judicially noticed facts. *See id.; Hebert Abstract Co. v. Touchstone Properties, **[**5]** Ltd., 914 F.2d 74, 76 (5th Cir.1990)*. For these purposes, we accept the facts alleged in the complaint as true and draw all inferences that favor the nonmovant, here Bankers. *See Slagle, 102 F.3d at 497*.

A. *Ability to Conspire*

HN3[] Purely unilateral action does not violate § 1 of the Sherman Antitrust Act; therefore, agents and employees of a single entity cannot conspire to restrain trade, as a matter of law. *See Tiftarea Shopper, Inc. v. Georgia Shopper, Inc., 786 F.2d 1115, 1118 (11th Cir.1986)*; *see also Copperweld,* 467 U.S. at 769, 104 S. Ct. at 2740-41. The district court thus correctly granted judgment in favor of the four individual defendants. The complaint alleges that the individual defendants are the executive director, counsel, and director of operations of the Association. As officers and counsel of the Association, they are its agents and submitted to its control in all matters relating to the Association. Their interests are, therefore, to that extent aligned, and the "plurality of persons" **[*1296]** needed for a § 1 violation is missing. *See Copperweld,* 467 U.S. at 769, 104 S. Ct. at 2740-41. We need not address whether a different conclusion would be appropriate **[**6]** if the individual defendants also represented other interests, *cf. St. Joseph's Hosp., Inc. v. Hospital Corp. of Am., 795 F.2d 948, 956 (11th Cir.1986)*, because the complaint contains no such allegations.

The question for the Association itself is more difficult. As Bankers argues, associations differ from corporations or other unitary entities enough that they may sometimes fall outside this intraenterprise conspiracy rule. *See Chicago Prof'l Sports, Ltd. v. National Basketball Ass'n, 95 F.3d 593, 598-99 (7th Cir.1996)*. We decline to reach this issue, however, because in any event the Association is entitled to state action immunity, as discussed below.

B. *State Action Immunity*

HN4[] Out of federal deference to state sovereignty, states are immune from federal ***antitrust law*** for their actions as sovereign. *Parker v. Brown, 317 U.S. 341, 351-53, 63 S. Ct. 307, 314, 87 L. Ed. 315 (1943)*. Three rules

[1] *317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*.

[2] *467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

[3] Bankers also asserts that the district court erred in not permitting Bankers to amend its complaint to add more conspirators. Bankers never sought to amend its complaint during the months between the motion for judgment on the pleadings and the district court's order, or at any time after that order. The district court did not abuse its discretion in not *sua sponte* inviting Bankers to amend.

limit this immunity, according to the antitrust defendant's status. *See Crosby v. Hospital Auth., 93 F.3d 1515, 1521-22 (11th Cir.1996)*, *cert. denied, __ U.S. __, 117 S. Ct. 1246, 137 L. Ed. 2d 328 (1997)*. First, state legislatures and courts are completely **[**7]** immune from antitrust liability. *Hoover v. Ronwin, 466 U.S. 558, 569, 104 S. Ct. 1989, 1995, 80 L. Ed. 2d 590 (1984)*. Second, political subdivisions such as municipalities are immune from antitrust liability if their anticompetitive acts follow a "clearly articulated and affirmatively expressed state policy." *See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44, 105 S. Ct. 1713, 1719, 85 L. Ed. 2d 24 (1985)* (quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415, 98 S. Ct. 1123, 1138, 55 L. Ed. 2d 364 (1978)* (opinion of Brennan, J.)); *Crosby, 93 F.3d at 1522-23*. Third, private actors benefit from state immunity only if they act pursuant to a "clearly articulated and affirmatively expressed state policy" *and* the state actively supervises the anticompetitive conduct. *Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 57, 105 S. Ct. 1721, 1727, 85 L. Ed. 2d 36 (1985)*; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233 (1980)*. The central dispute in this case is into which category--political subdivision or private actor--the Association falls, **[**8]** and thus whether the Association must show active state supervision to obtain *Parker* immunity.

No simply stated rule draws the line between the two categories. Cases before the Supreme Court have concerned only municipalities, the paradigm of a political subdivision. *See City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*; *Town of Hallie, 471 U.S. at 34, 105 S. Ct. at 1713*. ***HN5***[] This circuit, however, has found hospital and transit authorities to be political subdivisions. *See, e.g., Crosby, 93 F.3d at 1523-26*; *FTC v. Hospital Bd. of Dirs., 38 F.3d 1184, 1188 (11th Cir.1994)*; *Askew v. DCH Reg'l Health Care Auth., 995 F.2d 1033, 1038 (11th Cir.1993)*; *Bolt v. Halifax Hosp. Med. Ctr., 980 F.2d 1381, 1386 (11th Cir.1993)*; *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1460-62 (11th Cir.1991)*; *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir.1986)*. Other circuits have conferred political-subdivision status on a state bar organization, *Hass v. Oregon State Bar, 883 F.2d 1453, 1461 (9th Cir.1989)*, a transportation authority, *Interface Group v. Massachusetts **[**9]** Port Auth., 816 F.2d 9, 13 (1st Cir.1987)*, and a rural electric cooperative, *Fuchs v. Rural Elec. Convenience Coop., 858 F.2d 1210, 1217 (7th Cir.1988)*.

Each of these cases has focused on the government-like attributes of the defendant entity. ***HN6***[] Factors favoring political-subdivision treatment include open records, [4] tax exemption, [5] exercise of governmental functions, [6] **[*1297]** lack of possibility of private profit, [7] and the composition of the entity's decisionmaking structure. *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 212.7, at 208-10 (1997 Supp.). The presence or absence of attributes such as these tells us whether the nexus between the State and the entity is sufficiently strong that there is little real danger that the entity is involved in a *private* anticompetitive arrangement. *See Crosby, 93 F.3d at 1524*. The more public the entity looks, the less we worry that it represents purely private competitive interests, and the less need there is for active state supervision to ensure that the entity's anticompetitive actions are indeed state actions and not those of an alliance of interests that properly should be competing. *See Town of Hallie, 471 **[**10]** U.S. at 45, 105 S. Ct. at 1717*; *Fuchs, 858 F.2d at 1214*.

The Association is not short on public-entity trappings that suggest it is entitled to political-subdivision status. [8] The Association is subject to Florida's "sunshine laws." *See Fla. Stat. § 627.351(6)(n)*. It is exempt from corporate tax.

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[4] *Commuter Transp. Sys., Inc., 801 F.2d at 1290*; *Hass, 883 F.2d at 1460*; *see also id. at 1466-67* (Ferguson, J., dissenting) (noting absence of mandatory disclosure obligations for state bar that majority found to be political subdivision).

[5] *See Crosby, 93 F.3d at 1525*; *Commuter Transp. Sys., Inc., 801 F.2d at 1290*.

[6] *See Crosby, 93 F.3d at 1525* (running a hospital); *Interface Group, Inc., 816 F.2d at 13* (issuing tax-exempt bonds, rulemaking).

[7] *See Fuchs, 858 F.2d at 1217*.

[8] Bankers argues that the Florida Supreme Court advisory opinion, *In re Advisory Opinion to the Governor--State Revenue Cap, 658 So. 2d 77 (1995)*, is dispositive of the issue whether the Association is a political subdivision. This argument overlooks the difference between the issue there (whether Association revenue falls within Florida's constitutional state revenue cap) and here

See id. § 627.351(6)(j). It is authorized to issue tax-free bonds. *See id. § 627.351(6)(c)(3)*. Upon its dissolution, its assets become property of the state. *See id. § 627.351(6)(k)*. **[**11]** The Association operates under a detailed plan that must be approved by the Department of Insurance. *See id. § 627.351(6)(a)*, *(c)*. A board of governors supervises the Association's operations; the 13-member board includes five consumer representatives, the insurance consumer advocate, and two representatives of the insurance industry appointed by the state insurance commissioner. Only five of the members are appointed by the insurance industry, and even those serve at the insurance commissioner's pleasure. *See id. § 627.351(c)(4)*.

[12]** On the other hand, the Association has one attribute that at first blush would seem to weigh on the private side of the public/private scale: it is at bottom an association of private, competing insurers. Two facts, however, suggest that this attribute matters little here. First, the Association was not created to compete in or regulate an existing market; rather, it invented a market where--by definition--none existed before. *See Fla. Stat. § 627.351(6)(a)* (creating Association to serve "applicants who are in good faith entitled, but are unable, to procure insurance through the voluntary market"). The members of the Association are not, therefore, competing in the market the Association serves. This impossibility of competition is an indicator that the Association represents public interests, rather than competing private interests. *Cf.* *Hass, 883 F.2d at 1465-66* (Ferguson, J., dissenting) (contending that a state bar should not be considered a political subdivision because its members compete in the very market the bar regulates). Second, the Association is involuntary. *See id. § 627.351(6)(b)*. Coerced private participation is yet another clue that the Association is **[**13]** an entity created by Florida's legislature to serve public interests and not a private, anticompetitive alliance formed with the state's blessing.

All things considered, the Association is entitled to be treated as a political subdivision for antitrust purposes. It thus merits state-action immunity if its allegedly anticompetitive actions were pursuant to a clearly articulated state policy. The Association's actions pass this test. Bankers' complaint appears to assert that the Association and its agents engaged in two kinds of improper conduct during the bid-review process: first, the Association in several respects altered its selection criteria during the bidding process; and second, the Association disregarded the preferences of independent agents who sell Association policies. These actions were for the purpose, Bankers alleges, of knocking **[*1298]** Bankers out of the running and thereby reducing competition for servicing contracts.

HN7[] A state anticompetitive action is pursuant to a clearly articulated policy when the action is *both* authorized by statute *and* its anticompetitive effect is an intended (meaning foreseeable) result of this authorization. *See* *Crosby, 93 F.3d at 1532*; **[**14]** *Lee County,* 38 F.3d at 1189. The first prong of this test is satisfied. Florida's legislature has granted the Association open-ended authority to plan to have its policies serviced by outside contractors:

> ***HN8***[] The plan of operation of the association may provide for one or more designated insurers, able and willing to provide policy and claims service, to act on behalf of the association to provide such service. Each licensed agent shall be entitled to indicate the order of preference regarding who will service the business placed by the agent. The association shall adhere to each agent's preferences unless after consideration of other factors in assigning agents, including, but not limited to, servicing capacity and fee arrangements, the association has reason to believe it is in the best interests of the association to make a different assignment.

Fla. Stat. § 627.351(6)(c)(1).

The second prong is also satisfied. The legislature's selection of the modal "may," rather than "shall," "will," or "must," shows that *all* of the first sentence of the section authorizing servicing contracts is permissive, not mandatory. The Association is therefore freely permitted to "provide **[**15]** for" policy service as it sees fit --or not to contract at all. It is foreseeable that conferring such unfettered discretion on the Association to select policy servicing services could result in potentially anticompetitive adjustment and revision of standards and selection criteria. *Cf.* *Hass, 883 F.2d at 1458* (general authorization for state bar to require malpractice insurance, and to establish its own insurance fund, made it foreseeable that bar would require lawyers to purchase insurance from the bar); *Kern-Tulare Water Dist. v. City of Bakersfield, 828 F.2d 514, 519-20 (9th Cir.1987)* (grant of authority to buy

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(whether the Association is a political subdivision for antitrust purposes). *Cf.* *Crosby, 93 F.3d at 1525* (refusing to view a Georgia Supreme Court opinion concerning sovereign immunity as dispositive of a hospital authority's state-related status).

and sell water rights makes it foreseeable that a city would attach a no-resale-allowed condition to water sales). Furthermore, the legislature *explicitly* contemplates that the Association will do the other act Bankers complains of--disregarding independent agents' preferences--provided the Association believed it was in the Association's best interests to do so.

Because the Association is a political subdivision of the State of Florida and it acted pursuant to a clearly articulated legislative policy permitting it to select its contracting parties as it saw **[**16]** fit, the district court properly granted the Association judgment on the pleadings.

III. Conclusion

For the foregoing reasons, the district court's judgment is affirmed.

AFFIRMED.

Iams Co. v. L.A. Pet Foods

United States District Court for the Southern District of Ohio, Western Division

March 26, 1998, Filed

Case No. C-3-93-307

Reporter

1998 U.S. Dist. LEXIS 6584 *

THE IAMS COMPANY, Plaintiff, vs. L.A. PET FOODS, INC., et al., Defendants.

Disposition: **[*1]** Plaintiff's Motion to Enter Final Judgment (Doc.) # 91) sustained in part and overruled in part. No just cause for delay exists with respect to the Defendants' First, Second and Fourth through Sixth Claims for Relief in their Second Amended and Supplemental Counterclaim (Doc. # 46) final judgment entered with respect to those claims. Just cause for delay exists to Defendants' Third Claim for Relief.

Core Terms

Pet, claim for relief, Defendants', Declaration, distributor, products, Distributorship, customers, partial summary judgment, termination, parties, fiduciary duty, Counterclaim, deposition testimony, summary judgment, de facto, manufacturer, deposition, contradicts, fill-in, price fixing, employees, genuine issue of material fact, pet food, Sherman Act, nonrenewal, breached, solicit, breach of contract, final judgment

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

HN1[] **Discovery, Methods of Discovery**

Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

The moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party who must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. Once the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[] **Judgment as Matter of Law, Directed Verdicts**

A party may move for summary judgment by demonstrating that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. *Fed. R. Civ. P. 50*).

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Evidence > Burdens of Proof > Burdens of Production

HN3[] **Summary Judgment, Opposing Materials**

Once the burden of production has shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to simply show that there is some metaphysical doubt as to the material facts. Rather, *Fed. R. Civ. P. 56(e)* requires the nonmoving party to go beyond the unverified pleadings and present some type of evidentiary material in support of its position. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Summary judgment shall be denied if there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN4[] **Summary Judgment, Evidentiary Considerations**

In determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in the favor of that party. If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), a district court is not obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim. A court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

HN5[] **Summary Judgment, Opposing Materials**

A party cannot raise a genuine issue of material fact and, thus, avoid the entry of summary judgment against it, by submitting an affidavit which contradicts the affiant's previously given deposition testimony. However, an inconsistent affidavit may be used to create a genuine issue of material fact if the affiant states that he was confused at his deposition, if the affidavit explains the seeming inconsistencies between the deposition and the affidavit or if the affiant lacked access to material facts at the time of his deposition and the affidavit is based upon newly discovered evidence. Although an affiant can explain his deposition, he cannot raise a genuine issue of material fact by contradicting it.

Business & Corporate Law > ... > Remedies > Damages > Compensatory Damages

Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN6[] **Damages, Compensatory Damages**

Wine importer had just cause, as required by *Ohio Rev. Code Ann. § 1333.85*, to terminate distributor, because the two had developed an antagonistic and truculent relationship.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

Contracts Law > Contract Interpretation

HN7[] **Types of Contracts, Releases**

A release is a contract. Whether a particular agreement constitutes a release is to be determined, as with all contracts, from the intent of the parties. A release is to be examined in accordance with ordinary contract principles.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Contracts Law > Contract Conditions & Provisions

HN8[] **Contracts, Contract Conditions & Provisions**

Where a binding promise is made from which benefits would accrue to the promisee, the promisor impliedly agrees to do nothing that would deprive the promisee of such benefits, or of the opportunity to endeavor to reap such benefits. A grantor or promisor cannot derogate from his own grant.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

HN9[] **Contract Interpretation, Fiduciary Responsibilities**

A fiduciary relationship is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust. The fiduciary's role may be assumed by formal appointment or it may rise de facto from a more informal confidential relationship, which is a relationship in which one person comes to rely on and trust another in his important affairs and the relations there involved are not necessarily legal, but may be moral, social, domestic, or merely personal. Such a confidential relationship, however, cannot be unilateral. A fiduciary duty may arise from an informal relationship only if both parties understand that a special trust or confidence has been reposed.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

HN10[] Contract Interpretation, Fiduciary Responsibilities

A fiduciary has a duty to act for someone else's benefit, while subordinating his or her personal interests to that of the other person.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

HN11[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act, specifically *15 U.S.C.S. § 1*, declares illegal every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade. As can be seen from the quoted language, *§ 1* does not outlaw unilateral activity; rather, the touchstone of a violation of that statute is concerted activity, action taken by more than an individual entity, such as entering into a contract, combination or conspiracy. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. The manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN12[] Distributorships & Franchises, Termination

Concerted activity and, thus, liability under *§ 1* of the Sherman Act, specifically *15 U.S.C.S. § 1*, cannot be based upon a distributor's coerced, involuntary acquiescence with its supplier's demands. No agreement is formed when a dealer unwillingly complies solely because he wishes to avoid termination.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN13[] Federal & State Interrelationships, Abstention

The Younger abstention doctrine applies in cases in which a federal court is asked to enjoin state court or administrative proceedings. To abstain from jurisdiction under Younger, three elements must exist: 1) an on-going state proceeding; 2) the proceedings must implicate important state interests; and 3) the proceeding must provide an adequate opportunity to raise constitutional challenges. Under that doctrine, which is predicated upon principles of federalism and comity, a federal court must abstain from enjoining state criminal, civil or administrative proceedings on the basis of a federal constitutional defense, when that defense can be litigated in the state proceedings.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Torts > ... > Defamation > Remedies > Damages

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Remedies

HN14[] Jurisdiction, Jurisdictional Sources

A district court may, under certain circumstances, abstain from exercising jurisdiction in the interests of judicial economy, when a parallel action is pending in state court. Generally, however, the mere pendency of a state court proceeding involving the same subject matter does not bar a federal court from exercising its jurisdiction, given the virtually unflagging obligation of the federal courts to exercise the jurisdiction given to them.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN15[] Pleadings, Counterclaims

Fed. R. Civ. P. 54(b) provides: (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN16[] **Entry of Judgments, Multiple Claims & Parties**

Before a district court can direct the entry of final judgment pursuant to *Fed. R. Civ. P. 54(b)*, three conditions must be present: 1) the case must involve multiple claims and/or multiple parties; 2) at least one claim or the rights of one party must have been finally decided; and 3) there must be no just reason for delaying the appeal.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN17[] **Pleadings, Counterclaims**

Deciding whether there is no just cause for delay involves the exercise of discretion. A district court should consider the following factors when it exercises its discretion: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obligated to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Counsel: For IAMS COMPANY, plaintiff: Charles Joseph Faruki, Donald Jeffrey Ireland, Mary L Wiseman, Faruki Gilliam & Ireland - 3, Dayton, OH.

For LA PET FOODS INC, defendant: David Carr Greer, John Francis Haviland, Bieser, Greer & Landis - 3, Dayton, OH. Gregory D Young, Santa Barbara, CA.

For PREMIUM PET FOODS INC, defendant: Gregory D Young, Santa Barbara, CA.

For LA PET FOODS INC, counter-claimant: David Carr Greer, John Francis Haviland, Bieser, Greer & Landis - 3, Dayton, OH. Gregory D Young, Santa Barbara, CA.

For PREMIUM PET FOODS INC, counter-claimant: Gregory D Young, Santa Barbara, CA.

For IAMS COMPANY, counter-defendant: Charles Joseph Faruki, Donald Jeffrey Ireland, Mary L Wiseman, Faruki Gilliam & Ireland - 3, Dayton, OH.

Judges: WALTER HERBERT RICE, CHIEF **[*2]** JUDGE, UNITED STATES DISTRICT COURT.

Opinion by: WALTER HERBERT RICE

Opinion

EXPANDED OPINION SETTING FORTH REASONING AND CITATIONS OF AUTHORITY IN SUPPORT OF COURT'S DECISION OF AUGUST 15, 1995 (DOC. # 90) TO SUSTAIN PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE THIRD, FOURTH, FIFTH AND SIXTH CLAIMS FOR RELIEF IN DEFENDANTS' SECOND AMENDED AND SUPPLEMENTAL COUNTERCLAIM (DOC. # 61); TO SUSTAIN IN PART AND TO OVERRULE IN PART, AS MOOT, PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS THIRTEENTH ADDITIONAL DEFENSE TO DEFENDANTS' SECOND AMENDED AND SUPPLEMENTAL COUNTERCLAIM (DOC. # 66); TO SUSTAIN PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE FIRST AND SECOND CLAIMS FOR RELIEF IN DEFENDANTS' SECOND AMENDED AND SUPPLEMENTAL COUNTERCLAIM (DOC. # 69); AND TO SUSTAIN IN PART AND TO OVERRULE IN PART PLAINTIFF'S MOTION TO STRIKE THE DECLARATION OF STEVE SEGNER (DOC. # 89); DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART PLAINTIFF'S MOTION TO ENTER FINAL

JUDGMENT (DOC. # 91); DECISION AND ENTRY OVERRULING DEFENDANTS' MOTION TO DISMISS OR TO STAY (DOC. # 94); DECISION AND ENTRY OVERRULING, AS MOOT, PLAINTIFF'S MOTION FOR EXPEDITED DECISION (DOC. # 99); DECISION **[*3]** AND ENTRY OVERRULING, WITHOUT PREJUDICE TO RENEWAL, PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION (DOC. # 102); CONFERENCE CALL SET

The Plaintiff is a manufacturer of pet food. For a number of years, the Defendants [1] were distributors for the Plaintiff. The relationship between the parties was governed by a series of one-year distributorship agreements, the last two of which are attached to Plaintiffs Second Amended Complaint (Doc. # 15), as Exhibits A and B. Exhibit A gave L.A. Pet the right to be a non-exclusive distributor of pet food manufactured by Plaintiff, from February 1, 1993, until January 31, 1994, within 10 counties in Southern California and four counties in Nevada. Exhibit B gave Premium the right to be a non-exclusive distributor of pet food manufactured by Plaintiff, from February 1, 1993, until January 31, 1994, within Arizona and Clark County, Nevada. On or about August 13, 1993, Plaintiff terminated the two Distributorship Agreements.

[*4] Plaintiff brought this action, seeking, *inter alia,* a declaratory judgment from the Court, declaring that it did not violate the Distributorship Agreements by terminating them. *See* Doc. # 15. In addition, Plaintiff set forth claims of breach of contract, libel of business reputation and intentional interference with prospective economic advantage. *Id.* Rather than merely defending against Plaintiff's claims, Defendants sought affirmative relief on their own behalf. In their Second Amended and Supplemental Counterclaim (Doc. # 46), Defendants set forth eight claims for relief, of which six remain, [2] to wit: 1) price fixing in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1* (First Claim for Relief); 2) restraint of trade in violation of *§ 1* of the Sherman Act (Second Claim for Relief); 3) breach of contract (Third Claim for Relief); 4) breach of contract/interference with contracts (Fourth Claim for Relief); 5) breach of *de facto* fiduciary duty (Fifth Claim for Relief); and 6) bad faith (Sixth Claim for Relief).

[*5] On August 15, 1995, this Court entered a Decision in which it sustained Plaintiff's Motion for Partial Summary Judgment on the Third, Fourth, Fifth and Sixth Claims for Relief in Defendants' Second Amended and Supplemental Counterclaim (Doc. # 61) ("First Motion for Partial Summary Judgment"); sustained in part and overruled, as moot, in part Plaintiff's Motion for Partial Summary Judgment on its Thirteenth Additional Defense to Defendants' Second Amended and Supplemental Counterclaim (Doc. # 66) ("Second Motion for Partial Summary Judgment"); sustained Plaintiff's Motion for Partial Summary Judgment on the First and Second Claims for Relief in Defendants' Second Amended and Supplemental Counterclaim (Doc. # 69) ("Third Motion for Partial Summary Judgment"); and sustained in part and overruled in part Plaintiff's Motion to Strike the Declaration of Steve Segner ("Segner") (Doc. # 89) ("Plaintiff's Motion to Strike"). *See* Doc. # 90. In this Expanded Opinion, the Court sets forth citations of authority and reasoning in support of that Decision. As a means of analysis, the Court will initially set forth the standards which govern all motions for summary judgment (including motions **[*6]** which seek only partial summary judgment). Then, the Court will set forth citations of authority and reasoning which support its ruling on Plaintiff's Motion to Strike, since much of the evidence upon which Defendants relied to oppose the Plaintiff's three motions for partial summary judgment was contained Segner's declaration. Finally, the Court will turn to the Plaintiff's three motions for partial summary judgment, discussing them in the order in which they were filed.

I. Standards which govern motions for summary judgment

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[1] In its Second Amended Complaint, Plaintiff alleges that the Defendants are L.A. Pet Foods, Inc. ("L.A. Pet"), and Premium Pet Foods, Inc. ("Premium"). *See* Doc. # 15 at PP 2-3. According to the Defendants, Premium is not a separate corporate entity; rather, it is a fictitious name under which L.A. Pet does business in the states of Nevada and Arizona. *See* Doc. # 46 at P 3. It was not necessary for the Court to address the question of whether Premium is a separate corporate entity in ruling on the motions pending in this case.

[2] In their Seventh and Eighth Claims for Relief, Defendants alleged that the Plaintiff had violated § 2 of the Robinson-Patman Act, *15 U.S.C. § 13*, and *§ 3* of the Clayton Act, *15 U.S.C. § 14*. The Defendants have dismissed their Seventh and Eighth Claims for Relief, with prejudice. *See* Doc. # 81.

HN1[] Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Of course, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine **[*7]** issue of material fact.

Id. at 323. *See also* Boretti v. Wiscomb, 930 F.2d 1150, 1156 (6th Cir. 1991) (The moving party has the "burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial.") (quoting Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987)). The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, "once the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial." Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1245 (6th Cir. 1995). Read together, *Liberty Lobby* and *Celotex* stand for the proposition that HN2[] a party may move for summary judgment by demonstrating that the opposing party will not be able to produce sufficient evidence at trial to **[*8]** withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed.R.Civ.P. 50). Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989).

HN3[] Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). *See also* Michigan Protection and Advocacy Service, Inc. v. Babin, 18 F.3d 337, 341 (6th Cir. 1994) ("The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff."). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. Celotex Corp., 477 U.S. at 324. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **[*9]** show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment shall be denied "if there are … 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" Hancock v. Dodson, 958 F.2d 1367, 1374 (6th Cir. 1992) (citation omitted). Of course, HN4[] in determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all *reasonable* inferences in the favor of that party. Anderson, 477 U.S. at 255 (emphasis added). If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, *Federal Practice and Procedure,* § 2726. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not … obligated to wade through and search the entire record for some specific **[*10]** facts that might support the nonmoving party's claim." Interroyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied, 494 U.S. 1091 (1990)*. *See also* L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc., 9 F.3d 561 (7th Cir. 1993); Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915 n. 7 (5th Cir.), *cert. denied, 506 U.S. 832, 113 S. Ct. 98, 121 L. Ed. 2d 59 (1992)* ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment …."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

II. Plaintiff's Motion to Strike (Doc. # 89)

Plaintiff sought to have the Court strike the Declaration of Segner (Doc. # 75), who is the President of the Defendants, arguing that it contradicts the deposition testimony which he had given before he signed the declaration. [3] Although the **[*11]** Plaintiff requested that the Court strike the entirety of Segner's Declaration, it argued that only particular portions of it conflict with certain portions of his previously given deposition testimony. Accordingly, the Court considered striking only those portions of Segner's Declaration which the Plaintiff has specifically argued should be stricken.

On a number of occasions, the Sixth Circuit has said that ***HN5***[] a party cannot raise a genuine issue of material fact and, thus, avoid the entry of summary judgment against it, by submitting an affidavit which contradicts the affiant's previously given deposition testimony. *Jones v. General Motors Corp., 939 F.2d 380, 385 (6th Cir. 1991)*; *Reid v. Sears, Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986)*; *Biechele v. Cedar Point, Inc., 747 F.2d 209, 215 (6th Cir. 1984)*. In *Biechele,* the Sixth Circuit explained:

> "If a party who has been examined at length on deposition could raise **[*12]** an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."

Id. (quoting *Perma Research & Development Co. v. Singer Co., 410 F.2d 572, 578 (2nd Cir. 1969))*. However, an inconsistent affidavit may be used to create a genuine issue of material fact if the affiant states that he was confused at his deposition, if the affidavit explains the seeming inconsistencies between the deposition and the affidavit or if the affiant lacked access to material facts at the time of his deposition and the affidavit is based upon newly discovered evidence. *Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266-67 (9th Cir. 1991)*; *Miller v. A.H. Robins Co., 766 F.2d 1102, 1104 (7th Cir. 1985)*. *See also, Franks v. Nimmo, 796 F.2d 1230* (10 Cir. 1986); *Camfield Tires v. Michelin Tire Corp., 719 F.2d 1361 (8th Cir. 1983)*. In other words, although an affiant can explain his deposition, he cannot raise a genuine issue of material fact by contradicting it. Therefore, in determining whether a portion of Segner's Declaration must be stricken, **[*13]** the Court will initially determine whether a particular portion is inconsistent with his previously given deposition testimony; then, if an inconsistency is found, the Court will decide whether that inconsistency contradicts his deposition testimony, or whether it was the "result of an honest discrepancy, a mistake, or the result of newly discovered evidence" or is just an explanation of that prior deposition testimony. [4] *Kennedy, 952 F.2d at 267*.

The initial portion of Segner's Declaration which Plaintiff argued must be stricken involved the question of which entity **[*14]** (Plaintiff or L.A. Pet) *sold* "fill-in product" to PetsMart. By way of background, in early 1992, Plaintiff decided to sell products directly to certain national chains such as PetsMart. "Fill-in product" refers to the pet food which a retailer such as PetsMart would need in order to keep a shelf fully stocked between deliveries by Plaintiff. During his deposition, Segner testified that Plaintiff *sold* "fill-in product" to PetsMart and that L.A. Pet merely delivered it and billed Plaintiff. II Segner Dep. at 340. [5] In its Motion to Strike, Plaintiff argued that Segner indicated, at pages 2-5 of his Declaration, that L.A. Pet, rather than Plaintiff *sold* "fill-in product" to PetsMart. Certainly, the statement in his Declaration that L.A. Pet, rather than Plaintiff, *sold* "fill-in product" to PetsMart would conflict with Segner's deposition testimony. Moreover, the Defendants have not explained the inconsistency between Segner's deposition testimony and his Declaration, either in that Declaration or elsewhere. Nevertheless, the Court has reviewed the allegedly offending portion and, with some exceptions, cannot agree with the Plaintiff. For the most part, Segner uses the **[*15]** words "provided," "supplied" or "delivered" when referring to what L.A. Pet did with "fill-in product" as it relates to PetsMart. Those characterizations are consistent with his deposition testimony; L.A. Pet

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[3] The Defendants did not oppose the Plaintiff's Motion to Strike.

[4] In *Kennedy,* the Ninth Circuit explained that the purpose of the rule set forth in *Perma* and followed by its progeny (which include the Sixth Circuit cases cited above) is to prevent a party from creating a *sham* fact question; when the inconsistency was the "result of an honest discrepancy, a mistake, or the result of newly discovered evidence" the purpose of the rule is not advanced by striking the affidavit. *952 F.2d at 266-67*.

[5] The transcript of Segner's deposition consists of two volumes. The Court uses "I" to signify the first volume and "II" to signify the second.

did deliver "fill-in product" to that chain. The Court does not construe that language to mean that L.A. Pet actually *sold* "fill-in product" to PetsMart. The instances where Segner states that L.A. Pet *sold* "fill-in product" are found in the last complete sentence on page 3, the first independent clause of the second to the last sentence on page 5 and the second dependent clause of the last sentence on that page. In those places in his Declaration, Segner uses the word "sell" or "sold." Accordingly, the Court has struck the offending sentence on page 3 and the offending clauses on page 5.

On page 10 of his Declaration, Segner states:

> Declarant has **[*16]** been notified on numerous occasions that … L.A. Pet is not to undercut the prices being charged by competing distributors, including Pet Food Wholesale and UPM. At the direction of Mike Major and other Iams' employees, representatives of L.A. Pet (including declarant) and its competitors met and agreed not to try to win the customers of each other on the basis of price. Prior to said meeting Iams' representatives advised declarant and others employed by L.A. Pet that L.A. Pet would not be renewed or would be terminated as an Iams' distributor if it did not so agree with said other distributors.

On pages 22-23 of his Declaration, Segner stated that Plaintiff acted in bad faith and breached its *de facto* fiduciary duty by "directing L.A. Pet to price in accordance with Iams' directives." The Plaintiff argued that any reference in Segner's Declaration that it told L.A. Pet to price Iams' products in accordance with its directives is in contradiction with his deposition testimony. During his deposition, Segner was questioned about how L.A. Pet priced the products it sold as a distributor. Segner testified that L.A. Pet started with the price that the manufacturer had charged **[*17]** it and, after adding a profit margin to that sum, arrived at its base price. I Segner Dep. at 65-68. Then, if a discount were offered to a customer, that discount would be taken off the base price. [6] *Id.* In response to the specific question as to whether that pricing policy applied to Plaintiff's products, Segner testified that it did. *Id. at 68*. In his explanation of L.A. Pet's pricing policy, Segner did not testify that it charged a certain price for Plaintiff's products because Plaintiff had told it to charge that price. In addition, throughout his deposition, Segner testified about instances when either L.A. Pet would take business from one of its competing distributors of Plaintiff's products or the opposite would occur, because a better price was offered to the customer. Therefore, the Court concluded that the portion of Segner's Declaration in which he states that L.A. Pet priced Plaintiff's products in accordance with directives from Plaintiff contradicts his earlier deposition testimony. Moreover, the Defendants did not explain this inconsistency between Segner's deposition testimony and his later Declaration, either in that Declaration or elsewhere. Accordingly, **[*18]** the Court sustained the Plaintiff's Motion to Strike (Doc. # 89), to the extent that, with that motion, Plaintiff sought to have the Court strike the portion of Segner's Declaration in which he stated that L.A. Pet priced Plaintiff's products in accordance with directives from Plaintiff.

In his Declaration, Segner stated that there were numerous discount stores in the territory serviced by L.A. Pet which it did not sell to "because of the Iams' discount store prohibition." Doc. # 75 at 7. Furthermore, Segner states that L.A. Pet "would have considered selling Iams' products to discount stores at a profit if not prohibited from doing so by Iams." *Id.* at 11-12. Plaintiff argued that the quoted portions from Segner's Declaration contradict his previously given deposition testimony, during which he identified L.A. Pet's customers as "pet stores, feed stores, veterinarians, **[*19]** some upscale supermarkets, kennels [and] some home delivery." I Segner at 59. When asked whether L.A. Pet had sold any products to mass merchandisers such as Wal-Mart, Sams or Costco, Segner testified that it had not. *Id.* Segner explained that L.A. Pet had been concentrating on the six areas listed above, because it was all that company could do to service those customers, which Segner characterized as "our background," and that it did not occur to them "to go outside and look around." *Id. at 60*. That testimony contradicts, without question, the statement from Segner's Declaration to the effect that L.A. Pet did not sell to discount stores, because of Plaintiff's prohibition of such sales. Moreover, the Defendants did not explain this contradiction between Segner's deposition testimony and his Declaration, either in that Declaration or elsewhere. However, the Court did not agree with the Plaintiff that Segner's deposition testimony contradicted the statement in his Declaration that L.A. Pet "would have considered" selling Plaintiff's products to discount stores. That statement can be viewed as

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[6] Segner testified that he or one of two other employees of L.A. Pet, Roman Versch and John Helt, had to approve discounts. I Segner Dep. at 67-68.

predicting what would have occurred in the future. During his deposition, Segner **[*20]** testified about events which had happened in the past, prior to the Declaration. Accordingly, the Court sustained the Plaintiff's Motion to Strike (Doc. # 89), to the extent that, with that motion, Plaintiff sought to have the Court strike the portion of Segner's Declaration in which he states that L.A. Pet did not sell Plaintiff's products to discount stores, because of the Plaintiff's prohibition on such sales. However, the Court overruled that motion as it relates to Segner's statement that L.A. Pet would have considered such sales, i.e., at a point in time following the Declaration, since that statement is not inconsistent with his deposition testimony.

In his Declaration, Segner stated that eight of Plaintiff's employees told him that L.A. Pet was not permitted to sell Plaintiff's products to discount stores, because "those stores sold [Plaintiff's] products too inexpensively." Doc. # 75 at 7. This Court did not agree with the Plaintiff that this statement contradicts Segner's cited deposition testimony. During the cited portion of his deposition, Segner testified about discussions with Plaintiff's employees regarding sales to one particular retailer, Price Club (which the **[*21]** Court assumes is a discount store). Segner was not questioned about discussions with Plaintiff's employees regarding its reasons for prohibiting sales to other discount stores. Therefore, this portion of Segner's Declaration is not inconsistent with his deposition testimony. Accordingly, the Court overruled this branch of Plaintiff's Motion to Strike (Doc. # 89).

In his Declaration, Segner stated that Plaintiff threatened L.A. Pet with the termination of its distributorship if it "solicited any retailers which were not on the L.A. Pet approved list." Doc. # 75 at 9. During his deposition, Segner testified that Plaintiff had "pressured" L.A. Pet not to solicit retailers that were not on its list. The Court saw no contradiction between Segner's Declaration and his deposition testimony and overruled this branch of Plaintiff's Motion to Strike (Doc. # 89).

In his Declaration, Segner set forth a detailed version of the discussions he had with employees of Plaintiff (and representations those employees made to him) regarding L.A. Pet's decision to open a location in Las Vegas, Nevada. Doc. # 75 at 21-22. During his deposition, Segner testified:

> When we were going to open up Las **[*22]** Vegas, Mike Major [an employee of Plaintiff] came to me and asked me to do it. He said, "Open up a small distributorship like you have in L.A. Carry the other brands. Be kind of a full-line distributor to the limited market there."

I Segner Dep. at 215. Segner's testimony about a limited discussion with one employee of Plaintiff contradicts the statements in his subsequently executed Declaration about extensive discussions with numerous such employees. Moreover, the Defendants have not explained this contradiction of Segner's deposition testimony with his Declaration, either in that Declaration or elsewhere. Accordingly, the Court sustained this branch of the Plaintiff's Motion to Strike (Doc. # 89).

Based upon all of the foregoing, the Court sustained in part and overruled in part the Plaintiff's Motion to Strike (Doc. # 89). The Court did not consider the stricken portions of Segner's Declaration, when ruling upon the Plaintiff's Motions for Partial Summary Judgment.

III. Plaintiff's First Motion for Partial Summary Judgment (Doc. # 61)

With its First Motion for Partial Summary Judgment (Doc. # 61), Plaintiff argued that it was entitled to summary judgment on **[*23]** the Third Claim for Relief (breach of contract), Fourth Claim for Relief (breach of contract/interference with contracts), Fifth Claim for Relief (breach of *de facto* fiduciary duty) and Sixth Claim for Relief (bad faith) in Defendants' Second Amended and Supplemental Counterclaim (Doc. # 46). With its Second Motion for Partial Summary Judgment (Doc. # 66), Plaintiff argues that it is entitled to summary judgment on its Thirteenth Additional Defense to that Second Amended and Supplemental Counterclaim, with which Plaintiff alleges that "Defendants' claims are barred because they served as independent contractors pursuant to the terms of the written distributorship agreements and there was no fiduciary duty between Defendants and Iams." *See* Doc. # 49 at 13. The Court will address the parties' arguments relating to the four claims for relief on Defendants' counterclaim, against which Plaintiff seeks summary judgment, in the above order. [7]

[*24] The two Distributorship Agreements, upon which Defendants base their Third Claim for Relief in their Second Amended and Supplemental Counterclaim, provided that they were effective from February 1, 1993, until January 31, 1994. Defendants allege that Plaintiff breached those agreements by terminating them on August 13, 1993. Doc. # 46 at P 45. Section 4.2 of the agreements provide:

> Either party, at any time, may terminate this Agreement with cause by giving thirty (30) days prior written notice of such termination to the other party. For purposes of this Agreement "cause" shall include, but is not limited to, a failure on the part of the Distributor to meet its minimum quarterly or annual sales performance standards described in Section 5.1(b) of this Agreement.

Section 4.3(c)(v) of the agreements provides that Plaintiff may terminate the agreement for the "gross misconduct" of a distributor. In its First Motion for Partial Summary Judgment (Doc. # 61), Plaintiff argued that it had cause to terminate the agreements and that the Defendants committed an act of "gross misconduct," because of a lawsuit which L.A. Pet filed against the Plaintiff and two of its employees in **[*25]** a state court in California. [8] The lawsuit alleged that Plaintiff and its employees had engaged in price fixing. Regardless of whether the filing of the state court action constituted "gross misconduct," as the Plaintiff argued, it certainly gave Plaintiff "cause" to terminate the agreements. In his affidavit (Doc. # 72 at Tab 1) Martin E. Walker ("Walker"), Vice President of Sales for the Plaintiff, set forth a detailed recitation of Plaintiff's marketing strategy and the vital role that a close relationship between the manufacturer and its distributors plays in that strategy. The purpose of the agreements was to allow the parties to work together in the sale and distribution of pet food manufactured by Plaintiff, to the mutual benefit of all. The ability of the parties to work together was destroyed when L.A. Pet filed the state court action. Moreover, L.A. Pet named as defendants in that litigation the two employees of Plaintiff with whom it was required to deal most closely, Mike Major (Plaintiff's western area business manager) and Wes Boots (Plaintiff's western area regional manager). These two key employees could not have been expected to work closely with Defendants after **[*26]** having been sued by L.A. Pet. *Cf. Excello Wine Co. v. Monsieur Henri Wines, Inc., 474 F. Supp. 203 (S.D.Ohio 1979)* (***HN6***[↑] wine importer had just cause, as required by *Ohio Revised Code § 1333.85*, to terminate distributor, because the two had developed an antagonistic and truculent relationship). Accordingly, the Court sustained the Plaintiff's First Motion for Partial Summary Judgment (Doc. # 61), to the extent that Plaintiff sought summary judgment on Defendants' Third Claim for Relief (breach of contract).

In their Fourth Claim for Relief, Defendants alleged that the Plaintiff breached the Distributorship Agreements by preventing them from soliciting some customers. [9] *See* Doc. # 46 at PP 47-54. The limitations on soliciting customers, which Plaintiff allegedly placed upon Defendants, fall into three categories, to wit: allowing Defendants **[*27]** to sell only "fill-in products" to PetsMart (P 51); using the "ABC" list (P 52); and preventing them from selling to certain other potential customers, such as mass merchandisers (P 53).

As an initial matter, Plaintiff relied on § 16 of the Distributorship Agreements and argued that these claims were barred by virtue of releases in those agreements. The agreements contain two provisions which purport to release

[7] These four claims are state law claims. In their memoranda, the Plaintiff and the Defendants rely on the substantive law of Ohio. Indeed, *§ 13* of the Distributorship Agreements provided that they would be governed by the law of that state. Therefore, in ruling on the Plaintiffs' First and Second Motions for Partial Summary Judgment, the Court relied upon the substantive law of Ohio.

[8] In its letter to Defendants, dated August 13, 1993, Plaintiff stated that it terminating the agreements, because of the fact that L.A. Pet had filed the lawsuit.

[9] The Defendants caption their Fourth Claim for Relief as one for breach of contract/interference with contracts. In their Memorandum in Opposition to Plaintiff's First Motion for Summary Judgment (Doc. # 74), the Defendants disclaimed any intention of relying upon a tortious interference theory. Accordingly, it was not necessary for the Court to address the arguments raised by the Plaintiff that it was entitled to summary judgment on the Defendants' Fourth Claim for Relief, to the extent that it was predicated upon such a theory.

one party from claims of the other. One such provision, § 16, provides **[*28]** that the signing of that agreement terminates the previous agreement, under which the parties conducted business, and that "EACH PARTY HEREBY RELEASES THE OTHER FROM ANY AND ALL CLAIMS ARISING AS A RESULT OF OR IN ANY WAY RELATING TO THE RELATIONSHIP BETWEEN [IAMS] AND THE DISTRIBUTOR UNDER SUCH OTHER AGREEMENTS OR AS A RESULT OF SUCH TERMINATION." [10] The other such clause is § 8.1(c), which provides:

> The party terminating or, in the case of expiration of this Agreement, electing not to renew this Agreement pursuant to Section 4 hereof shall not be liable to the other party for any damage of any kind whether direct, indirect or consequential, incurred by the other party by the termination, expiration or nonrenewal of this Agreement.

This Court agreed with Plaintiff that § 16 released it from liability for alleged breaches of Distributor Agreements, **[*29]** which occurred prior to January 31, 1993, the date upon which the final such agreements, the agreements at issue herein, between Plaintiff and Defendants became effective. ***HN7***[] A release is a contract. *Picklesimer v. The Baltimore & Ohio Rd. Co., 151 Ohio St. 1, 7, 84 N.E.2d 214 (1949)*. Whether a particular agreement constitutes a release is to be determined, as with all contracts, from the intent of the parties. *Miami Valley Carpenters District Council v. U.S. Fidelity & Guaranty Co., 590 F. Supp. 61, 65 (S.D.Ohio 1984)*. A release is to be examined in accordance with ordinary contract principles. *Shaheen v. B.F. Goodrich Co., 873 F.2d 105, 107 (6th Cir. 1989)*. Herein, § 16 of the Distributorship Agreements expressly provides that Plaintiff and Defendants release each other "from any and all claims arising as a result of or in any way relating to the relationship between [Plaintiff] and the distributor under such other agreements." In their Fourth Claim for Relief, the Defendants allege that the Plaintiff breached the Distributorship Agreements by preventing them from soliciting certain customers. In other words, the Defendants' Fourth Claim for Relief arises out of the **[*30]** Distributorship Agreements under which the parties conducted business. Therefore, to the extent that the Defendants' Fourth Claim for Relief is predicated upon actions of the Plaintiff occurring *before* January 31, 1993 (the effective date of the last Distributorship Agreements between the parties), it arises out of the relationship between the parties under another distributorship agreement and, as a consequence, comes within the explicit language of § 16. However, that provision of the Distributorship Agreements would not apply to the portion of the Defendants' Fourth Claim for Relief which is predicated upon the Plaintiff's actions which occurred *after* the execution of the final Distributorship Agreements, on January 31, 1993, since it would arise out of the, then, current Distributorship Agreements. In addition, this Court cannot agree with Plaintiff that § 8.1(c) of the Distributorship Agreements released that portion of the Defendants' Fourth Claim for Relief which is predicated upon the Plaintiff's actions which occurred *after* the execution of the final Distributorship Agreements, on January 31, 1993. Section 8.1(c) addresses claims which arise out of the conclusion **[*31]** of the distributorship arrangement, regardless of whether that event occurs as a result of the termination, expiration or non-renewal of a Distributorship Agreement. Defendants' Fourth Claim for Relief does not arise out of end of their relationship with the Plaintiff; rather, they allege that the Plaintiff committed a breach of contract, by not permitting them to solicit certain customers, while the Distributorship Agreements were in effect.

Accordingly, the Court concluded that the Plaintiff was entitled to summary judgment on that aspect of the Defendants' Fourth Claim for Relief, which arises out of Plaintiff's actions which occurred *before* January 31, 1993, because Defendants released those claims by signing the Distributorship Agreements which became effective on that date. However, the Plaintiff is not entitled to summary judgment, because of the two releases in the agreements, on the portion of Defendants' Fourth Claim for Relief which arise out of Plaintiff's actions occurring after January 31, 1993. With respect to that aspect of the Defendants' Fourth Claim for Relief, the Court turns to the Plaintiff's alternative argument, to wit: that it did not breach the Distributorship **[*32]** Agreements.

As is stated above, the Defendants contend that the Plaintiff breached the Distributorship Agreement by preventing them from soliciting certain customers. In particular, the Defendants allege that the limitations placed upon them fall into three categories, to wit: allowing Defendants to sell only "fill-in products" to PetsMart (P 51); using the "ABC" list (P 52); and preventing them from selling to certain other potential customers, such as mass merchandisers (P

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[10] This release language excepts any claims Plaintiff may have against the distributor for goods or services it had provided to the distributor.

53). [11] In their Memorandum in Opposition to Plaintiff's First Motion for Partial Summary Judgment (Doc. # 74), Defendants add flesh to the theory which supports their Fourth Claim for Relief. According to the Defendants, Plaintiff's actions frustrated the purpose of the Distributorship Agreements, which was to allow them to sell products manufactured by the Plaintiff. In support of their theory the Defendants rely upon *Indianapolis v. Domhoff & Joyce Co., 69 Ohio App. 109, 36 N.E.2d 153 (Hamilton County 1941)*.

[*33] In *Domhoff & Joyce,* the parties entered into a contract, the term of which was five years and under which Domhoff & Joyce was appointed as the agent to sell coke produced by Indianapolis. [12] In essence, the contract provided that Domhoff & Joyce was given the first opportunity to sell all of the coke produced by Indianapolis; however, when it was not able to do so, Indianapolis was permitted to use the services of other agents. Under the contract, Domhoff & Joyce collected the proceeds from the sale of the coke and remitted that amount, less its commissions, to Indianapolis. In addition, Domhoff & Joyce was not required to remit an amount for items over which disputes relating to price, quantity or quality had arisen. The parties conducted business under the contract without controversy until Domhoff & Joyce remitted the final payment which it owed to Indianapolis under the contract. From that payment, Domhoff & Joyce deducted slightly in excess of $ 47,500. In a letter written to Indianapolis, the agent cited four instances by which Indianapolis had breached the contract between the two and had deprived it of commissions which could have been earned. As a consequence, Domhoff **[*34]** & Joyce asserted that it was entitled to set off the $ 47,500, which it had deducted from the final payment. The one instance which is of particular import, herein, was the allegation by Domhoff & Joyce that Indianapolis had breached the contract by allowing Hickman, Williams & Company to sell some of the coke which Indianapolis had produced.

The check, which was Domhoff & Joyce's final payment to Indianapolis, contained a restrictive endorsement that it was in full payment of any and all claims of any nature to the date of the check. After Indianapolis cashed the check, it sued Domhoff & Joyce for the $ 47,500, which the latter had deducted from the final payment. The agent, in turn, raised the affirmative **[*35]** defense of accord and satisfaction, relying upon the fact that Indianapolis had cashed a check with a restrictive endorsement. The trial court directed a verdict in favor of Domhoff & Joyce, concluding that the evidence (i.e., the fact that Indianapolis had cashed a check with a restrictive endorsement) established the defense of accord and satisfaction. Upon appeal, the Hamilton County Court of Appeals reversed, concluding that the jury must resolve the question of whether there was an accord and satisfaction. To reach its conclusion, the appellate court analyzed each of the four bases for deducting sums from the final payment, presented by Domhoff & Joyce in its letter, to determine whether the bases were *bona fide.* [13] With respect to the deduction for the commissions paid to Hickman, Williams & Company, the appellate court wrote:

> The third deduction is of commissions on foundry coke sold through Hickman, Williams & Company. Now it clearly appears in the evidence that when [Indianapolis] increased the amount of foundry coke, [Domhoff &

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[11] The first of these limitations arises out of Plaintiff's decision, made in 1992, to sell its products directly to certain customers, such as PetsMart. As a result, independent distributors, such as L.A. Pet, have sold only "fill-in products" to PetsMart, since that date. Under that program, Plaintiff would sell pet food directly to PetsMart, without using its distributors. Plaintiff would deliver the pet food to a central location, and PetsMart would distribute it to its stores. When a particular PetsMart store needed additional pet food on an immediate basis (i.e., "fill-in products"), Plaintiff would purchase the product from one of its distributors, such as L.A. Pet, who would, in turn, deliver it to the PetsMart store in need of same. Plaintiff would then be billed for that product by the distributor. The second such limitation is the "ABC" lists. The Plaintiff used an "ABC" list in order to track customers of its distributors so that each customer was serviced. An "A" customer of a particular distributor purchased more products from that distributor than from any other distributor. The third such alleged limitation arises out of Plaintiff's marketing strategy. That strategy, which is fully detailed in the affidavit of Martin Walker, was to have Plaintiff's products sold only in pet stores, veterinary clinics, lawn and garden stores and upscale grocery stores.

[12] In reality, Domhoff & Joyce entered into the contract with an entity which assigned its rights to Indianapolis; however, since Domhoff & Joyce had agreed to the assignment, the Hamilton County Court of Appeals treated Indianapolis as if it had been a contracting party. *See* ***69 Ohio App. at 110-11***.

[13] An accord and satisfaction is an affirmative defense to a claim for money damages when there is a *bona fide* dispute over an unliquidated demand. *Allen v. R.G. Indus. Supply, 66 Ohio St. 3d 229, 611 N.E.2d 794 (1993)*.

Joyce] was unable to dispose of the increased quantity. The contract in express terms authorized [Indianapolis] under such circumstances **[*36]** to contract with another agent to dispose of the surplus. It did that and we fail to find any substantial evidence that [Domhoff & Joyce] disputed the fact that it was unable to dispose of the increased production of foundry coke. Its objection was to the fact of increased production. There was no denial of the right to employ Hickman, Williams & Company to dispose of this surplus if [Indianapolis] had the right to shift the preponderant production from domestic to foundry coke [which it did].

Aside from this, however, there was objection to the conduct of Hickman, Williams & Company in the sale of this surplus, in that in certain specific instances they intruded themselves between [Domhoff & Joyce] and customers after [Domhoff & Joyce] had started negotiations, and induced such customers to send in orders through them when but for such interference the customers would have submitted the orders through [Domhoff & Joyce], who would then have been entitled to the commissions on such sales.

It is fundamental in the law of contracts that ***HN8***[] *where a binding promise is made from which benefits would accrue to the promisee[,] the promisor impliedly agrees to do nothing that* **[*37]** *would deprive the promisee of such benefits, or of the opportunity to endeavor to reap such benefits.* 9 Ohio Jur. 543, 567, *et seq.,* Sections 298, 318. A grantor or promisor cannot derogate from his own grant. Therefore, [Indianapolis] by reason of this contract was obligated not to interfere between [Domhoff & Joyce] and any of its customers with whom it was negotiating, and if it did that directly or through an agent, it would be liable for all damage directly flowing from the breach of this implied term of the contract. This damage certainly could not exceed the commissions on the sales which were in process of negotiation at the time of the interference. It would not entitle [Domhoff & Joyce] to commissions on other sales made by Hickman, Williams & Company, which they had a right to make.

69 Ohio App. at 117-18 (emphasis added).

[*38] Defendants argued that, in accordance with the language from *Domhoff & Joyce,* which this Court has highlighted, a duty was imposed upon Plaintiff not to prevent them from making any sales of Plaintiff's product within the assigned territory. This Court did not agree with the Defendants. *Domhoff & Joyce* is clearly distinguishable from the present case. Therein, the contract between the parties gave Domhoff & Joyce the first opportunity to sell all of the coke produced by Indianapolis. It was the fact that Domhoff & Joyce had been given the first opportunity to sell the coke which caused the Hamilton County Court of Appeals to conclude that Indianapolis was obligated to refrain from interfering with attempts of its agent to sell that product. Herein, the Distributorship Agreements did not give Defendants an exclusive right to sell the Plaintiff's product or even the first opportunity to sell the pet food manufactured by the Plaintiff. On the contrary, the Distributorship Agreements gave Plaintiff the right to name as many distributors as it wished and, even, to sell its products directly to customers. Therefore, the Court rejected the Defendants' argument that Plaintiff had **[*39]** breached the Distributorship Agreements by violating the duty, allegedly imposed upon it in accordance with *Domhoff & Joyce,* not to interfere with their attempts to sell pet foods manufactured by the Plaintiff.

Accordingly, the Court sustained the Plaintiff's First Motion for Partial Summary Judgment (Doc. # 61), to the extent that Plaintiff sought summary judgment on Defendants' Fourth Claim for Relief (breach of contract/interference with contract).

In their Fifth Claim for Relief, the Defendants allege that the Plaintiff breached a *de facto* fiduciary duty which it owed to them. In its First Motion for Partial Summary Judgment (Doc. # 61), Plaintiff argued that it is entitled to summary judgment on this claim, because it did not owe any such *de facto* fiduciary duty to the Defendants. The Ohio Supreme Court has been loathe to recognize the existence of a *de facto* fiduciary duty. For instance, in *Belvedere Condominium Owners' v. R.E. Roark, 67 Ohio St. 3d 274, 617 N.E.2d 1075 (1993)*, the Ohio Supreme Court held, in P 1 of the syllabus, that the developer of a condominium project does not owe a fiduciary duty to the owners association "absent an understanding by **[*40]** both parties that special trust and confidence have been reposed in the developer." In *Blon v. Bank One, Akron, N.A., 35 Ohio St. 3d 98, 519 N.E.2d 363 (1988)*, the Ohio Supreme Court held, in P 2 of the syllabus, that a bank does not owe a fiduciary duty to a consumer who borrows from it, "absent an understanding by both parties that special trust and confidence [have] been reposed in the creditor," *See also, Umbaugh Pole Bldg. Co. v. Scott, 58 Ohio St. 2d 282, 390 N.E.2d 320 (1979)*. In *Craggett v.*

Adell Ins. Agency, 92 Ohio App. 3d 443, 451-52, 635 N.E.2d 1326, 1331-32 (Cuyahoga County 1993), the court summarized the standards governing *de facto* fiduciary relationships:

> HN9[] A fiduciary relationship is one in which "special confidence and trust is (sic) reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." Stone v. Davis (1981), 66 Ohio St. 2d 74, 20 Ohio Op. 3d 64, 419 N.E.2d 1094; Haluka v. Baker (1941), 66 Ohio App. 308, 20 Ohio Op. 136, 34 N.E.2d 68; *Tool Steel Products Sales Corp. v. XTEK, Inc.* (Jan. 29, 1993), Hamilton App. No. C-910533, unreported, 1993 WL 19476. **[*41]** The fiduciary's role may be assumed by formal appointment or it may rise de facto from a more informal confidential relationship, Prudential Ins. Co. v. Eslick (S.D.Ohio 1984), 586 F. Supp. 763; Walters v. First Nat. Bank of Newark (1982), 69 Ohio St. 2d 677, 23 Ohio Op. 3d 547, 433 N.E.2d 608, which is a relationship in which:
>
> "'* * * One person comes to rely on and trust another in his important affairs and the relations there involved are not necessarily legal, but may be moral, social, domestic, or merely personal. * * *' Indermill v. United Savings (1982), 5 Ohio App. 3d 243, 245, 5 Ohio B. Rep. 530, 532, 451 N.E.2d 538, 540." Applegate v. Fund for Constitutional Govt. (1990), 70 Ohio App. 3d 813, 816-817 592 N.E.2d 878, 880-881.
>
> Such a confidential relationship, however, cannot be unilateral. The Ohio Supreme Court has explained that a fiduciary duty may arise from an informal relationship only if both parties understand that a special trust or confidence has been reposed. *Nielsen Enterprises, Inc. v. Ins. Unlimited Agency, Inc.* (May 8, 1986), Franklin App. No. 85AP-781, unreported, 1986 WL 5411 (no fiduciary relationship exists between an insurance agent and client which **[*42]** would require the agent, during the term of an existing policy, to apprise the client of new insurance offerings or to provide an interim review of the client's insurance coverage); *Roberts v. State Farm Mut. Auto. Ins. Co.* (Jan. 7, 1982), Cuyahoga App. No. 43388, unreported, 1982 WL 2284 ("The relationship between an insurance salesman and his customer may take on fiduciary dimensions when reliance is reasonably reposed in the salesman by the customer."); Umbaugh Pole Bldg. Co. v. Scott (1979), 58 Ohio St. 2d 282, 12 Ohio Op. 3d 279, 390 N.E.2d 320 (creditor's provision of advice and counseling to debtor in a congenial atmosphere not enough to create a fiduciary relationship); Warren v. Percy Wilson Mtge. & Fin. Corp. (1984), 15 Ohio App. 3d 48, 15 Ohio B. Rep. 76, 472 N.E.2d 364 (no fiduciary status arising from advice given in routine business relationship between debtor and creditor); Blon v. Bank One (1988), 35 Ohio St. 3d 98, 519 N.E.2d 363 (no fiduciary status conferred in arm's-length business transaction).

The Defendants did not cite one case in which a court concluded that a manufacturer owed a *de facto* fiduciary duty to its distributor (or even concluded that **[*43]** there was a genuine issue of material fact on the question).

Herein, the parties' relationship was governed by Distributorship Agreements, which provided that Defendants were independent contractors, a status which, objectively, contravenes the Defendants' assertion that Plaintiff owed them a *de facto* fiduciary duty. *See* Tool Steel Products Sales Corp. v. XTEK, Inc., 1993 Ohio App. LEXIS 333, 1993 WL 19476 (Hamilton County App. 1993) (manufacturer did not owe *de facto* fiduciary duty to distributor when agreement governing their relationship provided that the distributor was an independent contractor). Nevertheless, the Defendants argue that other provisions in the Distributorship Agreements evidenced the existence of a *de facto* fiduciary duty owed to them by the Plaintiff. In particular, the Defendants pointed to § 5(c) of the agreements, which obligated the Defendants to maintain a level of inventory which, in Plaintiff's judgment (after consultation with Defendants), was sufficient to service the needs of Defendants' customers. Defendants argued that this provision indicates that the parties understood that Defendants were putting their trust in Plaintiff. This Court did not agree. The **[*44]** fact that Plaintiff had the authority to require Defendants to maintain a certain level of inventory, in order that they could meet the needs of their customers, does not raise an inference that Plaintiff owed a *de facto* fiduciary duty to the Defendants. In reality, § 5(c) was for the benefit of the Plaintiff rather than for the Defendants. By requiring the Defendants to maintain minimum inventory levels, Plaintiff assured that its pet food was always available to customers, even though maintaining such levels may have increased the Defendants costs. [14] Moreover, ***HN10***[] a fiduciary "has a 'duty to act *for someone else's benefit,* while subordinating [his or her] personal interests to that of the other person.'" *Belvedere, 67 Ohio St. 3d at 282, 617 N.E.2d at 1082* (emphasis in the original and citation omitted). Provisions in the Distributorship Agreements objectively demonstrate that the Plaintiff was not a fiduciary of the Defendants. For instance, those agreements expressly state that neither contracting party has the authority to act for the other. In addition, under those agreements, Plaintiff could contract with additional distributors, who would compete with the Defendants **[*45]** in their territories; Plaintiff could even distribute its products in direct competition with the Defendants. Indeed, throughout the period that Defendants distributed the Plaintiff's pet food, the Plaintiff contracted with other distributors who competed directly with the Defendants. Those actions taken in reliance on specific contractual language are hardly the exercise of powers by or actions of a fiduciary.

Additionally, the Defendants argued that the existence of a *de facto* fiduciary duty is established by the fact that Plaintiff encouraged them to open a new distributorship in Nevada. As is discussed above (in connection with Plaintiff's Motion to Strike), the evidence on this point is one conversation with Mike Major ("Major"), **[*46]** an employee of Plaintiff. That conversation, in which Major advised the Defendants to open a small, full-line distributorship (i.e., a distributorship which carried products of manufacturers in addition to Plaintiff's), is not sufficient to raise a genuine issue of material fact regarding the existence of a fiduciary relationship. It simply does not raise an inference that the Plaintiff understood that the Defendants were placing their special trust and confidence in it, as that term is defined by law.

Accordingly, the Court sustained the Plaintiff's First Motion for Partial Summary Judgment (Doc. # 61), to the extent that, with that motion, Plaintiff sought summary judgment on Defendants' Fifth Claim for Relief (breach of *de facto* fiduciary duty).

In their Sixth Claim for Relief in their Second Amended and Supplemental Counterclaim, the Defendants allege that the Plaintiff took actions which constitute their claim of price fixing in their First Claim for Relief and actions which constitute the Third through Fifth such claims for Relief, and that the Plaintiff took these actions which constitute those claims in bad faith. The Court, based upon reasoning and citations of authority **[*47]** set forth above, has sustained the Plaintiff's First Motion for Partial Summary Judgment (Doc. # 61), as that motion related to the Defendants' Third through Fifth Claims for Relief. Further, the Court, based upon reasoning and citations of authority set forth below, has sustained the Plaintiff's Third Motion for Partial Summary Judgment (Doc. # 69), as that motion related to the Defendants' First Claim for Relief. Since the Court has concluded, as a matter of law, that the Plaintiff did not engage in price fixing, did not breach the contracts between the parties, [15] and did not owe the Defendants a *de facto* fiduciary duty, it cannot be held liable for doing any of those actions in bad faith. Therefore, the Court sustained the Plaintiff's First Motion for Summary Judgment (Doc. # 61), to the extent that, with that motion, Plaintiff sought summary judgment on Defendants' Sixth Claim for Relief (bad faith).

[*48] Accordingly, the Court sustained the Plaintiff's Motion for Partial Summary Judgment (Doc. # 61), in its entirety.

IV. Plaintiff's Second Motion for Partial Summary Judgment (Doc. # 66)

With this motion, the Plaintiff sought summary judgment on the Thirteenth Affirmative Defense contained in its Answer to Defendants' Second Amended and Supplemental Counterclaim (Doc. # 49). With that defense, the Plaintiff alleged:

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[14] The Defendants would have been required to purchase the pet food from the Plaintiff for it to be part of their inventory. Therefore, by requiring the Defendants to maintain a minimum level of inventory, the Plaintiff was requiring the Defendants to increase their costs.

[15] In their Fourth Claim for Relief, the Defendants had also alleged that the Plaintiff had tortiously interfered with contracts; however, the Defendants have abandoned that allegation. *See* Footnote 9, *supra.*

> Defendants['] claims are barred because they served as independent contractors pursuant to terms of written distributorship agreements and there was no fiduciary duty between Defendants and Iams.

Doc. # 49 at 13. The Court construed the portion of that defense setting forth the allegation that Plaintiff did not owe a fiduciary duty to the Defendants as being asserted against the Defendants' Fifth Claim for Relief, alone, since that is their only claim predicated upon such a duty. For the same reasons that the Court sustained Plaintiff's First Motion for Partial Summary Judgment (Doc. # 61), as that motion related to Defendants' Fifth Claim for Relief (breach of *de facto* fiduciary duty), the Court sustained the Plaintiff's Second Motion for Partial **[*49]** Summary Judgment (Doc. # 66), to the extent that Plaintiff's Thirteenth Affirmative Defense was predicated upon the allegation that it did not owe a fiduciary duty to the Defendants. The Plaintiff's Second Motion for Partial Summary Judgment made clear that the other allegation in the Plaintiff's Thirteenth Affirmative Defense (i.e., that the Defendants' claims am barred because they were independent contractors) was a defense to more than just the Defendants' Fifth Claim for Relief. *See* Doc. # 66 at 4 (arguing that independent contractor status is relevant to Defendants' federal antitrust claims, as well as to their claim of breach of fiduciary duty). Given that the Court had concluded that the Plaintiff was entitled to summary judgment on the merits of the Defendants' claims, without the need to reach the issue, the Court overruled that motion, as moot, to the extent that the Plaintiff had argued that it was entitled to summary judgment on those claims, because of the Defendants' alleged status as independent contractors.

V. Plaintiff's Third Motion for Partial Summary Judgment (Doc. # 69)

In its First and Second Claims for Relief of their Second Amended and Supplemental **[*50]** Counterclaim (Doc. # 46), the Defendants allege that the Plaintiff violated *§ 1* of the Sherman Act by engaging in price fixing and other restraints of trade. In particular, with respect to price fixing (the First Claim for Relief), the Defendants allege:

> Within four years prior to the commencement of this action[,] Plaintiff Iams has been engaged in illegal price fixing by conspiring with Defendant L.A. Pet, as a coerced, involuntary co-conspirator, to fix, control, raise or stabilize the price of the products manufactured by Plaintiff Iams[,] as hereafter alleged:
>
> (a) Plaintiff Iams has directed Defendant L.A. Pet how to price the products which Defendant has purchased from Plaintiff, and threatened Defendant with nonrenewal or termination as an Iams' distributor if Defendant L.A. Pet did not comply with Plaintiff Iams' directive;
>
> (b) Plaintiff Iams has directed Defendant L.A. Pet not to sell to competitive retailers, under threat of termination or nonrenewal as a distributor of Plaintiff's products if Defendant did not follow Plaintiff's directive, for the purpose of maintaining or keeping up the prices of Plaintiff's goods;
>
> (c) Plaintiff Iams has divided the potential **[*51]** customers for Plaintiff's products (primarily retail pet stores and veterinarians) in Defendant L.A. Pet's market area into three groups, assigned one group of customers to Defendant L.A. Pet and the other two groups of customers to Defendant's two direct competitors. Defendant, and its direct competitors, have been instructed, under threat of termination or nonrenewal as a distributor of Plaintiff's products, not to solicit the groups of customers assigned to its two competitors for the purpose of maintaining or keeping up the price of Plaintiff's goods;
>
> (d) Plaintiff has directed Defendant, under threat of termination or nonrenewal, not to solicit the same business which Plaintiff is servicing directly, such as PetsMart (other than on a "fill-in" basis);
>
> (e) Plaintiff has directed Defendant, under threat of termination or nonrenewal as a distributor of Plaintiff Iams' products, not to solicit the customers of other Iams' distributors on the basis of price;
>
> (f) Plaintiff has directed Defendant, under threat of termination or nonrenewal as a distributor of Plaintiff's products, to coerce Defendant's retailer customers not too [sic] sell Plaintiff's products inexpensively.

Doc. **[*52]** # 46 at P 29. With respect to restraint of trade (the Second Claim for Relief), the Defendants allege:

> Within four years prior to the commencement of this action, Plaintiff Iams has been engaged in illegal restraint of trade by conspiring with Defendant L.A. Pet, as a coerced, involuntary co-conspirator, as hereafter alleged:

(a) Plaintiff Iams has directed Defendant L.A. Pet not to sell to price competitive retailers, under threat of termination or nonrenewal as a distributor of Plaintiff's products if Defendant did not follow Plaintiff's directive, for the purpose of maintaining or keeping up prices of Plaintiff's goods;

(b) Plaintiff Iams has divided the potential customers for Plaintiff's products (primarily retail pet stores and veterinarians) in Defendant L.A. Pet's market area into three groups, assigned one group of customers to Defendant L.A. Pet and the other two groups to Defendant's two direct competitors. Defendant, and its direct competitors, have been instructed, under threat of termination or nonrenewal as distributors of Plaintiff's products, not to solicit the groups of customers assigned to its competitors for the purpose of maintaining or keeping up the price **[*53]** of Plaintiff's goods;

(c) Plaintiff has directed Defendant, under threat of termination or nonrenewal, not to solicit the same business which Plaintiff is servicing directly, such as non "fill-in" PetsMart business. The foregoing conduct of Plaintiff Iams is either unlawful *per se* or unreasonable.

Id. at P 36.

Initially, Plaintiff argued that it is entitled to summary judgment on Defendants' claims under *§ 1* of the Sherman Act, because it did not engage in concerted activity. ***HN11***[] *Section 1* of the Sherman Act declares illegal, "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade." As can be seen from the quoted language, *§ 1* does not outlaw unilateral activity; rather, the touchstone of a violation of that statute is concerted activity, action taken by more than an individual entity, such as entering into a contract, combination or conspiracy. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*; *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 760-61, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; *Nurse Midwifery Associates v. Hibbett, 918 F.2d 605, **[*54]** 611-12 (6th Cir. 1990)*. In *Monsanto,* the Supreme Court explained:

This Court has drawn two important distinctions that are at the center of this and any other distributor-termination case. First, there is the basic distinction between concerted and independent action--a distinction not always clearly drawn by parties and courts. *Section 1* of the Sherman Act requires that there be a "contract, combination … or conspiracy" between the manufacturer and other distributors in order to establish a violation. *15 U.S.C. § 1*. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*; cf. *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*. Under *Colgate,* the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

465 U.S. at 760-61.

In the First Claim for Relief of their Second **[*55]** Amended and Supplemental Counterclaim, the Defendants alleged that Plaintiff conspired to violate *§ 1* of the Sherman Act with "L.A. Pet, as a coerced, involuntary co-conspirator." Doc. # 46 at P 29. The Defendants' Second Claim for Relief contains the same allegation. *Id. at P 36*. These are the only allegations of concerted activity contained in the Defendants' most recent pleading. For purposes of ruling on Plaintiff's Third Motion for Partial Summary Judgment (Doc. # 69), the Court assumed that the evidence presented by the Defendants raises a *genuine* issue of fact as to whether Plaintiff's coercion induced L.A. Pet into becoming an involuntary co-conspirator. However, that *genuine* issue of fact is not *material.* Quite simply, ***HN12***[] concerted activity and, thus, liability under *§ 1* of the Sherman Act cannot be based upon a distributor's coerced, involuntary acquiescence with its supplier's demands. In *Isaksen v. Vermont Castings, Inc., 825 F.2d 1158 (7th Cir. 1987)*, *cert. denied, 486 U.S. 1005, 100 L. Ed. 2d 193, 108 S. Ct. 1728 (1988)*, the Seventh Circuit noted that that "after *Monsanto,* 'no agreement is formed when a dealer unwillingly complies solely because **[*56]** he wishes to avoid termination.'" *Id. at 1164* (quoting 7 Areeda, ***Antitrust Law****,* P 1451e). *See also, International Logistics Group v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989)* *cert. denied, 494 U.S. 1066, 108 L. Ed. 2d 784, 110 S. Ct. 1783 (1990)*; *Barnosky Oils, Inc. v. Union Oil Co., 665 F.2d 74 (6th Cir. 1981)* (where supplier merely exercises unilateral power, no antitrust concerted action is possible even if the supplier forced others to acquiesce in its restraints).

Defendants did argue that they had evidence which goes beyond the allegation that Plaintiff's threats of termination or nonrenewal "coerced" them to fix their prices. In particular, the Defendants relied on three particular incidents, which the Court will address in the order in which they were presented.

First, the Defendants pointed to Plaintiff's directive regarding "fill-in" orders for PetsMart. As is explained above (in connection with the Court's discussion of Plaintiff's Motion to Strike), Plaintiff decided, in 1992, to sell products directly to certain national chains such as PetsMart. Thus, Plaintiff would ship its products directly to PetsMart, with its independent distributors, **[*57]** such as L.A. Pet, no longer selling to such chains. When a particular PetsMart store needed additional products (between deliveries from Plaintiff), Plaintiff would purchase products from one of its independent distributors, such as L.A. Pet, which would then deliver the product to that store needing same. The uncontroverted evidence establishes that the pet food which L.A. Pet would deliver to PetsMart, as "fill-in products" was owned by that distributor. Defendants argue that this scenario evidences a conspiracy between Plaintiff and PetsMart, fixing the prices at which L.A. Pet would sell Plaintiff's products to PetsMart. The fatal flaw in Defendants' argument is that L.A. Pet did not *sell* Plaintiff's products to PetsMart. Rather, that distributor sold Plaintiff's pet food back to the Plaintiff and merely *delivered* same to PetsMart. The distributor would then bill the Plaintiff for the product. Defendants do not argue that a manufacturer violates *§ 1* of the Sherman Act, by fixing the price at which it will re-purchase its products from one of its distributors. Accordingly, the Court concluded that the Plaintiff was entitled to summary judgment on the Defendants' First **[*58]** Claim for Relief, to the extent that said claim is predicated upon the assertion that Plaintiff engaged in price fixing, when Plaintiff re-purchased these products from L.A. Pet, by paying L.A. Pet 108% of the price it (L.A. Pet) had paid to purchase the products initially.

Second, Defendants argued that the "ABC" lists constituted price fixing. This Court cannot agree. The maintaining of an "ABC" list was a method which the Plaintiff used to track customers of its distributors so that each customer was serviced. An "A" customer of a particular distributor purchased more products from that distributor than from any other distributor. Assuming for present purposes that the Plaintiff did refuse to allow Defendants to sell to the "A" customers of other distributors, this Court nevertheless cannot agree with the Defendants that such activity is evidence of concerted activity. Rather, it is merely a manifestation of Plaintiff's alleged unilateral activity. The fact that the Plaintiff may have caused its distributors to refrain from selling to certain customers, by threatening their termination if they sold to those customers, is not evidence of concerted activity.

Third, the Defendants **[*59]** argued that the Plaintiff engaged in concerted activity by preventing it from selling to mass or discount merchandisers. The uncontroverted evidence established that the Plaintiff, alone, made that decision, as an integral part of its marketing strategy. Therefore, this Court concluded that the evidence did not raise a genuine issue of material fact as to whether the Plaintiff's alleged refusal to allow Defendants to sell products to mass or discount merchandisers constituted concerted activity.

In sum, the Court concluded that there was no evidence that Plaintiff engaged in concerted activity. Since concerted activity is an essential element of any claim under *§ 1* of the Sherman Act (whether the claim is price-fixing or some other restraint of trade), the Defendants cannot establish either their First or Second Claims for Relief. [16] Accordingly, the Court sustained the Plaintiff's Third Motion for Partial Summary Judgment (Doc. # 69).

[*60] After this Court had issued its Decision (Doc. # 90), indicating how it would rule upon the Plaintiff's three Motions for Partial Summary Judgment, Plaintiff filed a Motion for Entry of Final Judgment (Doc. # 91), with which it requested that the Court enter such a judgment, pursuant to *Rule 54(b) of the Federal Rules of Civil Procedure*. [17] **[*61]** In addition to opposing that motion, the Defendants have filed a motion, with which they request this Court

[16] Since the Court had concluded that there was no evidence that the Plaintiff had engaged in concerted activity, it was not necessary to address Plaintiff's alternative argument, that the restraints in which it is alleged to have engaged were non-price, vertical restraints which are assessed under the "rule of reason" and that those restraints are, as a matter of law, reasonable.

to dismiss or to stay this litigation. *See* Doc. # 94. The genesis of these motions is the lawsuit which L.A. Pet filed against Plaintiff and its employees in the Superior Court for the County of San Bernardino, California. [18] That court initially stayed that litigation. However, on appeal, the California appellate court reversed the entry of the stay and remanded to the trial court to allow that litigation to proceed. Since a resolution of the Defendants' Motion to Dismiss or to Stay (Doc. # 94) could moot the necessity of a ruling on the Plaintiff's Motion to Enter Final Judgment (Doc. # 91), the Court will initially address the Defendants' motion, following it will turn to the Plaintiff's motion, if the former is overruled.

In support of their contention that this Court should dismiss or stay this litigation in favor of that pending in the California Superior Court, the Defendants rely upon *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)* and *Brillhart v. Excess Ins. Co., 316 U.S. 491, 86 L. Ed. 1620, 62 S. Ct. 1173 (1942)*. A comparison of the claims asserted by the parties in this litigation with the claims asserted by L.A. Pet in the California litigation convinces this Court that neither *Younger* nor *Brillhart* constitutes a basis for this Court to dismiss or to stay this litigation.

In the California litigation, L.A. Pet has alleged that Plaintiff and its employees violated California's state antitrust laws by engaging in resale price maintenance, by controlling prices and by committing unfair business practices. In this litigation, the Plaintiff has asserted four claims, to wit: a request for a declaration that it did not violate the Distributorship Agreements by terminating **[*62]** them and three claims for damages, predicated upon the Defendants' alleged breaches of those agreements, libel to its business reputation and interference with prospective economic advantage. *See* Doc. # 15. Rather than merely defending against Plaintiff's claims, Defendants sought affirmative relief on their own behalf. In their Second Amended and Supplemental Counterclaim (Doc. # 46), Defendants set forth eight claims for relief, of which the remaining six have been disposed of through summary judgment in this Decision, [19] to wit: 1) price fixing in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1* (First Claim for Relief); 2) restraint of trade in violation of *§ 1* of the Sherman Act (Second Claim for Relief); 3) breach of contract (Third Claim for Relief); 4) breach of contract/interference with contracts (Fourth Claim for Relief); 5) breach of *de facto* fiduciary duty (Fifth Claim for Relief); and 6) bad faith (Sixth Claim for Relief). Therefore, the claims asserted in this litigation, although sharing a common core of fact, are predicated upon different legal theories than those which L.A. Pet has plead in the California litigation.

[*63] ***HN13***[]

The *Younger* abstention doctrine has been applied in cases in which a federal court is asked to enjoin state court or administrative proceedings. *See e.g., Younger, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746* (criminal proceedings); *Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975)* (civil proceeding); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982)* (administrative proceeding); *GTE Mobilnet of Ohio v. Johnson, 111 F.3d 469 (6th Cir. 1997)* (same). To abstain from jurisdiction under *Younger,* three elements must exist: 1) an on-going state proceeding; 2) the proceedings must implicate important state interests; and 3) the proceeding must provide an adequate opportunity to raise constitutional challenges. *Sun Refining & Marketing Co. v. Brennan, 921 F.2d 635, 639 (6th Cir. 1990)*; *Middlesex County Ethics Comm., 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515*.

Quite simply, *Younger* abstention does not apply to the facts of this case. Under that doctrine, which is predicated upon principles of federalism and comity, a federal court must abstain from enjoining **[*64]** state criminal, civil or

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[17] The Plaintiff has also filed a motion requesting that this Court expedite disposition of its (Plaintiff's) Motion for Final Judgment (Doc. # 91). *See* Doc. # 99. Given that the Court rules, herein, upon the Plaintiff's request for entry of final judgment, the Court overrules, as moot, Plaintiff's Motion to Expedite Disposition (Doc. # 99).

[18] This is the litigation that caused Plaintiff to terminate the agreements between the parties.

[19] In their Seventh and Eighth Claims for Relief, Defendants alleged that the Plaintiff had violated § 2 of the Robinson-Patman Act, *15 U.S.C. § 13*, and *§ 3* of the Clayton Act, *15 U.S.C. § 14*. The Defendants have dismissed their Seventh and Eighth Claims for Relief, with prejudice. *See* Doc. # 81.

administrative proceedings on the basis of a federal constitutional defense, when that defense can be litigated in the state proceedings. *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10-11, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987)*. Herein, the Plaintiff has not asserted a claim with which it challenges the constitutionality of California's antitrust laws; rather, it seeks a declaratory judgment to the effect that it has lawfully terminated its agreements with the Defendants and, in addition, compensatory damages for breach of contract, libel to its business reputation and interference with prospective economic advantage. Under *Colorado River Water Conservation District v. United States, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)*, ***HN14***[] a District Court may, under certain circumstances, abstain from exercising jurisdiction in the interests of judicial economy, when a parallel action is pending in state court. Generally, however, the mere pendency of a state court proceeding involving the same subject matter does not bar a federal court from exercising its jurisdiction, given "the virtually unflagging obligation of the federal courts to exercise the jurisdiction **[*65]** given to them." *Id. at 817*. Therein, the Supreme Court concluded that the District Court had properly abstained from exercising its jurisdiction, since the litigation in state court had been pending much longer and had advanced farther than in federal court. That factor is not present in this case. This Court has now ruled upon Motions for Partial Summary Judgment which dispose of the remaining claims asserted by the Defendants in this litigation, motions which the parties devoted significant resources to briefing. It would be perverse indeed, if this Court were to conclude that the interests judicial economy dictate that it abstain from exercising its jurisdiction herein, thus causing the expenditure of its resources and those of the parties to have been wasted. Accordingly, the Court concludes that neither *Younger* nor *Colorado River* abstention prevents it from complying with its "virtually unflagging obligation" to exercise its jurisdiction in this matter.

In *Brillhart,* the Supreme Court recognized that a federal court may stay a request for declaratory relief in favor of pending state court litigation between the parties. That principle flows from the fact that **[*66]** the granting of a declaratory judgment is discretionary. *See e.g., Aetna Cas. & Sur. Co. v. Sunshine Corp., 74 F.3d 685 (6th Cir. 1996)*. This Court declines to stay this litigation on the basis of *Brillhart.* This litigation involves far more than merely the Plaintiff's request for declaratory relief. The Plaintiff has also asserted three claims with which it seeks compensatory damages. In addition, the Defendants had sought affirmative relief with their Second Amended and Supplemental Counterclaim (Doc. # 46). Merely because litigation between the parties is pending in California state court does not warrant this Court staying this litigation, even though the award of declaratory relief is discretionary in nature. Rather, the Court will address the question of whether it should exercise its discretion to grant the requested declaratory relief in connection with the decision on the merits of Plaintiff's claim for such relief.

Accordingly, the Court overrules the Defendants' Motion to Dismiss or to Stay (Doc. # 94).

Having so concluded, the Court turns to the Plaintiff's request that it enter final judgment on the Defendants' counterclaims. The Plaintiff moves pursuant to ***HN15***[] *Rule **[*67]** 54(b)*, which provides:

> (b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

HN16[] Before a district court can direct the entry of final judgment pursuant to *Rule 54(b)*, three conditions must be present: 1) the case must involve multiple claims and/or multiple parties; 2) at least one claim or the rights **[*68]** of one party must have been finally decided; and 3) there must be no just reason for delaying the appeal. 10 Wright, Miller & Kane *Federal Practice and Procedure* § 2656. Herein, all conditions but one are present. That exception is based upon the Defendants' Third Claim for Relief, with which they allege that the Plaintiff breached the Distributorship Agreements by terminating them.

First, Plaintiff asserted multiple claims against the Defendants, who, in turn, asserted multiple claims against the Plaintiff.

Second, the Court has adjudicated all of the claims asserted by the Defendants in their counterclaim, except the two which the Defendants voluntarily dismissed with prejudice.

Third, ***HN17***[] deciding whether there is no just cause for delay involves the exercise of discretion. The Sixth Circuit has said that a district court should consider the following factors when it exercises its discretion:

> "(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obligated to consider the **[*69]** same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic considerations, shortening the time of trial, frivolity of competing claims, expense, and the like."

Corrosioneering v. Thyssen Environmental Systems, Inc., 807 F.2d 1279, 1283 (6th Cir. 1986) (quoting, *Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360, 364 (3d Cir. 1975))*. *See also, Soliday v. Miami County, Ohio, 55 F.3d 1158 (6th Cir. 1995)*; *Solomon v. Aetna Life Insurance Co., 782 F.2d 58, 61 n.2 (6th Cir. 1986)*.

An application of those five factors convinces this Court that no just cause for delay exists as to the Defendants First, Second and Fourth through Sixth Claims for Relief. The Court will initially address those five claims and, then, turn to the Defendants' Third Claim for Relief. Although the five adjudicated claims share a common genesis with the Plaintiff's unadjudicated claims, the relationship between the parties relating to the distribution of the Plaintiff's pet food, those claims are not so interrelated as to preclude this **[*70]** Court from finding that no just cause for delay exists. The Plaintiff's claims arise out of the termination of the Distributorship Agreements and events which occurred contemporaneously (the filing of the lawsuit in California state court by L.A. Pet and letters it sent to its customers accusing Plaintiff of fixing prices). The five claims of the Defendants arise out of events which occurred while the relationship between the parties was ongoing (such as the claim that Plaintiff owed them a *de facto* fiduciary duty). Future events occurring in this litigation will not moot the need for appellate review of these claims, nor will the Sixth Circuit be required to review any issue more than once. Moreover, since the Court is being asked to grant final judgment in favor of Plaintiff on claims that have been asserted against it, there is no possibility of a set-off against this judgment. Finally, the pending litigation in the California state courts is a factor in favor of entering final judgment in favor of Plaintiff. This litigation has been vigorously prosecuted by all parties. The Plaintiff having obtained a favorable ruling on its three Motions for Partial Summary Judgment from this **[*71]** Court is entitled to have the opportunity to take advantage of the preclusive effect of this Court's Decision in the California litigation. Accordingly, the Court finds that no just cause for delay exists.

Since the Defendants' Third Claim for Relief is the flip side of the Plaintiff's request for declaratory relief, this Court concludes that said adjudicated claim is significantly interrelated to one which has not been adjudicated. Moreover, there is the possibility that the Sixth Circuit could be called upon to review the same issues twice, if this Court were to enter final judgment on Defendants' Third Claim for Relief. Accordingly, the Court cannot find that no just cause for delay exists with respect to that claim.

Accordingly, the Court sustains in part and overrules in part the Plaintiff's Motion to Enter Final Judgment (Doc. # 91). The Court expressly finds that no just cause for delay exists with respect to the Defendants' First, Second and Fourth through Sixth Claims for Relief in their Second Amended and Supplemental Counterclaim (Doc. # 46). The Court expressly directs that final judgment be entered with respect to those claims. As to the Defendants' Third Claim for **[*72]** Relief, the Court finds that just cause for delay exists. [20]

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[20] The Plaintiff has filed a motion with which it requests that the Court enjoin the California Superior Court from proceeding with the litigation between the parties currently pending before it. *See* Doc. # 102. Although this Court has no doubt of its authority to enter such injunctive relief (see *28 U.S.C. § 2283*), it chooses not to exercise that authority at this time. Rather, the California

[*73] Counsel listed below should take note that a telephone conference call is scheduled for noon, on Tuesday, April 7, 1998, for the purpose of selecting a trial date and other pertinent dates leading to the resolution of this litigation.

WALTER HERBERT RICE, CHIEF JUDGE

UNITED STATES DISTRICT COURT

Superior Court should, in the first instance, determine the preclusive effect of this Decision. Accordingly, the Court overrules the Plaintiff's Motion for Temporary Retraining Order and Preliminary Injunction (Doc. # 102), without prejudice to renewal on an immediate basis, should events in the California litigation convince Plaintiff that renewal is an idea whose time has come.

In addition, this Court has not entered final judgment on the Defendants' Third Claim for Relief, with which they had alleged that Plaintiff had breached the Distributorship Agreements by terminating those agreements, although the Court has granted Plaintiff summary judgment on that claim. Based upon a review of the complaint filed by L.A. Pet in the California action (which has been furnished this Court), it appears that a similar claim is not being pursued in that litigation. Indeed, that lawsuit was filed *before* those agreements were terminated. In the event that an amended complaint is or has been filed in that litigation, setting forth a claim similar to the Defendants' Third Claim for Relief, the Plaintiff is directed to renew its request for injunctive relief, on an immediate basis. The Court, in turn, will grant a temporary restraining order, leading to a hearing on a request for preliminary injunction, in order to protect and/or to effectuate its judgment with regard to the grant of summary judgment to the Plaintiff on that Third Claim for Relief of the Defendants. *28 U.S.C. § 2283*.

CDC Techs. v. IDEXX Lab.

United States District Court for the District of Connecticut

March 31, 1998, Decided

CIVIL NO. 3:95cv339(JBA)

Reporter

7 F. Supp. 2d 119 *; 1998 U.S. Dist. LEXIS 15125 **; 1998-2 Trade Cas. (CCH) P72,376

CDC TECHNOLOGIES, INC., Plaintiff, v. IDEXX LABORATORIES, INC., Defendant.

Disposition: **[**1]** Recommended ruling APPROVED and ADOPTED as the ruling of this Court over objection.

Core Terms

Recommended, distributor, anti-competitive, end-users, undisputed evidence, antitrust, customers

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN1[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

15 U.S.C.S. § 15 makes it unlawful to sell goods on the condition, agreement, or understanding that the purchaser shall not use or deal in the goods of a competitor of the seller, where the effect may be to substantially lessen competition, or tend to create a monopoly. Even though a single contract between single traders may fall within the initial broad proscription of the section, it must also have tendency to work a substantial lessening of competition in the relevant competitive market. An exclusive dealing arrangement does not violate the Clayton Act unless the probable performance of the agreement will foreclose competition in a substantial share of the line of commerce affected. Thus, exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are "frozen out" of the market by the exclusive deal. Notwithstanding the Clayton Act's proscription of certain exclusive dealing agreements, such agreements that are narrow in scope pose no threat of adverse economic

consequences, and may be substantially pro-competitive by ensuring stable markets and encouraging long term, mutually advantageous business relationships. Where market competitors may reach ultimate product consumers by using existing, or potential, alternate channels of distribution, an exclusive distributorship agreement may not foreclose competition in the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Governments > Local Governments > Claims By & Against

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN2[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

In ruling on a Clayton Act violation pursuant to *15 U.S.C.S. § 14*, the court focuses on whether the facts submitted by the plaintiff demonstrate any anti-competitive effect on its relationship with end-users in the relevant market.

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

When a distributor does not demonstrate or sell the product to the end-user veterinarian, or otherwise negotiate about the product, and such customers actually buy the product from direct sales forces, an exclusive distributorship arrangement does not translate into evidence of customer foreclosure.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Sherman Act, Claims**

If a claim does not fall within the broader proscription of § 3 of the Clayton Act, *15 U.S.C.S. § 14*, it is also not prohibited by *§ 1* and *§ 2* of the Sherman Act, *15 U.S.C.S. §§ 1*, *2*. Similarly, the elements of *Conn. Gen. Stat. § 35-27* are substantially similar to the elements under *§ 2* of the Sherman Act.

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For IDEXX LABORATORIES, INC., defendant: Richard M. Reynolds, Philip Smith Wellman, Day, Berry & Howard, Hartford, CT.

Judges: Janet Bond Arterton, United States District Judge.

Opinion by: Janet Bond Arterton

Opinion

[*120] RULING ON PLAINTIFF'S OBJECTION TO RECOMMENDED RULING [doc. 73]

In a March 12, 1998 Recommended Ruling, Magistrate Judge Garfinkel recommended that defendant Idexx Laboratories, Inc.'s ("IDEXX") motion for summary judgment be granted because plaintiff failed to demonstrate that IDEXX's exclusive dealing contract at **[**2]** the distributor level impeded plaintiff CDC Technologies, Inc.'s ("CDC") ability to reach the ultimate customers of its instruments used to perform clinic hematology analyses (veterinarians), as required by Section 3 of the Clayton Antitrust Act.

[*121] The Magistrate Judge also recommended summary judgment on CDC's claims under *sections 1* and *2* of the Sherman Antitrust Act, and on CDC's state law antitrust, CUTPA, civil conspiracy and tortious interference claims. CDC objects to the Recommended Ruling on the grounds that the Magistrate Judge erroneously concluded that CDC made an insufficient showing demonstrating a factual dispute that IDEXX's exclusive dealing agreements had an adverse effect on competition in the market for its clinical veterinary hematology instruments, the basis on which the Magistrate Judge recommended dismissal of CDC's federal antitrust claims and related state law claims.

HN1[] Section 3 of the Clayton Act makes it unlawful to sell goods on the condition, agreement, or understanding that the purchaser shall not use or deal in the goods of a competitor of the seller, where the effect may be to substantially lessen competition, or tend to create a monopoly. *15 U.S.C.* ***[**3]*** *§ 14*. "Even though a single contract between single traders may fall within the initial broad proscription of the section, it must also suffer the qualifying disability, tendency to work a substantial--not remote--lessening of competition in the relevant competitive market." *Tampa Electric Company v. Nashville Coal Company, 365 U.S. 320, 333, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*. An exclusive dealing arrangement does not violate the Clayton Act unless the probable performance of the agreement will "foreclose competition in a substantial share of the line of commerce affected." *Id. at 327*. Thus, exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are "frozen out" of the market by the exclusive deal. *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (O'Connor, J., concurring).

Notwithstanding the Clayton Act's proscription of certain exclusive dealing agreements, such agreements that are narrow in scope pose no threat of adverse economic consequences, and indeed, "may be substantially procompetitive by ensuring stable markets and encouraging long term, mutually **[**4]** advantageous business relationships." *Id.; Tampa Electric, 365 U.S. at 334*.

Where market competitors may reach ultimate product consumers by using existing, or potential, alternate channels of distribution, an exclusive distributorship agreement may not foreclose competition in the market. *Omega Environmental, Inc. v. Gilbarco, 127 F.3d 1157, 1163 (9th Cir. 1997)*; *Ryko Manufacturing Co. v. Eden Services,* 823 F.2d 1215, 1235 (8th Cir. 1987). The Magistrate Judge correctly found undisputed evidence on the submitted record that CDC has alternative avenues of reaching its end-users, which when buttressed by undisputed evidence of CDC's increase in sales since defendant entered the market, underscores the absence of evidence for jury determination of an anti-competitive effect from the exclusive arrangements at issue. Where the undisputed evidence shows that CDC continued to reach end-users in the relevant market, absent any other demonstration of anti-competitive effect, IDEXX's 80% share of the clinical hematology instrument market and its foreclosure of 65% of the distributor outlet market, claimed by CDC, are inadequate to support the inference of anti-competitiveness that **[**5]** their magnitude would suggest at first blush. CDC's focus on the impact of the exclusive agreements on "distributor outlets" ignores its failure to demonstrate an anti-competitive effect on the end-users in the relevant market. Inasmuch as the evidentiary showing CDC contends it has made addresses only the impact of the exclusive agreements on distributor outlets, it fails to show any anti-competitive consumer effect.

The Recommended Ruling ***HN2***[] properly focuses on whether the facts submitted by CDC demonstrated any anti-competitive effect on its relationship with end-users in the relevant market. *See* Omega Environmental, Inc., 127 F.3d at 1163 (generally, exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anti-competitive concern); Ryko Manufacturing, 823 F.2d at 1235 (same). *Cf.* Jefferson Parish Hospital, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (dismissing suit by unaffiliated anesthesiologist and finding no antitrust violation in exclusive agreement between **[*122]** hospital and anesthesiologist group providing that only doctors in that group could practice anesthesiology at hospital).

Specifically, the Magistrate Judge **[**6]** considered the undisputed evidence on the role of the distributors in the selling process under the challenged arrangement, namely, providing "qualified leads" only. ***HN3***[] Because the distributor does not demonstrate or sell the product to the end-user veterinarian, or otherwise negotiate about the product, and such customers actually buy the product from direct sales forces, the challenged arrangement does not translate into evidence of customer foreclosure. *See* Omega Environmental, 127 F.3d at 1163 (finding undisputed evidence that direct sales to end-users are an alternative channel of distribution in the market).

The Magistrate Judge relied on undisputed evidence of numerous alternatives on which CDC can, and did, rely to pursue direct sales to the customers, i.e., telemarketing, direct mail campaigns, customer lists, advertising, and participation in trade shows. Further, the Recommended Ruling correctly found no evidence submitted that IDEXX coerced distributors to enter into these exclusive agreements. In fact, it was not disputed that the agreements are limited in duration (one year), as well as have a 60 day terminability clause, during which time the distributor may end the **[**7]** agreement, further underscoring the lack of probative value of the arrangement on the issue of consumer competition foreclosure.

Because CDC has not demonstrated the existence of genuine issues of material facts such that reasonable jurors could find that IDEXX's exclusive dealing agreements substantially lessened competition by impeding CDC's ability to reach the ultimate customers of its hematology instruments, the Court concludes that summary judgment is properly entered for IDEXX on CDC's Clayton Act claim.

Since the Supreme Court has expressly held that ***HN4***[] if a claim does not fall within the broader proscription of section 3 of the Clayton Act it is also not prohibited by sections 1 and 2 of the Sherman Act, IDEXX is entitled to judgment on those claims as well. *See* Tampa Electric, 365 U.S. at 335. Similarly, the elements of Conn. Gen. Stat. § 35-27 are substantially similar to the elements under § 2 of the Sherman Act, and thus fail with CDC's federal claim. *See* Westport Taxi Service v. Westport Transit District, 235 Conn. 1, 15, 664 A.2d 719 (1995) (recognizing that statute was intentionally patterned after federal ***antitrust law*** and is similar to federal law in every **[**8]** respect). The Connecticut Supreme Court also has held that since Conn. Gen. Stat. § 35-29 is patterned after section 3 of the Clayton Act, the elements of the federal cause of action must be used in determining whether a violation of § 35-29 has occurred, State v. Hossan-Maxwell, Inc., 181 Conn. 655, 436 A.2d 284 (1980), and the failure of CDC's federal claim warrants dismissal of its § 35-29 claim. Finally, as to CDC's state law claims for civil conspiracy, tortious interference and CUTPA, the Court accepts the well-reasoned analysis set forth in the Recommended Ruling.

Accordingly, upon review and pursuant to *28 U.S.C. § 636(b)(1)(A)* and Rule 2 of the Local Rules for United States Magistrates (D. Conn. 1995), the recommended ruling is APPROVED and ADOPTED as the ruling of this Court over objection.

IT IS SO ORDERED.

/s/

Janet Bond Arterton

United States District Judge

Dated at New Haven, Connecticut: March 31, 1998.

LITTLE CAESAR ENTERPRISES v. SMITH

United States District Court for the Eastern District of Michigan, Southern Division

March 31, 1998, Decided ; March 31, 1998, Filed

Case No. 93-CV-40520-FL, Case No. 93-CV-40521-FL

Reporter

34 F. Supp. 2d 513 *; 1998 U.S. Dist. LEXIS 9195 **; 1999-2 Trade Cas. (CCH) P72,693

LITTLE CAESAR ENTERPRISES, INC., Plaintiff, vs. GARY G. SMITH, LINDA M. SMITH, BRIAN T. SMITH, AND SMITH FAMILY FOODS, INC., Defendants. GARY G. SMITH, LINDA M. SMITH, BRIAN T. SMITH, SMITH FAMILY FOODS, INC., JOHN W. HENNESSY, DANI L. HENNESSY, PIZZA FARM, INC., SHARON A. FIELDS, LCP OF LENOIR CITY, INC., LCP OF EAST NASHVILLE, INC., LCP OF CHAPMAN SQUARE, INC., AND LCP OF POWELL PLACE, INC., Plaintiffs, vs. LITTLE CAESAR ENTERPRISES, INC., BLUE LINE DISTRIBUTING, INC., AND LITTLE CAESAR NATIONAL ADVERTISING PROGRAM, INC., Defendants.

Subsequent History: [1]** Reported at: *34 F. Supp. 2d 513 at 516*.

Disposition: RECOMMENDED THAT Plaintiffs' Motion Pursuant to *Rule 54(b)* be DENIED.

Core Terms

distributor, alternate, futility, franchisees, antitrust, approve, summary judgment, promoters, requests, tie, new evidence, franchise, remedies, present case, franchisor, documents, suppliers, products, ticket, franchise agreement, tying arrangement, plaintiffs', authors, supplies, internal document, second source, Recommendation, parties, rights, district court

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Contracts Law > ... > Negotiable Instruments > Types of Parties > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Contracts Law > ... > Enforcement > Duties & Liabilities of Parties > General Overview

HN1[] **Relief From Judgments, Altering & Amending Judgments**

According to *Fed. R. Civ. P. 54(b)*, when multiple claims for relief are presented the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties if the court determines that there is no just reason for delay. The Rule notes in addition that in the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN2[] **Relief From Judgments, Altering & Amending Judgments**

Under Local Rule 7.1(h)(3), the movant shall not only demonstrate a palpable defect by which the court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN3[] **Relief From Judgments, Altering & Amending Judgments**

The major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

HN4[] **Relief From Judgments, Altering & Amending Judgments**

On a renewed motion for summary judgment before a second judge, the district court must balance the need for finality against the forcefulness of any new evidence and the demands of justice. With respect to a non-appealable denial of summary judgment, the law of the case is not a limit on the court's jurisdiction, but a rule of practice which may be departed from in the sound discretion of the district court.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN5[] **Relief From Judgments, Altering & Amending Judgments**

A reviewing court need not decide whether the new evidence considered by the district court meets some threshold test of sufficiency. The district court does not have to rely on new evidence; if the demands of justice require, it may simply change its mind.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The prima facie elements of a per se tie-in claim are: 1. there must be a tying arrangement between two distinct products; 2. the seller must have sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and 3. the amount of commerce affected must not be insubstantial.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN7[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In the absence of an express or admitted tie, there must be some independent proof of "forcing" or "coercion" in order to demonstrate a tie.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > General Overview

HN8[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In a setting where a franchisee can only obtain necessary goods to operate the franchise from a distributor approved by the franchisor, the question of whether there is an illegal tie within the meaning of prima facie element number 1 on the per se prohibition against tying can be proven in four distinct ways: 1. the tying arrangement is expressed in some written contract instrument; 2. the defendant admits that there is a tying arrangement; 3. the franchisee requested an alternate distributor, which alternate distributor is wrongfully denied approval for reasons motivated by an intent to restrain competition; or 4. The approval process can be demonstrated to be futile, including use of internal documents of the defendant, possibly obtained only after discovery in the litigation, and a. the franchisee did not apply for an alternate distributor because of the knowledge that the time and effort would be futile, or b. the futility could be demonstrated by sufficient evidence of other denials of other franchisees' requests for alternate distributors even if the individual plaintiff did not make a request for an alternate distributor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN9[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tie should not be deemed to arise when the defendant announces quality standards under which he stands ready to approve, without profit to himself, as many qualified suppliers as wish to provide the tied product, although he has not yet approved many or any. To be sure, a tie-in exists if the willingness to approve others is merely a charade. Normally, however, the expressed willingness to approve all comers meeting a standard will suffice absent such contrary evidence as internal records indicating that the defendant would not have approved others, or the defendant's unjustified denial of requests to approve disinterested suppliers, or other conduct leading reasonable buyers to understand the defendant was unwilling to approve such requests.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

One recurring issue is whether any tying condition may fairly be found when buyers took the package without requesting separate provision. The answer is affirmative when such a request would be futile. The courts typically demand that futility be proved with evidence of what has occurred in the marketplace. They do not ask whether futility may fairly be presumed when the tribunal knows of the defendant's silent tying condition even though buyers did not.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN11[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Evidence that requests for separate provision are futile include defendant's announced policy that he will not sell product A separately, rebuffed requests, refusals to sell or continue selling to those who do that his product B, putting two products in one box, or any similar conduct creating a reasonable impression of such a policy. For convenience in administering the antitrust laws, moreover, one can infer futility from defendant's internal documents or admissions known to the tribunal, though not to customers, that defendant would not sell A separately.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

HN12[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The "coercion" or "forcing" that the prohibition on tying is concerned with are seller abuses of power to restrain buyer choices as to product B. It is sustainable abuse of market power that concerns antitrust. Antitrust remedies generally should not be available as the initial recourse where simple market remedies exist and are unexhausted.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

There is no failure of the market if contract protections are available to franchisees to seek a second source of products needed to operate a franchise.

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Judges: STEVEN D. PEPE, UNITED STATES MAGISTRATE JUDGE. HONORABLE PAUL V. GADOLA.

Opinion by: STEVEN D. PEPE

Opinion

[*516] REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION TO AMEND THIS COURT'S AUGUST 7, 1995, ORDER

Plaintiffs have filed a motion under *Fed. R. Civ. P. 54(b)* to amend the August 7, 1995, order of this Court granting partial summary judgment **[**2]** on the tying claims of plaintiffs Hennessy and Fields. [1] In its August 7, 1995, opinion this Court denied nationwide class certification for franchisees who held pre-1990 Franchise Agreements, as did plaintiffs Hennessy and Fields. The Court also granted summary judgment on the tying claims of plaintiffs Hennessy and Fields because they did not exercise their contract rights to request an alternate distributor to Blue Line Distributing, Inc. ("Blue Line"), and because they could not prove that they did not make such a request because they knew it would be futile to do so. Thus, in the absence of an express tying arrangement (or a defendant's admission) plaintiffs Hennessy and Fields could not prove that they were "forced" or "coerced" to buy all goods from Blue Line as those terms are used in the antitrust cases to show that there was an illegal tie. *Little Caesar Enterprises, Inc. v. Smith, 895 F. Supp. 884, 894-96 (E.D.Mich. 1995)*.

[3]** Plaintiffs bring this motion asserting that since the August 7, 1995, ruling they have uncovered significant new evidence, and other courts, including the Sixth Circuit, have clarified the law concerning tying claims. They note that much of this new evidence was examined in the Court's certification of a class involving Little Caesar franchisees who signed post-mid-1990 Franchise Agreements. *Little Caesar Enter., Inc. v. Smith, 172 F.R.D. 236 (E.D.Mich. 1997)*. Plaintiffs also assert that the Court did not expressly address the plaintiffs' claim of fraudulent concealment of the 1989 Exclusive Licensing Agreement between Little Caesar and Blue Line in its earlier opinion.

The factual background as well as a substantial summary of plaintiffs' evidence, including the newly discovered evidence, is set out in detail in Section V.A, B and C of my March 31, 1998, Report and Recommendation on Defendant's Motion for Partial Summary Judgment (hereinafter "March 1998 Summary Judgment Report"). These facts and the background and procedural facts in that opinion are incorporated here by reference.

I. PROCEDURAL BACKGROUND:

HN1[] According to *Fed. R. Civ. P. 54(b)*, when multiple claims for **[**4]** relief are presented "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" if the Court determines that there is no just reason for delay. The Rule notes in addition:

> In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In effect, *Rule 54* reserves for the court the power to revise any interim judgments prior to the direction of the entry of final judgment. While the Court has the **[*517]** power to modify its non-final judgments, plaintiffs' motion seeking to trigger this power is, in effect, a motion to amend or alter a judgment or for reconsideration. ***HN2***[] Under our Local Rule 7.1(h)(3):

> The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that **[**5]** a different disposition of the case must result from a correction thereof.

---

[1] This case is consolidated. Because Fields and Hennessy were co-plaintiffs of Gary Smith in Case No. 93-CV-40521 against LCE, this Report and Recommendation refers to LCE as the defendant. Plaintiffs' claims were initially brought against three defendants, LCE, Blue Line Distributing, Inc., and Little Caesar National Advertising Program, Inc. ("LCNAP"). This Court has granted summary judgment on all claims involving LCNAP. After this suit was filed, LCE merged with Blue Line. Thus, LCE is the sole remaining defendant.

Cale v. Johnson, 861 F.2d 943, 947 (6th Cir. 1988), cites from 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure §* 4478 pp. 790-95 (1981):

> **HN3**[] The major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

This section also notes concern when one judge is reexamining an opinion of another judge that there are concerns both of "an undesirable denial of comity between colleagues" and also "unfettered reexamination would unduly encourage efforts to shop around from one judge to another." *Id.* at 795 (footnotes omitted).

Judge Learned Hand in *Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131, 134* (2d Cir.), *cert dismissed, 352 U.S. 883 (1956)*, considered both the factors of "mutual respect between members of the same court," and concerns that "the defeated party might shop around in hopes of finding a judge more favorably disposed." Judge Hand concluded:

> The first reason is clearly untenable: judicial sensibilities **[**6]** should play no part in the disposition of suitors' rights. The second reason has indeed much to recommend it, and, as a matter of practice, has been universally regarded a sufficient reason for treating the first ruling as conclusive. It is, however, quite another question whether under all circumstances it makes the first ruling immune from reconsideration.

Id. at 134-35. The Sixth Circuit in *Cale* cited *Corporacion De Mercadeo Agricola v. Mellon Bank International, 608 F.2d 43, 48 (2d Cir. 1997)*, noting:

> We held that **HN4**[] on a renewed motion for summary judgment before a second judge, the district court must balance the need for finality against the forcefulness of any new evidence and the demands of justice. With respect to a non-appealable denial of summary judgment [such as in the present case where the denial is not yet appealable], the law of the case is not a limit on the court's jurisdiction, but a rule of practice which may be departed from in the sound discretion of the district court.

In considering the challenge of the appellant in *Cale,* the appellant asserted that the new evidence, which was only an affidavit of the defendant, was insufficient. **[**7]** The Sixth Circuit noted:

> **HN5**[] We need not decide whether the new evidence considered by the district court meets some threshold test of sufficiency . . . . The district court does not have to rely on new evidence; if the demands of justice require, it may simply change its mind.

861 F.2d at 948.

II. THE PRIOR SUBSTANTIVE RULING:

As this Court has noted in its earlier summary judgment opinion **HN6**[] the *prima facie* elements of a *per se* tie-in claim are:

> 1. there must be a tying arrangement between two distinct products;
>
> 2. the seller must have sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and
>
> 3. the amount of commerce affected must not be insubstantial.

Little Caesar Enter., Inc. v. Smith, 895 F. Supp. 884, 894 (E.D.Mich. 1995).

This case does not involve express contractual language that directly, or by necessary implication, binds the purchaser to buying the tied product in order to obtain the tying product. Nor does it involve the absence an admission of a tie by the defendant. Thus the Court in its earlier opinion was considering the issue of whether there was other suitable **[**8]** evidence to fulfill *prima facie* element # 1 to show that there was a tying arrangement between **[*518]** two products within the meaning of the *per se* tying rule. ***HN7***[] in the absence of an express or admitted tie, the case law has demonstrated there must be some independent proof of "forcing" or "coercion" in order to demonstrate a tie.

In the Court's earlier opinion, it ruled against plaintiffs Hennessy and Fields because of their inability to show either: (1) that they objected to Blue Line as a distributor by requesting approval of an alternate distributor; or (2) that they were aware that the approval process was futile, thus excusing their need to exercise their contractual rights to request an alternate distributor to Blue Line. The Court noted that prior to Smith's April 1992 request for AmeriServ to be an alternate distributor, which denial plaintiff Smith contends was wrongful, his earlier 1988 efforts to seek an alternate distributor along with franchisees was not pursued because "after a series of meetings, Smith's concerns were addressed and he decided to stay with Blue Line. *Id. at 895* With respect to Fields and Hennessy, the Court noted that Hennessy never sought an alternate **[**9]** distributor. Nor did Fields, and she "was only aware of the single rejection of AmeriServ as an alternate distributor for Smith." *Id. at 895-96*. The Court concluded:

> As to plaintiffs Hennessy and Fields, however, the court will grant Little Caesar's motion for summary judgment on the tying claim as to these two plaintiffs. Within the applicable time period, neither one requested approval of an independent distributor or were subject to an explicit contractual tie-in as part of the franchise agreements by which they were bound. Furthermore, these plaintiffs cannot show that had they made a request for an alternate distributor, it would have been futile. As a result, there is no indication that either Fields or Hennessy was forced to continue purchasing supplies through Little Caesar/Blue Line.

Id. at 896.

HN8[] In a setting where the franchisee can only obtain necessary goods to operate the franchise from a distributor "approved" by the franchisor, the question of whether there is an illegal tie within the meaning of *prima facie* element # 1 on the *per se* prohibition against tying can be proven in four distinct ways:

> 1. the tying arrangement is expressed **[**10]** in some written contract instrument;
> 2. the defendant admits that there is a tying arrangement;
> 3. the franchisee requested an alternate distributor, which alternate distributor is wrongfully denied approval for reasons motivated by an intent to restrain competition; [2]

---

[2] If a franchisor has a legitimate business justification for denying a franchisee's request for an alternate distributor, the mere fact that the franchisor may also have a secondary desire not to face competition does not involve a violation of the antitrust laws. In other words, if the defendant can demonstrate that they would have denied the request for an alternate distributor even in the absence of the fact that this would reduce the competition they would face, the denial would be justified and no ***antitrust law*** violated. Obviously a jury could determine either (1) that the business justification was a pretext, or alternatively (2) the business justification, while of some degree of legitimacy, would not have been sufficient to warrant the denial in the absence of the defendant's desire to restrain competition. *Cf.* *Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977)* (in a constitutional context, once a plaintiff has established a *prima facie* case that the defendant's action was taken against him in retaliation for the exercise of a constitutional right, the burden shifts to the defendant to show by a preponderance that he would have taken the same action even if the plaintiff had not engaged in the constitutionally protected action.) While this is not the central issue of this motion, and I am unaware of any specific antitrust case law on this precise point, the policy considerations lying behind the *Mount Healthy* case are consistent with and applicable to the policy considerations in ***antitrust law*** in precluding a franchisor from using otherwise legitimate reasons for denying an alternate distributor as a cover for a denial that is actually motivated by a desire to restrain competition. Courts in the constitutional context have made it clear that an act in retaliation for the exercise of a constitutionally protected right is actionable under *42 U.S.C. § 1983* even if the act, when taken for different reasons, would have been proper. *Franco v. Kelly, 854 F.2d 584, 590 (2d Cir. 1988)*; *Howland v. Kilquist, 833 F.2d 639, 644 (7th Cir. 1987)*; *Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986)* *(per curiam).* Similar analysis has been made in the antitrust context. *See* *Schine Chain Theatres v. United States, 334 U.S. 110,*

[*519] 4. The approval process can be demonstrated to be futile, including use of internal documents of the defendant (possibly obtained only after discovery in the litigation); and

a. the franchisee did not apply for an alternate distributor because of the knowledge that the time and effort would be futile, or

b. the futility could be demonstrated by sufficient evidence of other denials of other franchisees' requests for alternate distributors even if the individual plaintiff did not make a request for an alternate distributor.

[11]** III. PLAINTIFFS' ASSERTIONS:

Plaintiffs in their motion argue that PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811 (6th Cir.), *cert. denied, 138 L. Ed. 2d 195, 117 S. Ct. 2434 (1997)*, indicated that when a defendant conceals from a customer at the time of purchase a policy of tying two products together or a change in policy, in such cases that the tie could be found to violate § 1 of the Sherman Act. Plaintiffs are correct that in the present case if LCE failed to disclose its policy of refusing to approve alternate distributors at the time when Fields and Hennessy signed franchise agreements giving them contractual rights to seek an alternate distributor, and then, after Fields and Hennessy purchased their franchises and became "locked in" LCE implemented its policy of refusing to approve an alternate distributor request, plaintiffs Fields and Hennessy could assert a *Kodak*-type market for the tying product. Yet, for reasons stated in my Report and Recommendation on LCE's motion for partial summary judgment, the *Kodak/PSI* analysis deals with the second *prima facie* element of a *per se* tie-in claim. The Court's August 7, 1995, opinion dealt **[**12]** with the first *prima facie* element of a tying claim -- was there a forced tie between the continuing operation of a Little Caesar franchise and the purchase from Blue Line of all goods necessary to operate such a franchise?

IV. PROOF OF FUTILITY:

As noted by Professors Areeda, Hovenkamp and Elhauge in their antitrust treatise:

> ***HN9***[] Nor should a tie be deemed to arise when the defendant announces quality standards under which he stands ready to approve, without profit to himself, as many qualified suppliers as wish to provide the tied product, although he has not yet approved many or any. To be sure, a tie-in exists if the willingness to approve others is merely a charade. Normally, however, the expressed willingness to approve all comers meeting a standard will suffice absent such contrary evidence as internal records indicating that the defendant would not have approved others, or the defendant's unjustified denial of requests to approve disinterested suppliers, or other conduct leading reasonable buyers to understand the defendant was unwilling to approve such requests.

X AREEDA, HOVENKAMP AND ELHAUGE, ***ANTITRUST LAW*** (1990), P 1753g, at 299-300 (emphasis supplied, **[**13]** footnotes omitted).

Later the Areeda authors add:

> ***HN10***[] One recurring issue is whether any tying condition may fairly be found when buyers took the package without requesting separate provision. The answer is affirmative when such a request would be futile. The courts have typically demanded that futility be proved with evidence of what has occurred in the marketplace. They have not asked whether futility may fairly be presumed when the tribunal knows of the defendant's silent tying condition even though buyers did not. We would so presume on the ground that forcing the parties to litigate and the tribunal to resolve the futility issue seems wasteful when we can take the defendant's own word that such a request would have been futile.

Id. at P 19,556, p. 312 (emphasis supplied).

[*520] In examining how futility is proven, the authors state:

119, 92 L. Ed. 1245, 68 S. Ct. 947 (1948) ("Even an other otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce.")

> *HN11*[] Evidence that requests for separate provision are futile include defendant's announced policy that he will not sell product *A* separately, rebuffed requests, refusals to sell or continue selling to those who do that his product *B,* putting two products in one box, or any similar conduct creating a reasonable impression of **[**14]** such a policy. For convenience in administering the antitrust laws, moreover, we would infer futility from defendant's internal documents or admissions known to the tribunal -- though not to customers -- that defendant would not sell *A* separately.

Id. at P 1756e, p. 325.

In the present case, there are no announced statements by LCE that it would not approve alternative distributors. There were only two refusals during the limitations period, one by AmeriServ in the southeastern United States (and possibly nationwide) and one by Chopping Block in Wisconsin. Plaintiffs have only challenged the defendant's reasons for denying the AmeriServ application. They have not challenged the business justification for LCE's denial of Chopping Block that it did not intend to carry a full line of products needed by Little Caesar franchisees.

Before considering plaintiffs' new evidence, it is helpful to review the cases the Areeda treatise cites on proof of futility in seeking seller approvals. This will set a context for determining whether the new evidence in light of the existing evidence and or a fuller understanding the of law warrant a modification of this Court's earlier determination **[**15]** to correct clear error or prevent manifest injustice.

In support of its proposition that a tie can exist where the willingness to approve other suppliers is a "charade," the Areeda authors cite *Tic-X-Press, Inc. v. Omni Promotions Co. of Ga., 815 F.2d 1407 (11th Cir. 1987)*; *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705 (11th Cir. 1984)*; *Advance Business Systems and Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969)*, *cert. denied, 397 U.S. 920, 25 L. Ed. 2d 101, 90 S. Ct. 928 (1970)*.

In *Tic-X-Press,* Atlanta Coliseum, Inc. ("ACI"), Omni Promotions Company, Limited ("TOPCOL" also "PROMOTIONS") had rights to lease the uniquely large Omni Coliseum for large concerts with audiences of 4,000 to 16,000. ACI, TOPCOL and SEATS were owned by a common entity and functioned as a single enterprise. In renting the Omni Coliseum, TOPCOL used a form agreement requiring tickets to be sold by PROMOTIONS ("TOPCOL") "or at other ticket agencies approved by PROMOTION . . ." *815 F.2d at 1412*. This was the "approved source" provision. PROMOTIONS did its ticket sales through SEATS. Defendants had no "written specifications on procedures for approving other ticketing services." **[**16]** *Id.* Plaintiff, Tic-X-Press, Inc. ("TXP"), had unsuccessfully requested on a number of occasions to sell some or all tickets to Omni concerts. TXP and SEATS were the only two ticket companies in Atlanta selling at multiple locations throughout the area. In *Tic-X-Press,* no promoter of a concert at the Omni had ever requested approval of another ticketing agency other than SEATS, and no one had requested TXP to see if the defendant would approve them. One promoter, Jim Veal, indicated he would have used TXP if they had been approved. *815 F.2d at 1416*.

The Eleventh Circuit rejected defendants' contention that proof of coercion in this case required proof that at least some of the promoters had requested permission to have TXP do their ticketing in the Omni. in reaching its decision, the Circuit opinion noted:

> In this case, the court found other facts tending to show that the use of SEATS was not voluntary, at least as to Jim Veal. More specifically, it found that promoters did not attempt to use other ticketing agencies because they understood through years of dealing with [TOPCOL] and using the Agreement that they were required to use SEATS.

Id. at 1418-19. **[**17]**

> * * *
>
> Furthermore, it also found that the appellants had never approved another ticket agency and that they had never established written standards and procedures **[*521]** for approving other agencies. *Cf. Kentucky Fried Chicken, supra,* 549 F.2d [368] at 378 (approval clause reasonable where seller had already approved 10 suppliers and had never refused a request for approval). Given these findings, it is reasonable to conclude that

> the approval clause was somewhat bogus under the circumstances present in this case and that promoters did not have meaningful freedom of choice in the tied market.

815 F.2d at 1417. [3] The Court acknowledged that the subjective perception of the buyer standing alone could not be enough to support a finding of liability. Yet, there were "several other factors" including "the language of the Producer's Agreement that sustained the lower court's finding."

[18]** In the present case, plaintiffs are not relying on subjective understanding, but rather other evidence to show that the alternate supplier clause was a bogus provision during the relevant time periods. In *Tic-X-Press,* the lower court had found the promoters, from years of dealings, understood that they were required to use SEATS when they promoted an event at the Omni. Thus, *Tic-X-Press* involved an "understood condition" as that term is defined in the Areeda treatise at P 1754c; *see Little Caesar Enterprises, Inc. v. Smith, 172 F.R.D. 236, 256 (E.D.Mi. 1996)*. The present case involves no apparent evidence of an understood condition. While plaintiffs' counsel argues now, in part from internal documents, that the "second source" provisions of Section VII of the Franchise Agreement were bogus and application for an alternate distributor would be futile, neither plaintiff asserts his or her understanding that seeking an alternate distributor was futile.

The Areeda authors also cite *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705 (11th Cir. 1984)*, in support of their contention that an approved source clause can be a "charade." In that case the franchisor, **[**19]** Waffle House, Inc., required its franchisees to purchase equipment from approved sources. At the time, the only approved source for its restaurant was The Hickman Company, and its only approved source for vending machines was Metro Distributors, Inc. *Id. at 710, 712*. Waffle House had financial interests in both of these companies. While not resolving the issue, the Eleventh Circuit notes that:

> Defendants contend that plaintiffs never sought to purchase equipment or obtain vending services from sources other than The Hickman Company and Metro Distributors, Inc. Plaintiffs' position is that to have done so would have been futile because they had been told that no other sources would be approved. Each of these contentions presents disputes of fact. Unless plaintiffs can prove they were coerced into purchasing equipment and vending services from The Hickman Company and Metro Distributor, Inc., their claim that illegal ties existed will fail.

Id. at 712. The Court does not discuss what evidence would be sufficient in order for the plaintiffs in this case to demonstrate that a request for an alternate source of equipment would be futile. While not clear from the opinion, **[**20]** it suggests that plaintiffs "had been told [by defendant] that no other sources would be approved." The present case involves no similar facts by agents or employees of LCE or Blue Line to prove futility.

The final case cited by the AREEDA authors on the "approved source/charade" issue is *Advance Business Systems and Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969)*, *cert. denied, 397 U.S. 920, 25 L. Ed. 2d 101, 90 S. Ct. 928 (1970)*. SCM sold extended warranties with various of its machines. The warranty agreement noted that the SCM copying machines were designed to give excellent performance when used with SCM photocopy supplies. Its warranty stated that:

> SCM reserves the right to suspend this agreement as to any machines in which other suppliers' paper or other supplies **[*522]** have been used. Agreement shall not apply to any repairs made necessary by the use in SCM

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[3] The court also rejected the fact that several promoters would have used SEATS regardless, noting that the tying

> arrangement prevented them from making that choice freely. We reiterate that the principal evil of tie-ins is that they foreclose competition *on the merits* in the tied market.

Id. at 1417,

> photocopy machines dispersant, replenisher, electrostatic copy paper or other photocopy supplies made by other than SCM and not approved by SCM for use in SCM equipment.

415 F.2d at 65. It was found that SCM never approved any competitive paper for use in its machine even though they knew that Nashua **[**21]** paper was "safe and as effective as SCM paper for such use." *Id.* This *pre-Fortner II* and *pre-Kodak* case upheld the lower court finding "that the competitive supplies clauses in the service contracts gave rise to a *per se* violation of the Sherman Act . . ." Id. at 65. [4]

[22]** The Areeda authors also cite Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 722 (7th Cir. 1979), as a case "implying that evidence that requests for approval were unreasonably denied would have sufficed to show a tie." AREEDA, ET AL., p. 300 n.47. The *Photovest* case actually held that because four of the Photovest franchises were permitted to purchase processing from alternate

Fotomat-approved sources, the tying arrangement was not established sufficiently.

> Photovest did not show that Fotomat unreasonably withheld approval. Indeed, it appears that Photovest never submitted a processor to Fotomat for approval during this time period. Photovest contends that the tie was nevertheless sufficiently established because Fotomat did not provide a list of approved processors. This does not in our opinion establish the requisite condition for illegal tying. Given the contractual language, which at least provides for the possibility of purchasing processing from non-Fotomat sources, we are reluctant to find a tying arrangement without some evidence that Fotomat applied the contract language so restrictively as to constitute a de facto tying clause.

606 F.2d at 722. **[**23]** [5]

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[4] This *SCM* case also found a tie-in between the paper and the rental agreements of the SCM photocopying machines. While there was no express tie, the rental agreements acknowledge that "supplies which may cause damage or deterioration will not be used in the machines." 415 F.2d at 63. The lower court found a pattern of conduct by the SCM representatives "to threaten the cancellation of rental agreements with customers who used competitive supplies in their SCM machines[,]" and SCM representatives specifically misinformed customers that "the use of Nashua supplies would cause service calls and interrupt the continuous operation of their SCM machines[,]" and defendants did this to induce rental customers to stop dealing with the plaintiff who sold Nashua paper. Id. at 63 and 64. The contract noted "SCM reserves the right to suspend this agreement as to any machines in which other suppliers' paper or other supplies have been used." Id. at 65. This has later been referred to as the "tying by lying" theory.

In SCM, the misstatement of fact about Nashua paper coupled with the threat that the machines could break down and the service contracts could be voided induced people to purchase SCM paper, and thus this was causally linked to the establishment of the tie-in. In the present case, if, as plaintiffs assert, defendant's contractual agreement to approve alternate distributors was a misrepresentation, this representation that they would approve alternate sources did not "cause" any tie-in of the use of Blue Line. In *SCM,* the buyers relying on the representation of the defendant would be induced to buy the defendant's paper. In the present case, any franchisee relying on the representation of the defendant would be induced to believing they could seek an alternate source of goods other than Blue Line. Thus, even if plaintiffs are correct in their contention that the second source provision of the franchise agreement was a "charade," this does not result in "tying by lying" because relying on this representation did not cause the tie. At most, relying on this representation may have caused the franchisee to sign a franchise agreement and become locked in. This lock-in issue, however, may possibly relate to market power but this misrepresentation does not directly implicate the question of whether there is a tie. In the present case, if there is a tie because the second source provision of the contract is a charade, the tie is not caused by the second source provision in the Franchise Agreement and representation by the defendant, but rather by the defendant's allegedly wrongful refusal to honor it.

[5] In the *Photovest* case, for a period prior to the June 1971 *Chicken Delight* case, 12 of the 16 franchisees had signed agreements that required them to buy processing from Fotomat. Thus, there was an express tie in the tying contract. Four of the Photovest franchisees did not have such restrictive language in their contract but rather were permitted to obtain processing from Fotomat-approved sources. The Seventh Circuit ruled against the plaintiff with respect to these franchisees because plaintiff never attempted to exercise their contract rights and thus could not prove wrongful refusals to constitute a *de facto* tie-in.

In the present case, there are not the proofs of futility available in *Tic-X-Press,* **[*523]** *Midwest Waffles,* or *Advanced Business Systems.* There is no evidence of an understood condition as in *Tic-X-Press.* There is no defendant's statement that "no other sources would be approved" as apparently occurred in *Waffle House,* and there is no evidence of failing to approve **[**24]** a closely qualified alternate source as there was in *Advance Business Systems* where SCM refused to authorize use of Nashua paper even though they knew it was of suitable quality.

The case of Fields and Hennessy is closer to that of the four Photovest franchisees who could seek an alternate source for having their film processed other than by franchisor, Fotomat, but failed to do so. The Seventh Circuit found that these plaintiffs failed to demonstrate a tying arrangement because they could not prove futility.

V. PLAINTIFFS FIELDS' AND HENNESSY'S NEW EVIDENCE:

Two of the new documents discovered since the Court's earlier ruling are evidence that LCE intended to use its exclusive rights over logoed goods to make Blue Line the exclusive source of those goods and this was done "to more effectively posture Blue Line vis-a-vis its competition." David Deal's March 1989 Memo to LCE Board Member Jay Bielfield. Ex.3, Perry April 1997 Declaration, noted in the March 1998 Summary Judgment Report at 66.

The second newly discovered document was in a November 12, 1991, memo from David Deal to David Kushner, he notes:

> The original intent of the agreement was to provide an exclusive **[**25]** arrangement for Blue Line to distribute paper products and other supplies to Little Caesar restaurants so that Little Caesar would be able to exclude third parties from these offerings. It was not contemplated at that time to put in place an even broader agreement to involve products that do not ultimately find their way to the customer, such as uniforms, signage, etc. Plaintiff's Exh. 21.

Lockridge August 1995 Declaration, Ex. 21, March 1998 Summary Judgment Report at 66-67.

These new documents reinforce other earlier discovered documents from which a jury could find that LCE intended to use its control over its logoed goods to require that franchisees buy them from its subsidiary Blue Line. The undisclosed 1989 Exclusive Licensing Agreement is further evidence of this intent. A jury could also find that during the relevant statute of limitations period for this litigation, LCE intended to deny access to logoed goods to any alternate distributor who might compete with Blue Line knowing the lack of logoed goods would make it more difficult for rivals to compete with Blue Line. Yet, for reasons stated in the March 1998 Summary Judgment Report, there is not sufficient evidence **[**26]** in the record that during the limitations period LCE ever actually had to implement this covert policy. Thus, these two documents and the covert 1989 Licensing Agreement are not directly relevant to Fields' and Hennessy's claim that seeking an alternate distributor would be futile. The discovery of additional evidence of this LCE plan, including the 1989 Exclusive Licensing Agreement, also had no effect on the statute of limitations period because there is no evidence that LCE during the limitations period acted on this policy and used it to exclude an existing rival distributor or to prevent entry of any such rival.

The critical evidence relevant to Fields' and Hennessy's motion is whether any new documents were discovered that indicated a plan or intention of LCE to deny all applications for an alternate distributor. One of the new documents does deal with this issue. Plaintiffs have discovered a November 26, 1991, internal memorandum from Matt Ilitch to Al Thompson regarding franchisee Chuck Walls' request for an alternate distributor in the Madison, Wisconsin, area which notes:

> There is no formal approval process for outside food and paper distributors where there is an **[**27]** existing Blue Line distribution center in the market area.
>
> * * *
>
> In any event, Blue Line will not reveal to any distributor, information about Little Caesar products and how to get them without first establishing that Blue Line has **[*524]** not fulfilled both pricing and service obligations.

Ex, 4 Lockridge December 1996 Declaration, noted in the March 1998 Summary Judgment Report at 74-75. This document suggests that Blue Line would not cooperate in the approval process of an alternate distributor if a Blue Line warehouse was servicing the Little Caesar franchisees in that area.

The other document of which this Court was aware in August 1996, was a follow-up July 31, 1991, letter from Matt Ilitch to Kathy Campbell of LCE's Associate Distributor Leprino Foods in California. Matt Ilitch wrote her an official letter informing her that Blue Line would begin distribution operations in California and Nevada from a warehouse in Stockton, California, by mid-September 1991. He added:

> Please know that Leprino Foods did not fail as our associate distributor. Rather, it is part of the Little Caesar master plan to control distribution of Little Caesar brand products through its Blue **[**28]** Line distribution division. In fact, of all of our past and present associate distributors, Leprino Foods' reputation is at the top.

Lockridge August 1995, Declaration, Ex. 7, noted in the March 1998 Summary Judgment Report at 73.

The Matthew Ilitch 1991 memo to Al Thompson and his 1991 letter to Kathy Campbell are the only "internal" documents allegedly indicating a LCE policy not to approve alternative distributors. Taking defendant's word from internal documents that defendant would not approve qualified distributors would suffice for the Areeda authors to prove futility. Yet, the internal documents must clearly express company policy. These two documents are not the clear internal documents of a policy not to approve an alternate source that I believe the Areeda authors had in mind in the above quoted sections of their treatise. These two documents coupled with the denial of AmeriServ and Chopping Block are not sufficient evidence from which a jury could determine "futility" in the absence of more denied requests for approval or other evidence of futility. This would be the case even in the absence of the 1995 approvals of three alternate distributors.

HN12[] The "coercion" **[**29]** or "forcing" that the prohibition on tying is concerned with are seller abuses of power to restrain buyer choices as to product *B* -- here the goods needed to operate a Little Caesar franchise. It is sustainable abuse of market power that concerns antitrust. Antitrust remedies generally should not be available as the initial recourse where simple market remedies exist and are unexhausted.

HN13[] There is no failure of the market if contract protections are available to franchisees to seek a second source of products needed to operate a franchise. The second source language in Section VII of the Little Caesar Franchise Agreement is a contract safeguard (like fixed pricing, a pricing formula or most favored customer clauses) that a prudent franchisee would seek to protect against franchisor opportunism.

LCE can exercise sustainable power in the aftermarket for goods needed to operate a Little Caesar franchise (product *B)* only if it could continue to exclude competition. The rejection of AmeriServ, [6] even if wrongful, would not result in sustainable exclusion of other distributors from the market unless that rejection caused all other franchisees and possible distributors to give up **[**30]** hopes of applying to be an alternate distributor. Without more proofs than presently available, plaintiffs Fields and Hennessy do not have proof that the AmeriServ rejection caused this result.

The rejection of AmeriServ's application to be an alternative distributor did not alone cause the *sustained* market failure. The reluctance of other franchisees or alternative distributor to seek approval to compete with Blue Line contributed to this result. Unlike the plaintiffs in *Tic-X-Press, Advance Business Systems, Jefferson Parish, Kodak,* and *PSI,* who had no contract rights to counter the defendant's alleged abuse of power, here **[*525]** each franchisee individually and multiple franchisees collectively had legal entitlements in their Franchise Agreement to attempt to avoid precisely the type of franchisor opportunism of which they now accuse LCE. They knew the monopoly of Blue Line and chose **[**31]** not to challenge it by seeking alternative distributors individually or collectively. If these franchisees with available contract remedies were not sufficiently dissatisfied to challenge LCE with their contract tools the LCE Franchise Agreement gave them, courts should be reluctant to cobble up "antitrust remedies" for them. This is not to say that antitrust remedies should not be available to wronged franchisees, but

[6] In the present case, there is really only one contested denial during the limitations period, that of AmeriServ.

only that in the absence of a clearer showing of futility than exists in this case, they should not be too readily available.

If a single denial of approval of an alternate source coupled with two internal documents from a single author that suggest a tie will turn a wrongful denial contract case into an treble damages antitrust case for any other franchisee, possibly involving a nationwide class, there are significant social costs. Courts will face an increase in complex litigation. Litigants will incur substantial transaction costs. The risk of erroneous court determinations will increase because tolerating such limited evidence as sufficient will undermine the accuracy of jury determinations. Franchisors will become overly cautious and circumspect that a single, **[**32]** good faith, erroneous decision (or even one that is in the realm of reasonable business judgment but that is second-guessed and found wanting by a jury) could lead to crushing liability. While at some threshold of wrongdoing antitrust remedies should supplement or supplant contract remedies, antitrust laws should not be available unless there are intended anticompetitive activities that involve sustained abuses of power in the market.

While futility can be demonstrated in certain circumstances without each individual plaintiff having applied for an alternate approved source, it should not excuse seeking to exercise express contract rights in the absence of a number of failed attempts by other franchisees to obtain approval. A franchisee who has not asserted his or her legal power under a contract for a second approved source does not have any contract remedies, because in the absence of a demand there can be no breach. In certain circumstances with clearer proofs of futility than exist in this case, such a franchisee should have an antitrust remedy without individually having to have sought to exercise their contract rights. Yet, short of a clearer showing of futility than exists **[**33]** here, such a franchisee should not have available antitrust remedies where he or she would have no contract remedy.

If ***antitrust law*** against tying arrangements is concerned with sustainable abuses of power restraining buyer choice, it is not too much to ask that before invoking antitrust remedies the plaintiff has sought to exercise the legal power readily available to attempt to counter the allegedly abusive power of the defendant. This is not to say that a plaintiff must file a breach of contract law suit before asserting an antitrust claim. But it is reasonable to ask a franchisee who has express contract rights to a second source to at least make a formal request under the franchise agreement if the franchisee cannot show with clear proof that such a request would be futile.

The reality is that a franchisor may through courage or uninformed folly deny one or two requests for a second source, but may relent, with or without legal advice, in the face of a number of second source requests. Each successive denial of a second source increases the franchisor's exposure to an antitrust remedy and each successive denial increases the likelihood that such a lawsuit may succeed. This reality **[**34]** may reverse minor abuses of power without resort to complex litigation. When the abuse of power is more unrelenting, then antitrust remedies are available with increased chances of success and lesser risks of harmful social costs. To require a higher standard of proof of futility than Fields and Hennessy have shown is not a license to franchisors to abuse their power under approved source contracts. Rather, a few more applications for an alternate source need only be tried which will either reverse the franchisor's reluctance to approve alternate sources or, alternatively, **[*526]** build a sufficient claim of futility to get to a jury.

Plaintiffs in their brief in support of this motion cite the case of *Collins v. International Dairy Queen, 939 F. Supp. 875 (M.D.Ga. 1996)*, where in a class action franchise situation similar to the present case the district court found sufficient evidence of coercion to deny summary judgment. The court did not require a showing that each member of the class seek approval of an alternate source of goods needed to operate a Dairy Queen franchise.

In *Collins,* the district court in finding sufficient evidence of coercion for the class members discussed **[**35]** assertions by the plaintiffs of various coercive actions by defendant Dairy Queen to frustrate the approval of alternate sources. Dairy Queen refused to recognize the Dairy Queen Operators' Cooperative ("DQOC") as the agent of the franchisees and "additionally refused to consider DQOC's requests for approval Of alternate suppliers" thereby frustrating franchisees efforts "to obtain alternate sources of supply and more favorable prices." *Id. at 881-882*. DQOC was "a Minnesota corporation organized as a purchasing cooperative for the benefit of Dairy Queen franchisees and store owners" *Id. at 881 n.3*. [7] If this occurred in the present case, the evidence of it is not clear from the present record.

[36]** In addition there were multiple examples of Dairy Queen only giving summary specifications or making them available only for inspection and not for copying. Dairy Queen would change specifications or its logos after approved suppliers had invested in producing a product that complied with former specifications and had used the outdated logo. Additionally, there were examples of extreme delays in getting suppliers approved, some clearly unneeded because laboratory reports completed "several months" earlier confirmed the supplier met Dairy Queen's specifications. Dairy Queen approved warehouses refused at one time to stock an ice cream topping that had been used by its franchisees for years and met specifications where Dairy Queen had not approved the toppings because Dairy Queen would not approve the labels placed on its container. When these toppings were eventually allowed to be available to franchisees, the competition caused **[*527]** Dairy Queen to reduce substantially its own toppings prices.

A review of *Collins* shows that the evidence of Dairy Queen's misuse of its approval process from which the *Collins* court determined that futility could be proved is more substantial than **[**37]** the evidence of similar abuses in the current record. Thus, while common proofs of futility are possible in a franchise antitrust case, in the present case, without Fields and Hennessy seeking approval of an alternate distributor, or being able to point to a sufficient number of other franchisees' failed efforts to obtain approval of an alternative distributor, or more substantial and convincing internal LCE/Blue Line documents, the single rejection of AmeriServ and the two Ilitch memos are not sufficient new evidence to warrant a modification of this Court's earlier grant of summary judgment.

VI. RECOMMENDATION:

For the reasons noted above, IT IS RECOMMENDED THAT Plaintiffs' Motion Pursuant to *Rule 54(b)* be DENIED.

Any objections to this Report and Recommendation must be filed on or before May 11, 1998. *28 U.S.C. § 636(b)(1)*; E.D. Mich. LR 72.1(d)(2). Failure to file objections within the specified time constitutes waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985)*; *Ivey v. Wilson, 832 F.2d 950, 957-*

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[7] At the October 16, 1997, hearing on this motion, *Collins v. International Dairy Queen, Inc., 168 F.R.D. 668 (M.D.Ga. 1996)*, was discussed. It was noted that in *Collins* the franchisees' association, DQOC, had sought to act as a buying cooperative and in other ways act on behalf of the Dairy Queen franchisees. While it was not earlier asserted, plaintiffs' counsel in a November 5, 1997, letter brief to the Court noted that "The facts underlying this case are similar [to *Collins]* in that plaintiff Smith also attempted to obtain alternate distributors on behalf of a franchisee cooperative, the A.L.C.F." (An Association for the Little Caesar Franchisee.) Unlike DQOC, it is not clear that A.L.C.F. is organized as a purchasing cooperative. Plaintiffs' counsel then asserts that a June 5, 1992, response from LCE's Vice Chairman Charles Jones to Gary Smith noted that Smith's request was written on A.L.C.F. stationary, but stated he "assumed that you were writing that letter in your capacity as a Little Caesar franchisee." This letter and other documents concerning Gary Smith's efforts to get AmeriServ approved as an alternate distributor are set out in the March 1998 Summary Judgment Report at and around p. 78. Plaintiffs' counsel claims that this indicates that "defendants flatly refused to recognize franchisees' efforts to purchase goods through a cooperative." Lockridge November 5, 1997, Letter the Court. Defense counsel responds that plaintiffs "now for the first time relies on a 1992 letter to establish a co-op request for a new distributor." Sussman November 7, 1997, Letter to the Court.

Plaintiffs are a little late in claiming that Gary Smith was acting on behalf of A.L.C.F. or all members of A.L.C.F. including Fields and Hennessy. It is also surprising that if A.L.C.F. was making the request that plaintiffs would not have some better proofs of Gary Smith's agency than the June 5, 1992, letter from LCE's Vice Chairman Charles Jones -- possibly a declaration or affidavit, or a notation of an A.L.C.F. meeting. While AmeriServ made a presentation to all A.L.C.F. members at their convention in early 1993, this is consistent with the application for AmeriServ to be an alternative distributor being from Gary Smith representing his franchises only. It is also noteworthy that AmeriServ's memo notes that "until someone in the organizations take[s] a stand for their contract rights against the corporation, we will not be able to purchase/stock logo products." Turnbull October 16, 1995, Declaration, Ex. 19, noted in the March 1998 Summary Judgment Report at 79. This new assertion that Gary Smith was seeking approval of AmeriServ in his capacity as President of A.L.C.F. was not even listed among the new evidence" that plaintiffs' counsel asserts warrants a reconsideration of this Courts denial of the tying claims of Fields and Hennessy. Nor is the association a plaintiff in this litigation.

58 (6th Cir. 1987); United States v. Walters, 638 F.2d 947 (6th Cir. 1981). Pursuant to E.D. Mich. LR 72.1(d)(2), **[**38]** a copy of any objections is to be served upon this Magistrate Judge.

On or before June 1, 1998, the opposing party may file a response to any objecting party's timely filed objections. The response shall address specifically, and in the same order raised, each issue contained within the objections.

STEVEN D. PEPE

UNITED STATES MAGISTRATE JUDGE

Dated: March 31, 1998

Ann Arbor, Michigan

Little Caesar Enters., Inc. v. Smith

United States District Court for the Eastern District of Michigan, Southern Division

March 31, 1998, Decided ; March 31, 1998, Filed

Case No. 93-CV-40520-FL, Case No. 93-CV-40521-FL

Reporter

34 F. Supp. 2d 459 *; 1998 U.S. Dist. LEXIS 9340 **; 1999-2 Trade Cas. (CCH) P72,692

LITTLE CAESAR ENTERPRISES, INC., Plaintiff, vs. GARY G. SMITH, LINDA M. SMITH, BRIAN T. SMITH, AND SMITH FAMILY FOODS, INC., Defendants. GARY G. SMITH, LINDA M. SMITH, BRIAN T. SMITH, SMITH FAMILY FOODS, INC., JOHN W. HENNESSY, DANI L. HENNESSY, PIZZA FARM, INC., SHARON A. FIELDS, LCP OF LENOIR CITY, INC., LCP OF EAST NASHVILLE, INC., LCP OF CHAPMAN SQUARE, INC., AND LCP OF POWELL PLACE, INC., Plaintiffs, vs. LITTLE CAESAR ENTERPRISES, INC., BLUE LINE DISTRIBUTING, INC., AND LITTLE CAESAR NATIONAL ADVERTISING PROGRAM, INC., Defendants.

Subsequent History: [1]** Reported at: *34 F. Supp. 2d 459 at 462*.

Disposition: Defendant's Motion for Partial Summary Judgment DENIED on the issue of there being one product and not two, and defendant's motion GRANTED on the issue that plaintiffs have insufficient proof of market power in the tying product market.

Core Terms

franchisees, franchise, logoed, products, distributor, prices, franchise agreement, supplier, market power, customers, alternate, costs, tie, tying product, food, consumer, seller, Declaration, tie-in, Plaintiffs', locked, supplies, buyer, machines, specifications, manufacturer, tied product, Distributing, exploitation, supracompetitive

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN1[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A 30 percent market share is insufficient to show significant market power in the tying product market that is needed to invoke the per se rule against tying.

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Trademark Law > ... > Licenses > Licensable Subject Matter > Tying Arrangements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Governments > Courts > Authority to Adjudicate

Trademark Law > Conveyances > General Overview

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Licenses

HN2[] **Conveyances, Franchises**

The law is well-settled that a franchise license itself can be the tying product. A franchise license constitutes a separate and distinct marketable item. The weight of judicial authority supports the proposition that if prospective franchisees are compelled to purchase equipment or other tied products in order to obtain the franchise and trademark, an illegal tying arrangement exists.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN4[] **Tying Arrangements, Defenses**

When the per se rule against tying is invoked, market harm is presumed and this obviates the need for the extensive discovery and proofs of market harm and the balancing of procompetitive benefits against anticompetitive harms. The per se rule against illegal tying is a judicial shortcut available where risks of market harm are so obvious that courts will dispense with the cumbersome market harm inquiry and balancing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under tying's per se rule, the seller must possess substantial market power in the tying product market. In addition, tying's per se rule provides for an inquiry into whether the defendant's conduct has procompetitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6[] **Price Fixing & Restraints of Trade, Tying Arrangements**

There is a three-step analysis for determining whether a tying arrangement is likely to cause such an anticompetitive effect: (1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Market power in the tying product market is an indispensable requirement under either per se or rule-of-reason analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN8[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The prima facie elements of a per se tie-in claim are: there must be a tying arrangement between two distinct products; the seller must have sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and the amount of commerce affected must not be insubstantial.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN9[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Market power has been defined as the power to force a purchaser to do something that he would not do in a competitive market such as buying a tied product that the buyer did not want at all or might have preferred to purchase elsewhere or on different terms. When such forcing is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Power can be inferred from a large share of the relevant market or from other factors such as a unique product with no substitutes, e.g. a patented product, or substantial barriers to the ease of entry.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN11[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Defendant bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN12[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A narrowed market definition is available for a per se tying claim when: there are information costs that prevent certain information from being generally known; and these information costs are sufficiently high that a reasonable consumer would not anticipate (and it would not be cost efficient to invest more in the acquisition of additional information on) the risk of some change of policy post-contract that would expose the consumer to a burdensome tie involving above market pricing; and after a substantial number of customers have sunk significant costs that are not recoverable and face other switching costs, the seller takes some action changing its policy (or acting on a prior undisclosed policy) that takes advantage of its locked in customers' lack of information in order to reap supracompetitive profits by imposing a burdensome tie-in.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In the general case, a lack of market power in a competitive pre-market will prevent market power in the derivative aftermarkets. This general economic presumption, if unrebutted, would allow summary judgment for the defendant. Under this rebuttable presumption, the burden would then shift to the plaintiffs to prove that there is a specific reason to believe that normal economic reasoning does not apply.

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Judges: HONORABLE STEVEN D. PEPE, UNITED STATES MAGISTRATE JUDGE. HONORABLE PAUL V. GADOLA.

Opinion by: STEVEN D. PEPE

Opinion

[*462] REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY **[**2]** JUDGMENT (III)

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II. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

III. IS THE PURCHASE AND OPERATION OF AN LCE FRANCHISE A SEPARATE PRODUCT FROM THE LOGOED PRODUCTS OR OTHER PRODUCTS NECESSARY TO OPERATE SUCH A FRANCHISE?

A. Can A Franchise Be a Tying Product?

B. Are the Products Associated with a Franchise Trademark Separate From the Franchise Itself?

IV. CAN THE CLASS PLAINTIFFS PROVE LCE HAS SUFFICIENT MARKET POWER IN THE TYING **[*463]** PRODUCT MARKET TO INVOKE THE *PER SE* RULE MAKING A TIE-IN ILLEGAL?

A. Substantial Market Power in Tying Market After *Fortner II* and *Jefferson Parish*

B. *Kodak* and Narrowed Market Definition

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1. The *Kodak* Analysis

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V. ANALYSIS

A. Facts Known to Franchisees Signing the mid-1990 Franchise Agreement

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REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION **[**3]** FOR PARTIAL SUMMARY JUDGMENT (III)

Defendant Little Caesar Enterprises, Inc. ("LCE") has filed a motion for partial summary judgment which has been referred for Report and Recommendation under *28 U.S.C. § 636(b)(1)(B)*. [1]

[4]** I. BACKGROUND FACTS:

The current motion involves only the antitrust tie-in class certified by this Court in its March 31, 1997, order. *Little Caesar Enterprises, Inc. v. Smith, 172 F.R.D. 236 (E.D.Mich. 1997)*. Plaintiffs are approximately 400 franchisees of

[1] This case is consolidated. Because the class certified by this Court involves an antitrust claim (case No. 93-CV-40521) by class representative Gary Smith against LCE, this Report and Recommendation refers to the class members as plaintiffs and LCE as defendant. Gary Smith's claim was initially brought against three defendants, LCE, Blue Line Distributing, Inc. ("Blue Line"), and Little Caesar National Advertising Program, Inc. ("LCNAP"). This Court has granted summary judgment on all claims involving LCNAP. After this suit was filed, LCE merged with Blue Line. Thus, LCE is the sole remaining defendant. Case No. 93-CV-40521 was filed by Gary Smith along with two other franchisees, John Hennessy and Sharon Fields. This Court has granted summary judgment against Hennessy and Fields, although they have filed a motion for reconsideration of that ruling and an expanded class of plaintiffs. *Little Caesar Enterprises, Inc. v. Smith, 895 F. Supp. 884, 894-898 (E.D.Mich. 1995)*.

LCE throughout most of the nation who own and operate carry-out-only Little Caesar restaurant franchises under a mid-1990 Franchise Agreement. These franchisees purchase their supplies needed to operate from Blue Line Distributing, Inc. ("Blue Line"), formerly a wholly owned subsidiary that has now merged with LCE. The class plaintiffs seek damages, declaratory and injunctive relief for alleged antitrust tie-in violations by defendant. During the relevant class period, Blue Line, in areas where it had a warehouse, sold to LCE franchises virtually all goods necessary to operate their Little Caesar restaurants. [2]

[5]** Little Caesar was founded in Michigan in 1959 by Michael Ilitch, who began to franchise his "Little Caesar" restaurants in 1962. As noted in this Court's earlier opinion, as of June 1, 1995, there were 536 franchisees nationwide operating 2,867 carryout-type restaurants. *Little Caesar Enterprises, Inc. v. Smith, 895 F. Supp. 884, 887 (E.D.Mich. 1995)*. The majority of these are class plaintiffs. LCE also has over 1,000 company-owned outlets comprising approximately 25% of the carryout units and over 500 Little Caesar restaurants in Kmart stores. Blue Line purchases all of the items used in Little Caesar's restaurants from producers and suppliers and then re-sells them to LCE franchisees making a single delivery of the multiple goods. Most of these items are produced to meet LCE specifications. These items include foodstuffs, beverage products, sign equipment, paper products, salad dressing, other condiments with LCE's proprietary symbols and marks, and other items. Blue Line initially had only one warehouse in Farmington Hills, Michigan, and thus was limited in the number of Midwestern franchisees to whom it could distribute goods. Other associate distributors, not affiliated **[**6]** with defendant, were approved by LCE in various **[*464]** regions throughout the country to service its other franchisees and LCE's company owned carryout facilities.

In the middle 1980's, Blue Line began to expand the number of its distribution warehouses throughout the country. LCE replaced the other associate distributors with its Blue Line distribution warehouses. By August 1989, defendant had eliminated the majority of third party distributors servicing Little Caesar franchisees and thereafter eliminated virtually all of the remaining distributors in the continental United States, except for two remote areas in Idaho that was not economically feasible for Blue Line to service.

Plaintiffs accuse defendant of unlawfully tying sales of the above-noted goods from Blue Line to the sale and continued operation of the Little Caesar franchises. They allege that the defendant LCE has used its inherent monopoly power derived from its copyrights, trademark, service names, and trade names to impose contractual and other uniform restrictions on the distribution of the various goods to franchisees, thereby eliminating the possibility of renewed competition with Blue Line by other food distributors.

[7]** Plaintiffs also allege that because LCE franchisees have invested substantial funds and effort in their restaurants and goodwill, and have signed long-term franchise agreements with a continuing two year non-compete clause in the pizza, pasta and submarine sandwich markets, they are effectively "locked in" to the LCE franchise system. Section VII of the relevant mid-1990 Franchise Agreement specifically grants franchisees the right to purchase supplies, including logoed goods (but excluding proprietary spice and dough mixes) from "any source of its choosing . . . previously approved as a supplier by LITTLE CAESAR." While the franchise agreements provide to each franchisee the right to request that LCE approve an alternate supplier of products made to LCE specifications, the mid-1990 Franchise Agreement [3] **[**8]** -- unlike earlier franchise agreements and the more recent 1995 Franchise Agreement -- excluded logoed goods needed to operate a Little Caesar franchise. [4]

LCE in June 1989 entered into a licensing agreement that gave Blue Line the exclusive right to distribute logoed products to franchisees. This Court has determined that the "logoed products" involved in this 1989 Licensing Agreement as well as in the mid-1990 Franchise Agreement applied only to those items bearing the Little Caesar

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[2] In September 1989, Blue Line had warehouses serving eight regions of the United States. By December 1992, it operated warehouses serving Little Caesar franchises in 16 regions covering most of the United States.

[3] The term "Franchise Agreement" or "mid-1990-Franchise Agreement" as used throughout this Report refers to the August 1990 form franchise agreement as distinguished from the "pre-mid-1990 Franchise Agreement" or the 1995 Franchise Agreement.

[4] All of the agreements before and after 1990 also precluded a request for an alternate source of signage, which practice, like the proprietary spice and dough mixes, is not challenged in this litigation.

registered mark, which a Little Caesar's franchise provides its customers in the sale of its food products. These include items such as logoed paper products (bags, cups, napkins), packaging, and condiments such as salad dressing. *895 F. Supp. at 890-92*. Defendant asserts that these logoed products comprise only about 6% of the food products and other items sold by Blue Line to a franchisee and needed to operate a franchise. While plaintiffs dispute these figures, they offer no substantial counter proofs. For purposes of this motion the logoed products will be **[**9]** considered less than 10% of the entire "market basket" of goods a franchisee needs to purchase in order to operate a Little Caesar carryout restaurant. Plaintiffs contend that because the profit margin for a distributor on logoed products is greater than other items, and because of the preference of many franchisees to obtain all their needed supplies from one source, other potential distributors cannot effectively compete with Blue Line if they are not given access to these logoed products. [5]

[*465] This 1989 Exclusive Licensing Agreement with Blue Line was not initially **[**10]** disclosed to the franchisees and only came to light several years later. Franchisees renewing their franchises on existing outlets [6] or those entering into franchises for a new outlet after the middle of 1990, would sign the Franchise Agreement that contained the restrictive language not permitting them to seek an alternate source of logoed products. Because the evidence would support such a finding and because disputed issues on a motion for summary judgment must be resolved in favor of the non-moving party, this Report will assume none of those franchisees who signed the mid-1990 Franchise Agreement were aware of the June 1989 Exclusive Licensing Agreement between LCE and Blue Line before the signing.

The logoed products are essential to the operation of **[**11]** a Little Caesar franchise and their usage is required. Under the Franchise Agreement plaintiffs contend that defendant is using this 1989 exclusive Blue Line licensing right on logoed paper, combined with the new 1990 contractual limits on franchisees seeking alternate distributors of logoed products, to preclude alternate sources of supply and competition on these logoed items. Plaintiffs assert that the defendant's denial of access to these logoed products is also intended to make it less profitable or more burdensome for alternate distributors of franchise supplies to enter the market.

Plaintiffs argue that the tying arrangement is not limited to logoed products. They assert that the practical economic effect of the exclusive licensing agreement for logoed products is to affect a tie-in of the entire "market basket" of goods needed to operate a Little Caesar franchise. Plaintiffs' experts also argue that the tied product is the market basket of goods, supplies and distribution services, not merely logoed products because "it is uneconomic to operate as a distributor without access to logoed products." Siwek and Nelson December 22, 1996, Declaration at PP 4-10.

Plaintiffs also **[**12]** contend that the forced tie-in of the entire "market basket" of goods is burdensome because Blue Line is charging supracompetitive prices. Because discovery on the pricing structure is not complete, this Report will accept the premise that plaintiffs by trial would have sufficient evidence to get to a jury on "supracompetitive" prices for the entire "market basket" of goods.

In addition to the arguments that franchisees in the class are forced to purchase the entire "market basket" of goods from Blue Line, because LCE/Blue Line uses the exclusive licensing agreement and the resulting market leverage over logoed goods to exclude rival distributors of the non-logoed items needed to operate a Little Caesar franchise, plaintiffs continued to accuse defendant of a pattern of wrongfully refusing requests for approval of alternative distributors other than Blue Line. Plaintiffs argue that until this litigation was commenced, it was "futile" for any franchisee to seek an alternate distributor to Blue Line because such a request would be denied. In its earlier

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[5] In the present case, plaintiffs have not specifically alleged that Blue Line is charging "supracompetitive prices" on the logoed goods, but rather on the blended profit margins on the entire market basket of goods Blue Line sells. Defense counsel at a hearing on a related motion asserted, without challenge from plaintiffs, that plaintiffs are not charging, and could not prove that Blue Line is charging, above market prices for the logoed goods.

[6] In 1990, the carryout franchises contract term was for 10 years with an option to renew under the then current franchise agreement terms. The term of earlier franchise agreements that would need reviewing in the 1990's is not identified in the record.

opinion denying a nationwide class of franchisees, including those with pre-1990 Franchise Agreements, this Court granted summary judgment **[**13]** on the tying claims of plaintiffs Hennessy and Fields, and Gary Smith before April 1992, because they did not exercise their contract rights to request an alternate distributor to Blue Line, and because they could not prove they did not make such a request because they knew it would be futile to do so. Thus, in the absence of an express tying arrangement (or a defense admission) these plaintiffs could not prove they were "forced" or "coerced" to buy all goods from Blue Line as those terms are used in the antitrust cases to show there was an illegal tie. *895 F. Supp. at 894-96*. Plaintiffs have filed a motion under *Fed. R. Civ. P. 54(b)* to reconsider that ruling, which will be analyzed in a separate report and recommendation.

This case involves the certified class of franchisees who signed the mid-1990 Franchise Agreement that did not provide an **[*466]** express contract right to seek an alternate supplier of logoed products. [7] That class was certified to determine whether there was an illegal tie between the continued operation of a Little Caesar franchise and the purchase of logoed products from Blue Line. This case can determine the plaintiffs' contention that the practical economic effects **[**14]** of the tying of logoed goods also tied in the purchase of the entire "market basket" of goods needed to operate a Little Caesar franchise by raising rival distributors' entry barriers and costs of operation.

[15]** This Report's analysis will involve both the question of (1) whether there were any refusals by LCE/Blue Line to allow potential rivals access to logoed goods and whether the refusal made it economically infeasible for rivals to enter the market to compete with Blue Line; and (2) whether the knowledge of the unavailability of logoed goods to alternate distributors dissuaded any distributor from considering seeking LCE approval to become an alternate distributor. Yet, this post-mid-1990 Franchise Agreement class was not certified to revisit the issue of whether LCE wrongfully refused to approve alternate distributors or the issue of whether it was futile and/or known to be futile for an alternate distributor to apply. That issue will be addressed in the Report and Recommendation of plaintiffs' *Rule 54(b)* motion.

II. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT:

LCE has moved for partial summary judgment, raising numerous issues. Because I recommend summary judgment be granted to defendant on an issue that involves the *per se* tying claims of all the class plaintiffs, this Court need only consider two of the issues.

First, LCE claims that the franchise agreement and the **[**16]** logo paper products that Blue Line sells are not separable and therefore are not products that can be tied together. For reasons stated below, these are two products that can be tied for antitrust purposes.

LCE's most forceful argument with respect to the tie-in class is that the plaintiffs cannot demonstrate that LCE has sufficient market power in the relevant tying market to appreciably restrain competition in the tied market. Defendant argues that the relevant tying market in the present case is the market for either carryout pizza franchises [8] **[**17]** or, alternatively, a larger market of all fast food franchises, and not the market comprised solely of Little Caesar franchises. [9] Defendant contends that it has no significant market power based on their market share of either of

[7] In reaching its decision denying certification of a class that included the pre-mid-1990 franchisees, the Court left open the question of whether there might be a "basis for certification of a national class action [involving] the franchise agreements signed after mid-1990 [that] prevent franchisees from requesting an alternate distributor of logoed products." *Id. at 905*. The Court noted: "It could be argued that the post mid-1990 agreements, combined with the 1989 exclusive licensing agreement, evidence an express contractual tie-in of logoed products which could receive class treatment." Thus, the Court did not grant summary judgment on the tie-in claim involving the mid-1990 Franchise Agreements. It was this class the Court later certified in its March 31, 1997, order. ***172 F.R.D. at 239*** and 268.

[8] Defendant's Brief Supporting its Motion for Partial Summary Judgment at 6-7 asserts that "the relevant market for a tie-in claim on logo products and on other products used by a pizza chain's franchisees is the 'pre contract' market for the sale of franchises for either take out pizza franchises, fast food franchises or restaurant franchises in general."

these markets. [10] Thus, plaintiffs **[*467]** cannot prove a critical element necessary to prevail on their *per se* tie-in claim.

[18]** III. IS THE PURCHASE AND OPERATION OF AN LCE FRANCHISE A SEPARATE PRODUCT FROM THE LOGOED PRODUCTS OR OTHER PRODUCTS NECESSARY TO OPERATE SUCH A FRANCHISE?

A. Can A Franchise Be a Tying Product?

In a subsequent motion, the defendant questions whether a franchise and its continued operation can be a tying "product." Many courts, without question, treat a franchise as such. As noted by the Seventh Circuit in *Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 722 (7th Cir. 1979)*:

> ***HN2***[] The law is well-settled that a franchise license itself can be the tying product. In *Northern v. McGraw-Edison Co., 542 F.2d 1336, 1345 (8th Cir. 1976)*, *cert denied, 429 U.S. 1097, 97 S. Ct. 1115, 51 L. Ed. 2d 544 (1977)*, the court stated:
>
>> A franchise license constitutes a separate and distinct marketable item. The weight of judicial authority supports the proposition that if prospective franchisees are compelled to purchase equipment or other tied products in order to obtain the franchise and trademark, an illegal tying arrangement exists.
>
> *Accord, Milsen Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971)*; *Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th* ***[**19]*** *Cir. 1971)*, *cert denied, 405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972)*.

See also, Wilson v. Mobil Oil Corp., 984 F. Supp. 450 (E.D.La. 1997); *Collins v. International Dairy Queen, Inc., 168 F.R.D. 668 (M.D.Ga. 1996)*.

Grappone v. Subaru, 858 F.2d 792, 797 (1st Cir. 1988), notes that a product distribution dealership is a franchise when privately owned, and one dealer can operate multiple franchises from a single location.

> The record shows that Subaru was but one of many automobile franchisors, and that Grappone itself held not only Subaru, but also AMC, Pontiac, Jeep, Toyota, and Peugeot franchises.

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[9] Of the pizza chains listed in the top 100 fast food chains, LCE has a market share below 20%. Def. Motion Ex. 2-3. Because of the many smaller carryout pizza outlets, LCE's market share of all pizza outlets would be smaller. LCE's market share of the top 100 fast food chains (including pizza and other carryout foods) is approximately 3.4%. *Id.*

[10] *Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*, found ***HN1***[] a 30% market share insufficient to show significant market power in the tying product market that is needed to invoke the *per se* rule against tying. In light of *Jefferson Parish,* LCE concludes that plaintiffs have failed to show that LCE has enough market power in a market of all fast food franchises or of pizza franchises to invoke the *per se* rule on tying. The plaintiffs' claim of a *per se* tie-in violation requires the tying market to be defined as the single-brand Little Caesar carryout franchises, as they and their economic experts have alleged it to be. While market power can be shown by factors other than market share -- such as a unique product protected by a patent, copyright or trademark -- plaintiffs have failed to produce sufficient evidence that LCE has significant market power derived solely from its trademark or copyrighted products bearing its trademark, logo and other distinctive marks. *Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342, 1346-47 (9th Cir. 1987)*; *A.I. Root co. v. Computer Dynamics, Inc., 806 F.2d 673, 676 (6th Cir. 1986)*. X AREEDA, HOVENKAMP AND ELHAUGE, ***ANTITRUST LAW*** (1990) at 95-96, P 1737, specifically cites *A.I. Root* as rejecting the earlier case law that inferred market power from copyright or trademark protection. *See also Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 480 n. 15 (3d Cir. 1992)* (*en banc*) ("The plaintiffs do cite several old cases that viewed trademarks as creating presumptions of market power. But modern courts and commentators reject this position.").

Professors Areeda, Hovenkamp and Elhauge cite *Chicken Delight* and *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982)*, to note that at least in the "business format" franchise where the franchisee makes the product or service sold to the public:

> The trademark has been deemed the standard tying product for many franchises where the typical tied product was the equipment or ingredients used by the franchisee to make the final product.

AREEDA, ET AL., ***ANTITRUST LAW*** (1996) at 14, P 1733 (footnote omitted). **[**20]** The Areeda authors in considering when a single-brand tying market can be allowed under the *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*, "lock-in" theory specifically use franchises and dealerships with their trademarks as examples of a potential tying product. AREEDA at p. 139, P 1740; pp. 145-48, P 1740c2. Also, in discussing single-brand products such as machines that can be a tying product, the authors note: "to simplify we will not say much more about franchisees or dealers in this subparagraph. Most of what is said about the machine buyer also applies to them." *Id.* at p. 155 n.47, P 1740.

Plaintiffs' expert economists have also provided their opinion and economic explanation why the continued right to operate a franchise is an economic commodity for which a market exists for economic and antitrust purposes. Siwek and Nelson Dec. 1997 Declaration. [11]

[21]** **[*468]** Thus, substantial authority suggests that a franchise and its continual operation can be a tying product.

B. Are the Products Associated with a Franchise Trademark Separate From the Franchise Itself?

In the *Chicken Delight* case, portions of which have recently come under criticism, the Ninth Circuit held that a Chicken Delight franchise was a separate product from the various "commonplace articles" that needed to be sold to a franchisee in order to operate a Chicken Delight franchise. *448 F.2d at 47-49*. In *Krehl,* the Ninth Circuit distinguished between a business format franchise such as the one involved in *Chicken Delight* and a product distribution franchise. *664 F.2d at 1353. The Krehl* case noted that in contrast to *a business format* franchise, in a *product distribution* franchise where the trademark identifies the actual end product consumed -- the ice cream sold by Baskin-Robbins -- there are not two separate products but only one, and thus there could not be an illegal tie-in. [12]

[22]** Defendant argues, however, that the logoed products -- including the paper goods and condiments bearing the LCE Roman man and other distinctive marks -- that are allegedly being tied would not have any market value and could not be sold anywhere or used anywhere separate from a LCE franchise. LCE cites *Casey v. Diet Center, Inc., 590 F. Supp. 1561, 1563-66 (N.D. Cal. 1984)*, that suggests that no tying can exist in a franchise context where the products and services allegedly tied have "no market distinct from that of the franchise itself." *Id. at 1566*. Defendant argues there is no separate market for the LCE logoed paper goods apart from a Little Caesar franchise.

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[11] Stephen Siwek and Philip Nelson note that an economic commodity that can be bought or sold can define *a market.* Siwek and *Nelson* December 1997 Declaration. They add that the franchise rights created by Little Caesar franchise agreements is an "economic commodity" and can be traded in markets. They assert that during the period 1993-1995 LCE repurchased 241 Little Caesar franchises, and third parties purchased 597 Little Caesar franchises (Little Caesar March 29, 1996, *Franchise Offering Circular). Id. at 3-4, P 10*. Thus, the authors conclude that there is "a distinguishable antitrust market for the right to operate as a Little Caesar[] franchisee."

[12] The Fourth Circuit in *Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980)*, *cert. denied, 451 U.S. 970, 68 L. Ed. 2d 349, 101 S. Ct. 2047 (1981)*, took a different position with respect to franchising. It noted that when the tied items were integral components of the franchised business -- such as carefully selected outlet locations and unique design associated with the trademark -- there could not be a tie-in. The Sixth Circuit has never cited the *Principe* case in defining separate products, nor did the Supreme Court in considering the question of defining one versus two products in its *Jefferson Parish* case, *466 U.S. at 23 n.35*.

The Supreme Court in *Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*, noted that ***HN3***[] "the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Id. at 19*. *Jefferson Parish* involved the market for anesthesiologists and the market for hospitals. The Court found that even though these were used together and functionally related, they were two separate **[**23]** products that could be selected and marketed separately.

Since the date defendant filed its motion, the Sixth Circuit in *PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811* (6th Cir.), *cert. denied, 138 L. Ed. 2d 195, 117 S. Ct. 2434 (1997)* (hereafter *"PSI"),* reiterated the *Jefferson Parish* standard for determining whether there are two products for a tie-in claim. According to *PSI,* the issue is not whether the items provide a "functionally integrated package," but rather the "character of the demand for the two items." *Id. 104 F.3d at 815* (quoting *466 U.S. at 19*). In *PSI,* Honeywell manufactured and sold industrial control equipment ranging in price from $ 250 to $ 800,000 per unit. These devices were dependent on internal printed circuit boards. Ninety-five percent of the components on the circuit board were "generic components" that could be purchased from a component manufacturer or distributor. Five percent, however, were designed specifically for Honeywell by a third party manufacturer who was contractually bound not to sell these proprietary items to Honeywell equipment owners or to **[*469]** independent service providers, such as the plaintiff in PSI. Like the **[**24]** LCE logoed products, these small number of Honeywell parts would have no market apart from Honeywell industrial control machines. PSI offered circuit board repair services to owners of industrial control equipment. Because PSI was unable to obtain the five percent of the circuit board components manufactured exclusively for Honeywell control equipment, it was unable to compete in the market for the repair of Honeywell circuit boards. [13]

Honeywell provided replacement parts for faulty circuit boards by replacing the entire board with a new or refurbished board, charging the customer 50% of the list price for a new board so long as the customer returned the defective board. Honeywell would thereafter evaluate whether the defective board could be repaired, and if it could it would be repaired **[**25]** and put back into the inventory for replacement boards. The question before the Sixth Circuit was whether there was a separate market for two products -- "parts for the circuit boards" and "the servicing of circuit boards when a board required repair or replacement." *104 F.3d at 814*. Like the LCE logoed products needed to operate an LCE franchise, these items -- parts and service -- were functionally related.

The lower court found there were not two separate products that could be tied in violation of the antitrust laws. The Sixth Circuit reversed the lower court. It noted that the Supreme Court in *Kodak* also dealt with whether the unique replacement parts for Kodak copiers were separate from the services utilized to repair a Kodak copying machine. The Supreme Court in *Kodak* determined that parts and service could be separate products if there is "sufficient consumer demand so that it is efficient for a firm to provide service separately from parts." *Kodak, 504 U.S. at 462*, quoted in *PSI, 104 F.3d at 815*.

In applying the consumer demand test of *Kodak* to its facts, the Sixth Circuit in *PSI* framed the question as to whether it would "be efficient for a firm **[**26]** to provide some component parts separate from the circuit-board services." *104 F.3d at 816*. It noted that "PSI's very existence indicates the possibility of a separate market for service, because PSI does not manufacture any of the component parts for the circuit boards but instead purchases them from third-party manufacturers." *Id.* The Sixth Circuit also noted in applying the consumer-demand test that 95% of the components necessary to construct a Honeywell circuit board were "available for sale either directly or through the manufacturer or a third-party distributor." *Id.* Obviously firms sold these generic parts separate from service.

In applying the consumer demand test to the present case, it is clear that the market for Little Caesar franchises is separate from the market for the goods and services, including logoed paper goods, necessary to run a Little Caesar franchise. Prior to the expansion of Blue Line to nearly all regions of the country, other private distributors,

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[13] An economic expert at the trial contended that absent the restrictive policies of Honeywell, "PSI's market share [for repairing Honeywell control equipment] should be as high as twenty-seven percent." *Id. 104 F.3d at 814*.

unrelated to Little Caesar, sold all the goods and services necessary to run Little Caesar franchises, including logoed paper goods. Yet, the Little Caesar franchises were sold separately by LCE and **[**27]** franchisees. Since the commencement of this suit, Little Caesar has also approved three alternate distributors of the goods necessary to run a Little Caesar franchise and has agreed to provide them logoed products to sell. [14] In the past, there was a period where PYA Monarch, one of the recently reapproved distributors, sold all of the products needed by LCE franchises except logoed goods, which at that time the Little Caesar franchises in the Atlanta area had to buy logoed separately from Blue Line. [15]

[28]** **[*470]** Thus, the past history as well as the current approvals of new distributors demonstrate that there is sufficient consumer demand both for logoed goods and the other goods necessary to operate a Little Caesar franchise to provide them separately from the sale and marketing of the Little Caesar franchise itself. Defendant's Motion for Partial Summary Judgment on the issue as to there being but one product should be denied.

IV. CAN THE CLASS PLAINTIFFS PROVE LCE HAS SUFFICIENT MARKET POWER IN THE TYING PRODUCT MARKET TO INVOKE THE *PER SE* RULE MAKING A TIE-IN ILLEGAL?

While a claim of illegal tying can be attacked as an antitrust violation under a rule-of-reason analysis, this requires actual proof of market harm in the tied product that can involve complex analysis of whether the anticompetitive consequences of the tie are outweighed by procompetitive business justifications asserted by the defendant. ***HN4***[] When the *per se* rule against tying is invoked, market harm is presumed and this obviates the need for the extensive discovery and proofs of market harm and the balancing of procompetitive benefits against anticompetitive harms. The *per se* rule against illegal tying is **[**29]** a judicial shortcut available where risks of market harm are so obvious that courts will dispense with the cumbersome market harm inquiry and balancing. *See Arizona v. Maricopa County Medical Society, 457 U.S. 332, 350-51, 102 S. Ct. 2466, 2476, 73 L. Ed. 2d 48 (1982)*. In the present case, class plaintiffs are asserting a *per se* tying violation and LCE's Motion for Partial Summary Judgment asserts that plaintiffs cannot prove sufficient power in the tying product market, as properly defined, to make any tie-in subject to a *per se* attack. [16]

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[14] While none of these three distributors has entered the market, they were permitted to distribute products needed to operate a Little Caesar franchise except for special proprietary dough and spice mixes.

[15] This was in and before 1989, a time prior to Blue Line's 1990 merger into its parent corporation LCE. While Blue Line at the time was a subsidiary of LCE, the significant point is that some franchisees obtained their rights to operate a LCE franchise under the LCE trademark from one firm and obtained their food products and their logoed products from two separate firms. While Blue Line was the firm selling the logoed products, from an economic and antitrust point of view, it could have been a firm unrelated to LCE that was allowed to sell LCE's copyright and trademark protected products.

[16] While plaintiffs' counsel, at a hearing on a more recent motion, asserted that they also challenge the defendant's actions under the rule of reason doctrine, this has not been briefed or argued in this motion. It has been my assumption in both of my earlier Reports and Recommendations on class certification and in this Report, that plaintiffs' challenge to defendant's conduct is under the *per se* tie-in doctrine. The cases cited and analyzed are *per se* tie-in cases, and this Report and Recommendation considers the sufficiency of market power in the tying product that is needed to make out a *prima facie* element of a *per se* tie-in claim. *PSI* states that the *per se* rule and rule of reason analysis

> have, in effect, merged in recent years. Under traditional per se analysis, restraints of trade were condemned without any inquiry into the market power possessed by the defendant. *See, e.g., Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*. However, ***HN5***[] under tying's per se rule, the seller must possess substantial market power in the tying product market. In addition, tying's per se rule provides for an inquiry into whether the defendant's conduct has procompetitive effects. *See Kodak, 504 U.S. at 478-79, 112 S. Ct. at 2088-89*. Such an extensive factual inquiry is hardly the stuff of per se analysis. Under rule-of-reason analysis, the antitrust plaintiff must show, inter alia, an adverse effect on competition. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29-30, 104 S. Ct. 1551, 1567-68, 80 L. Ed. 2d 2 (1984)*. This circuit adopted the following ***HN6***[] three-step analysis for determining whether a tying arrangement is likely to cause such an anticompetitive effect: "(1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct." *Hand v. Central Transp.,*

[30]** **[*471]** As this Court has noted in its earlier summary judgment opinion ***HN8***[] the *prima facie* elements of a *per se* tie-in claim are"

1. there must be a tying arrangement between two distinct products;

2. the seller must have sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and

3. the amount of commerce affected must not be insubstantial.

Little Caesar Enter., Inc. v. Smith, 895 F. Supp. 884, 894 (E.D.Mich. 1995).

The earlier Report and Recommendation which this Court accepted addressed class certification of those LCE franchise owners who had signed the post-mid-1990 Franchise Agreement. Because this case does not involve an admitted tie nor an express tie clearly set out in the Franchise Agreement or other documents, a major issue in that class certification controversy concerned whether there was a tying arrangement under *prima facie* element # 1 above. Could class plaintiffs prove whether their purchase of logoed goods from Blue Line was actually a "coerced" or "forced" tie -- i.e. an understood condition of continuing as a Little Caesar franchise -- or was it a voluntary choice, and thus **[**31]** not illegal under ***antitrust law***. The core dispute for class certification purposes was whether under *Fed. R. Civ. P. 23(b)(3)* class plaintiffs had sufficient *common* proofs of this "forcing" or "conditioning" to proceed as a class, or would the issue of "coercion" depend predominately on *individual* proofs.

Inc., 779 F.2d 8, 11 (6th Cir. 1985). Thus, in this circuit, ***HN7***[] market power in the tying product market is an indispensable requirement under either per se or rule-of-reason analysis. As Professors Areeda, Elhauge, and Hovenkamp comment, "the per se rule against tying is 'per se' in only one respect--namely, dispensing with proof of anticompetitive effects. . . ." 10 PHILLIP E. AREEDA ET AL., ***ANTITRUST LAW*** P 1760e, at 372 (1996). The merger of these two theories is apparent in the majority in *Kodak,* which does not even mention the terms "per se" or "rule of reason," even though *Kodak* was technically a per se case.

104 F.3d at 815.

This statement, which was not the matter at issue in *PSI*, is not my understanding of the relation of rule of reason analysis to *per se* tying analysis, nor does the section cited from *Kodak* support this PSI statement. While current case law and substantial academic literature tout the procompetitive effects on certain tying arrangements, the analysis of actual harm to competition and the balancing process is not part of a *per se* tying case unless after plaintiff has made out the elements of the *prima facie per se claim* the defendant then wishes to assert a procompetitive justification for the tying arrangement to rebut the *per se presumption* of harm to the market. Thus, a defendant can raise an *affirmative defense* of procompetitive effects of the tie which then triggers the balancing test and a review of alternative means available to defendant that fulfill the procompetitive aspect with lesser harm to competition. *See, e.g., United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 560 (ED Pa. 1960)*, *aff'd,* ***365 U.S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806 (1961)*** (per curiam). *See also Jefferson Parish, 466 U.S. at 25 n. 42* (where it classified alleged procompetitive effects by a defendant as a "goodwill" *defense* that is routinely rejected by a court's finding that less restrictive "contractual quality specifications" can protect a company's goodwill with less harm to competition than a tie-in).

In the present case, defendant is not in this motion asserting any procompetitive effects of its behavior. It is merely asserting that plaintiffs cannot prove market power in the tying product that is needed for them to invoke the *per se* anti-tying shortcut. While plaintiffs in the present case could attack an anticompetitive tie-in directly under the rule of reason by asserting that LCE's conduct has harmed competition in the market for foods and/or supplies sold to restaurants, this is not their claim. Rather, they are asserting a *per se* tying violation, and LCE is claiming they cannot prove an essential *prima facie* element of such a claim. Accord, *Digital Equip. Corp. v. Uniq Digital Technologies, 73 F.3d 756, 760 (7th Cir. 1996)* (Easterbrook, J.).

Even if I am wrong on this analysis of when and whether the rule of reason balancing enters the *per se* tying picture, *PSI* notes that "in this circuit, market power in the tying product market is an indispensable requirement under either per se or rule-of-reason analysis." *104 F.3d at 815*. Thus, a showing of no market power in the present case would defeat either claim.

The Areeda authors disagree with this position. They argue that even where a plaintiff cannot show market power in the tying product by large market share, an antitrust challenge can be made under the rule of reason test where substantial harm to competition can be shown in the tied product market. X AREEDA, ET AL., at 45, P 1734b4.

This Court determined that in light of the change in language in the mid-1990 Franchise Agreement, and the practical economic effects of the market realties and other internal documents of the defendant, this "coercion" issue on the "was there a tie" issue could proceed by common proofs and thus class treatment was appropriate. Also, in determining whether the case could proceed as a class action, this Court did not inquire "into the merits of plaintiffs' claims" and "assumed plaintiffs' legal theory was correct." *Little Caesar Enter., Inc. v. Smith, 172 F.R.D. 236, 241, 261 n.19 (E.D.Mich. 1997)*.

The "coercion" issue considered in that earlier class certification dispute dealt with *prima facie* element # 1 of a tying claim -- is there a tie of two products? [17] **[**33]** The present **[*472]** motion deals with element # 2-- does the defendant have sufficient economic power in the tying **[**32]** market to invoke the *per se* tie-in doctrine. The core dispute on the present motion is how the relevant tying product market should be defined. Plaintiffs contend the tying product market is the market of LCE franchises and the rights to continue operating these economic entities. If that is the case, LCE has substantial market power in the tying product. Defendant argues that plaintiffs have defined the wrong market. As noted above, defendant argues that the appropriate market for antitrust purposes is the market either for carryout pizza franchises or for all fast food franchises of which they have less than 20% of the market which is insufficient for plaintiffs to invoke the *per se* tying rule. [18]

A. Substantial Market Power in Tying Market After Fortner II and *Jefferson Parish*:

HN9[] Market power has been defined as the power "to force a purchaser to do something that he would not do in a competitive market" such as buying a "tied product that the buyer did not want at all or might have preferred to purchase elsewhere or on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Jefferson Parish, 466 U.S. at 12* and 14. It has also been defined as "the ability of a single seller to raise price and restrict output." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. It can be determined by various surrogate tests, but the most common is determining the defendant's share of the relevant market.

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[17] As noted in that Report, in the absence of express tie-in language in the franchise agreement there had to be proof of some "forcing" or "coercion" to take Product *B* in order to obtain Product *A.* This "coercion" or "forcing" is a necessary element of proving two products are tied when the tie-in is not clearly expressed in the contract or admitted by the defendant. While this "coercion" element to prove the existence of a tie *(prima facie* element # 1) relates to a defendant's power, it is different (albeit overlapping to some extent) from the consideration of power in *prima facie* element # 2-- does defendant have significant market power in the tying market to restrain appreciably competition in the tied product market.

This distinction is more clearly illustrated in the example used by Justice Black in *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 7, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*:

> If one . . . food store[] in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself.

Assume the single food store that only sold flour [Product *A*] if the buyer took sugar [Product *B*] refused to admit this practice and used no written contracts with an express tie. Instead its cashiers used salesmanship, even overbearing tactics and threats to remove the sugar from the goods sold if the customer wanting flour did not also buy a bag of sugar. These sales practices would be evidence of "forcing" or "coercion" relevant to *prima facie* element # 1 on whether there is a tying arrangement.

In such a case, the proofs related to the "coercion" on *prima facie* element # 1 (are the two products tied in fact) are clearly separate from the proofs needed to show the seller had substantial market power in the market for Product A (*prima facie* element # 2). The former would involve what the cashiers said and did, and the latter would involve proofs of market share in the sale of flour. Yet, the proofs on the separate elements are related because the effectiveness of the salesman tying the sale of sugar to flour is dependent on the degree of the seller's power in the market for flour. If the customer can obtain flour or a satisfactory substitute from another grocer, the *customer* is free to buy sugar elsewhere or not at all. While the tying store can continue to insist (and "force") the sale of sugar when a customer wants to buy flour, ***antitrust law*** is unconcerned because consumer choice and competition are not seriously harmed. The reason is that there is no proof of *prima facie* element # 2 on market power.

[18] See n. 10 above.

While earlier *per se* tying cases were quick to condemn tying arrangements without too much attention to the strength of the defendant's power in the tying product market, this ended when Justice White's dissent in *Fortner I* [19] gained **[**34]** favor with Justice Stevens and a substantially different Court in *Fortner II* [20] United States Steel (through one subsidiary) was discriminating in price on certain tied sales -- it charged more for **[*473]** prefabricated homes that it sold to developers who financed those homes through another United States Steel subsidiary than it charged when the homes were purchased by a developer separately. The tying product loans were for 100% of the cost not only of the prefabricated houses, but also the land and development costs of the developer. These unique 100% loans were "unusually inexpensive" financing giving the U.S. Steel defendants power to attract credit hungry developers.

[35]** In assessing this tying arrangement, Justice Black in *Fortner I* suggested that economic power in the tying market for credit could be found when an "appreciable number" of buyers wanted the tying product sufficiently that they would take the tied product which they might have preferred to buy elsewhere, all other factors being equal. Because tie-ins were deemed to serve no legitimate procompetitive purpose that could not be achieved by a less restrictive means, Justice Black concluded that "the presence of any appreciable restraint on competition" can serve to trigger the *per se* tie-in doctrine.

> Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market . . . . despite the freedom of some or many buyers from the seller's power . . . . Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie in, with respect to any appreciable number of buyers within the market.

Fortner I, 394 U.S. at 503-504. United States Steel by offering uniquely favorable credit terms (the tying product) was able to extract supracompetitive prices **[**36]** for its prefabricated houses (the tied product). [21]

After remand, Fortner prevailed in the lower court which allowed a finding that United States Steel had sufficient power in the credit market to invoke *per se* condemnation of the tying arrangement. When the case eventually returned to the Supreme Court, *Fortner II* held that a more careful analysis of actual power in the tying market was needed -- even for **[**37]** "unique" products and for powerful defendants such as United States Steel. As is alleged in the present case concerning the full "market basket" of goods purchased from Blue Line, United States Steel was charging its tied customers supracompetitive prices for the tied product, and there were a substantial number of buyers accepting this "burdensome" tie.

Nonetheless, the Supreme Court held that the plaintiff had to prove that "the seller has the power, within the market for the tying product, to raise prices" or "to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *Id. at 620*. The defendant must have "some advantage not shared by his competitors in the market for the tying product." *Id. at 620*. Cheaper and more freely available credit terms are indeed a "unique" tying product, but this is because U.S. Steel was "willing to accept a lesser profit -- or to incur greater risks -- than its competitors." Without dissent, the *Fortner II* Court determined that this is not the "kind of uniqueness" that constitutes exploitable "economic power in the credit market." *Id. at 621-22*. The Court noted that United States Steel **[**38]** was willing "to provide cheap financing in order to sell expensive houses" and this

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[19] *Fortner Enters. v. United States Steel Corp. (Fortner I), 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*.

[20] *United States Steel Corp. v. Fortner Enters. (Fortner II), 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)*. Justices Burger, Blackmun, Powell, Rhenquist and Stevens were not on the Court when *Fortner I* was decided. Even Justices Brennan and Marshall, in the majority in *Fortner I,* joined the majority of *Fortner II* which was unanimous on its treatment of market power in the tying market.

[21] Justice White in his *Fortner I* dissent determined first that there was nothing "unique" about the money U.S. Steel was lending other than its "low cost" which is "ordinarily no reflection of market power." *Id. at 515*. He added that if the great credit deal was not available from any source other than U.S. Steel, then Steel's competitors in the prefabricated house market lost no possible sales in the "tied market" because the potential buyer/developers who needed such otherwise unavailable credit to build these houses could not buy prefabricated houses from a competitor of U.S. Steel.

"unique . . . financing" does not support a finding that defendant "had the kind of economic power" which a plaintiff must demonstrate to invoke the *per se* rule against tie-ins.

Fortner II refused to infer market power from the fact United States Steel's prefabricated houses were sold at above-market prices, and there were a number of people that accepted its tie between credit and the purchase of these houses. The lack of apparent power for the fungible tying item -- the market for money -- led the Court to accept "the possibility" that the lower cost of borrowing **[*474]** offset the higher cost of the houses, and the bundled package was thus "competitive." *Fortner II, 429 U.S. at 618*. [22] When a seller defendant clearly dominates a conventionally defined market, the finding of market power is an easy task. In other cases, it is a far more complicated task involving comparisons of the product the defendant is offering with that of the defendant's rivals. The defendant's and its rivals' prices and costs must also be compared for each of the products and for the combined package. It is possibly for **[**39]** this reason that courts, such as *Fortner II,* will not infer substantial market power solely from the existence of numerous ties coupled with above-market prices for the *tied* product. [23]

[40]** *Jefferson Parish* reiterated that significant power in the tying product market is needed to find a tie-in *per se* illegal. The Court defined the tying market as competing hospitals in the Jefferson Parish geographic area from which a patient (with the advice or preference of his or her doctor) could select. Defendant had only a 30% share of that market. [24] The Supreme Court considered this insufficient market power in the tying product to condemn East Jefferson Hospital under the *per se* tie-in rule even though it unquestionably had a tie-in between the use of its surgical facilities and the services of its selected anesthesiologists. If patients, in consultation with their doctors, did not like East Jefferson Hospital's tie-in because it was more expensive or limited their free choice in the tied market, they could go to another hospital in the Jefferson Parish area and get a different anesthesiologist of their choice.

[41]** As commonly stated and recently reiterated by the Sixth Circuit, under tying's *per se rule* the seller must possess substantial market power in the tying product market. *PSI, 104 F.3d at 815 n.2*. Without significant market power in the tying product the defendant cannot force the buyer to pay higher prices or accept other burdensome terms such as buying a tied product on less favorable terms than offered by competitors or that the buyer would otherwise not have purchased at all. [25] **[**42]** As with every element of the *prima facie* case, plaintiffs have the burden of proof on showing significant market power in the tying market. [26]

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[22] This suggests that before market power can be inferred from a number of customers accepting "burdensome" terms, a court must evaluate whether the terms of the tie really are "burdensome." One would need to know whether the quality-adjusted package price exceeds rival prices for the two products. One of the LCE claims argued in this motion that this Court need not address involves this issue of whether plaintiffs must prove that the total package is priced above market. *(See* Defendant's brief at 11-12.)

[23] *See also Will v. Comprehensive Accounting, 776 F.2d 665, 672-73 (7th Cir. 1985)*, *cert. denied,* ***475 U.S. 1129, 90 L. Ed. 2d 201, 106 S. Ct. 1659 (1986)*** (the Seventh Circuit assumed the tied product price was above market but refused to infer power in the absence of a showing that the tied price for both items exceeded the market price for the two items sold separately). *Jefferson Parish* found no market power even though there were a substantial number of ties and an asserted indifference to price in the tied product due to market imperfections and information costs.

[24] ***HN10***[] Power can be inferred from a large share of the relevant market or from other factors such as a unique product with no substitutes, *e.g.* a patented product, or substantial barriers to the ease of entry. *See Jefferson Parish, 466 U.S. at 16*; *Tic-X-Press, Inc. v. Omni Promotions Co. of GA., 815 F.2d 1407, 1420 (11th Cir. 1987)*. Most of the cases involving proof of market power by methods other than a high share of the relevant tying market were before 1977 when *Fortner II* turned a more critical eye on assertions of substantial market power in the absence of substantial market share.

[25] The Areeda treatise notes that "*Jefferson Parish* . . . indicated that a defendant without power in the tying market can neither coerce customers to take an unwanted product from him nor significantly impair competition in the tied market." *466 U.S. at 11-13*. The Areeda authors use an example of "suppose that all franchisors require their franchisees to take certain supplies from the franchisor. If none of them has the requisite power individually, the per se rule would be inapplicable. Nor would the restraints be unreasonable when the aggregate foreclosures were but a minor share of the tied market." AREEDA, ET AL., at 40, P 1734a n.6.

One of the most thoughtful analyses of the "significant" aspect of market power is found **[*475]** in *Grappone v. Subaru of New England, 858 F.2d 792 (1st Cir. 1988)*, where Justice (then Judge) Stephen Breyer wrote for the First Circuit. He defined "*significant* market power" as necessitating "more than the mere ability to raise price only slightly, or only on occasion, or only to a few of a seller's many customers." *Id. at 796*. "To show market power, the seller must have a significant market share or sell a unique, such as a patented, product for which there are not readily available substitutes." [27] *Id.* A seller with limited ability to raise prices "cannot easily cause harm in *tied* product markets" and "cannot easily harm consumers." *Id. at 796-97*.

[43]** *Grappone* noted that without market power in Product *A*, the seller cannot force a buyer to take "a more expensive or less desirable Product B." *Id. 858 F.2d at 795*. It notes that a seller with market power in Product *A* who has already exercised it by charging more for Product A

> cannot force buyers to take a more expensive or less desirable Product B, *unless* it provides buyers *equivalent* compensation by lowering the price of Product A (or maintaining Product A's price at a level lower than the Seller has the *power* to charge), for otherwise buyers, who were already paying as much as the Seller could charge them (with its degree of market power) would also likely switch to other sellers or discontinue use of Product A. *See Jefferson Parish, 466 U.S. at 39* & n. 8, 40, *104 S. Ct. at 1572* & n. 8, 1573 (O'Connor, J., concurring). This is simply to make the logical point that "fully exploited" buyers would not take a less desirable Product B without compensation, for otherwise they were not being "fully exploited."

Id. at 795. [28]

[44]** The *Grappone* opinion notes that *Jefferson Parish* brings into visibility the upshot "counterintuitive" notion

> that a "tie" does not hurt the typical buyer in any *obvious* way; one needs a more refined analysis to find the harm.
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> * * *
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> The *Jefferson Parish* Court provides that more refined analysis. The majority and concurrence recognized that a Seller, possessing significant market power with respect to Product A, may cause anticompetitive harm by tying as follows: by reducing the price of Product A slightly (or by otherwise not fully exploiting its power with respect to Product A), the Seller may induce the Buyer to accept the tie; by doing so, the Seller may build a strong market position in Product B; and *that position* in Product B, in turn, may increase its power to charge high prices in respect to Product A. If a monopolist of patented can-closing machinery, for example, insists, as a condition of selling his machines, that their purchasers buy his cans, he will likely soon have a monopoly in cans as well as machines. And, that fact--the fact that he controls *both* cans and machines--may make his monopoly safer from competitive attack when his patent **[**45]** on the can-closing machinery expires. A new competitor would then have to enter *both* levels of the business (cans and machines) to deprive him of monopoly profits. And, this added security may enable the machinery monopolist to charge higher prices. The tie, by permitting the Seller to extend its market power from one level to two, may thereby raise entry barriers,

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[26] *A.I. Root Co. v. Computer Dynamics, 615 F. Supp. 727, 733 (N.D. Ohio 1985)*, *aff'd, 806 F.2d 673 (6th Cir. 1986)*, placed the burden on the plaintiff to show not only a substantial number of customers accepted the tie, but their doing so could only be explained in terms of the defendants having market power.

[27] As noted by Justice O'Connor in her concurring opinion in *Jefferson Parish,* even a patent does not make a product unique for purposes of determining market power if the relevant market contains reasonable substitute products to which a consumer can turn if the price of the patented item goes up significantly. *466 U.S. at 39-40*.

[28] *Jefferson Parish* suggests that this is not always the case because by tying *B* to *A* the seller may camouflage the true price of each product. The Court notes that a seller might increase "monopoly profits over what they would be absent the tie" either by price discrimination (against the less informed consumer) or "perhaps by [the buyer's] inability to evaluate the true cost of either product when they are available only as a package." *See also 466 U.S. at 15* and n.24.

> providing security that helps a monopolist-seller further harm the consumer. This point is made both by the *Jefferson Parish* majority, 466 U.S. at 14, 104 S. Ct. at 1559, and the concurring justices, id. at 36-37, 39, 104 S. Ct. at 1570-71, 1572; *see also* 3 Areeda and Turner PP 725h, 733e.
>
> **[*476]** Of course, in such circumstances, tying would hurt the Buyer or consumer only when it first hurts firms seeking to sell the *tied* product. Only if the tie significantly reduces the opportunities to sell Product B, can the tie significantly increase the Seller's power in respect to Product B, and thereby *(i.e.,* by raising entry barriers) increase the Seller's power in respect to Product A. *See* Jefferson Parish, 466 U.S. at 14, 18-25, 104 S. Ct. at 1559. And, insofar as tying impedes "competition on the merits," **[**46]** discouraging the search for innovation or efficiency, it does so in the *tied* product markets. Jefferson Parish, 466 U.S. at 14, 104 S. Ct. at 1559; 3 Areeda and Turner P 725g;
> * * *
>
> The majority and minority [concurring] opinions in *Jefferson Parish* disagree, not in respect to the nature of the link between tie and potential competitive harm, but in respect to the legal conclusions they would draw from the nature of this linkage. The minority would abandon the *per se* anti-tying rules and analyze tying under a "rule of reason"; it would prohibit tying only when according to its "demonstrated economic effects[,] . . . [tying's] anticompetitive impact outweighs its contribution to efficiency." Jefferson Parish, 466 U.S. at 41-42, 104 S. Ct. at 1573-74. The majority would retain pre-existing *per se* rules; but it also breathes life into the screening function that the preconditions of those *per se* rules serve. The majority, for example, makes clear that by its requirement of "market power" it means *significant market power--more than* the mere ability to raise price only slightly, or only on occasion, or only to a few of a seller's many customers. **[**47]**
> * * *
>
> That the "market power" hurdle is moderately high--that it cannot ordinarily be surmounted simply by pointing to the fact of the tie itself or to a handful of objecting customers--makes sense in light of the harms the anti-tying rules seek to avoid. . . . Virtually every seller of a branded product has *some* customers who especially prefer its product. But to permit that fact alone to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose.

858 F.2d at 795-97 (various case citations and academic references omitted). [29]

While *Grappone* was pre-Kodak, and plaintiff Grappone was not "locked in" by high switching costs because the dealership in which he had "sunk costs" sold multiple brands of cars other than **[**48]** the Subaru, the opinion concludes that for most product distribution franchises or dealerships, the relevant tying market is the interbrand foremarket. In *Grappone,* the tied product was a package of Subaru parts, the tying *product* was the Subaru franchise, but the relevant tying product *market* was either all automobiles or all imported automobiles.

> Subaru's market share, whether measured in terms of sales of all autos or of imports or in any other reasonable way, is minuscule. *See* Kenworth of Boston, Inc. v. Paccar Financial Corp., 735 F.2d 622, 623-24 (1st Cir. 1984) (tying product is Paccar trucks, relevant market is that for all heavy trucks); Kingsport Motors, Inc. v. Chrysler Motors Corp., 644 F.2d 566, 571 (6th Cir. 1981) (tying product is Dodge cars, relevant market is that for all medium priced automobiles sold in U.S.); Anderson Foreign Motors, Inc. v. New England Toyota Distributors, Inc., 475 F. Supp. 973, 986 (D.Mass. 1979) (tying product is Toyotas, relevant market is that for all new foreign and domestic cars); *see also* A.I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673, 675 (6th Cir. 1986) (tying product is specialized computer **[**49]** equipment, relevant market is that for all small computers).

Id. 858 F.2d at 797.

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[29] *Fortner II* also noted that most sellers have the ability to raise prices and not lose particularly loyal customers, but this limited "power" does not trigger the *per se* tying rule. 429 U.S. at 621 n.14.

Thus, the *Fortner II-Jefferson Parish* cases insisted on a "more refined analysis" of the need for demonstrating substantial market **[*477]** power in the tying product market before the probability of harm in the tied market is so high that it can be presumed under the *per se* tying doctrine. Thereafter, courts were reluctant to find market power in single brand products, no matter how coveted or unique, if other brands of the product might, at a certain price level, be selected as substitutes for the preferred brand. [30] If the interbrand competition containing Product *A* is healthy, and no firm has a substantial market share suggesting market power in the pre-contract market, courts assumed that interbrand competition in the foremarket would police any market abuses by competing firms. Thus, with a competitive foremarket if any firm had a tie-in of its Product *A* with Product *B,* the normal economic assumption would be that acceptance of the bundling was a voluntary consumer choice and not "coerced." *Jefferson Parish* involved clearly tied products in which substantial consumers acquiesced. **[**50]** *Fortner II* involved not only a substantial number of consumers accepting the tie of the credit and houses, but also proven abovemarket prices for Product *B* when obtained as part of a tie. [31]

[51]** B. *Kodak* and Narrowed Market Definition:

The Supreme Court in *Kodak* called into question the reluctance of courts to use a single brand product to define a market for antitrust tying purposes and its *per se* rule. Kodak sold photographic and micrographic equipment which the majority opinion defined as "unique" at least to the extent that software programs and parts that operated with Kodak's machines were "not compatible with competitors' equipment, and visa versa." *504 U.S. at 457*. It provided service and parts to its customers. Some of its unique parts were made by Kodak but most were made by licensed manufacturers. Independent service organizations ("ISO's") in the 1980's began repairing Kodak equipment, selling its parts, reconditioning and reselling used Kodak equipment. In 1985-86 Kodak began a policy of selling replacement parts only to buyers of its equipment who used Kodak's repair service or who serviced their own equipment. The manufacturers of those Kodak parts that Kodak did not make agreed not to sell such parts to anyone except Kodak. As a result of this new policy, ISO's were unable to get adequate parts to service or rebuild Kodak machines, and many **[**52]** went out of business. *Id. at 458*.

The ISO's sued Kodak alleging an illegal tie under the *per se* rule that involved Kodak tying its service to its unique parts. After very limited discovery the district court granted Kodak summary judgment because the ISO's had provided no evidence that Kodak's *equipment* was tied to Kodak's *parts and service* -- a claim that the ISO's were not making. The Ninth Circuit reversed noting that there was a disputed issue of fact over whether there were separate markets for the tying product (which the Ninth Circuit correctly recognized the ISO's were claiming was the unique Kodak repair parts) and the tied product (the Kodak service). Having determined that there was sufficient evidence to allow a finding that two product markets existed, the Ninth Circuit considered the question of whether "Kodak has sufficient economic power in the tying product market [parts] to restrain competition in the tied product market [service]." *504 U.S. at 460* (quoting *Image Technical Service, Inc. v. Eastman Kodak Co., 903 F.2d 612, 616 (9th Cir. 1990)*, bracketed materials in original). Kodak argued that as a matter **[*478]** of law interbrand "competition in **[**53]** the equipment market [prevented] Kodak from possessing power in the parts market." *Id.* While the Ninth Circuit acknowledged that this "theoretical" premise "might be true" it would not allow summary judgment on a factually thin record because "market imperfections can keep economic theories about how consumers will act from mirroring reality." *903 F.2d at 617*. In its *certiorari* review, the Supreme Court majority opinion stated that "the principal issue here is whether a defendant's lack of market power in the primary equipment

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[30] Courts have consistently refused to consider one brand to be a relevant market of its own when the brand competes with other potential substitutes. *A. I. Root v. Computer Dynamics, 615 F. Supp. 727, 733 (N.D. Ohio 1985)*, *aff'd, 806 F.2d 673, 675-76 (6th Cir. 1986)*, and the other cases cited in *Grappone* (small business computers was a relevant market, not just those that would run on BOSS software); *see also General Business Sys. v. North Am. Philips Corp., 699 F.2d 965, 972-75, 977-78 (9th Cir. 1983)* (small business computers and not the defendant's unique computer storage cards was the relevant market); *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 672-73 (7th Cir. 1985)*, *cert. denied,* ***475 U.S. 1129, 90 L. Ed. 2d 201, 106 S. Ct. 1659 (1986)*** (franchises for an accounting system).

[31] There was clear price discrimination for the prefabricated homes in *Fortner II* between those who needed United States Steel's credit and those who did not.

market precludes -- as a matter of law -- the possibility of market power in derivative aftermarkets." 504 U.S. at 454-455. It noted later that:

> Kodak does not present any actual data on the equipment, service or parts markets. Instead, it urges the adoption of a substantive legal rule that "equipment competition precludes any finding of monopoly power in derivative aftermarkets . . . . Kodak argues that such a rule would satisfy its burden as the moving party of showing "that there is no genuine issue as to any material fact" on the market power issue. 11

11 Kodak argues that such a rule would be *per se,* with no opportunity for **[**54]** respondent to rebut the conclusion that market power is lacking in the parts market. . . .

504 U.S. at 466.

> A legal presumption against a finding of market power is warranted in this situation, according to Kodak, because the existence of market power in the service and parts market absent power in the equipment market "simply makes no economic sense," and the absence of a legal presumption would deter procompetitive behavior.

504 U.S. at 467. The majority opinion notes that in considering Kodak's *per se* defense:

> To determine whether Kodak has met [its summary judgment] burden, we must unravel the factual assumptions underlying its proposed rule that lack of power in the equipment market necessarily precludes power in the aftermarkets.
>
> The extent to which one market prevents exploitation of another market depends on the extent to which consumers would change their consumption of one product in response to a price change in another, *i.e.* the "cross-elasticity of demand."

* * *

504 U.S. at 469. Kodak argued that the Court should accept, as a matter of law, this "basic economic reality" . . . "that competition in the equipment market necessarily **[**55]** prevents market power in the aftermarket." 504 U.S. at 470.

The Supreme Court in *Kodak* stressed that in considering market power, economic theory provides useful guides. Yet, textbook economic models cannot be a substitute for the actual facts and the market realities of the case.

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record." In determining the existence of market power, and specifically the "responsiveness of the sales of one product to price changes of the other," this Court has examined closely the economic reality of the market at issue.

504 U.S. at 466-67 (citations omitted). At least in a case where the plaintiff has come forward with some evidence of a dysfunction in the theory that markets control prices by competition and free access to new competitors, the *Kodak* court stressed that ***HN11***[] defendant "bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and **[**56]** excluded competition, an inference of market power is unreasonable." *Id. at 469*.

Citing *Jefferson Parish, Kodak* emphasized "the relevant market for antitrust purposes is determined by choices available to Kodak equipment owners." *Id. at 482*. "The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' **[*479]** faced by consumers." *Id.* (quoting *United States v. Grinnell, 384 U.S. 563, 572, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966))*. *Grinnell* had held that after defining the appropriate market, monopoly may "ordinarily be inferred from the predominant share of the market." 384 U.S. at 571.

The Court stated that "Kodak's theory does not explain the actual market behavior revealed in the record." *504 U.S. at 473*. The ISO's had come forward with some evidence that was inconsistent with the general economic theory. They demonstrated that Kodak had raised prices and driven out ISO competition in the aftermarkets. *504 U.S. at 477*.

The Court found that:

> Respondents [the ISO's] offer a forceful reason why Kodak's theory, although perhaps intuitively appealing, may not accurately explain the behavior of the **[**57]** primary and derivative markets for complex durable goods: the existence of significant information and switching costs. These costs could create a less responsive connection between service and parts prices and equipment sales.

504 U.S. at 473.

The *Kodak* majority also noted that there was other evidence consistent with illegal ties. There was evidence of price discrimination favoring those Kodak customers who serviced their own equipment (which might be the more sophisticated customers) and thus could avoid any supracompetitive pricing of Kodak service. The Court added:

> Service prices have risen for Kodak, but there is no evidence or assertion that Kodak equipment sales have dropped.

504 U.S. at 472.

In light of these factors and "higher service prices and market foreclosure," the Court chided that "Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition." *Id. at 478-79*. The Court concluded that Kodak

> has failed to demonstrate that respondents' inference of market power in the service and parts markets is unreasonable, and that, consequently, Kodak is entitled to summary judgment. It is **[**58]** clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so. It is also plausible . . . to infer that Kodak chose to gain immediate profits by exerting that market power where locked in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any long-term loss.

Id. at 477-78 (footnote omitted).

Justice Scalia, in his dissenting opinion, makes it clear that if Kodak had from the outset tied a lifetime parts and service warranty to the sale of its micrographic and photocopying equipment, or if it had announced its policy of limiting parts sales solely to customers who serviced their own machines, then the customers would have bought the equipment in the first hypothetical situation with knowledge of the tie between equipment and parts and service, and in the second hypothetical "with the knowledge that aftermarket support could be obtained only from Kodak." *504 U.S. at 491*. In both of these cases, Justice Scalia argues that "the *tying* product market would be the *equipment"* market in which Kodak had no market power **[**59]** that could have "effectively forced consumers to purchase Kodak micrographic or photocopying machines subject to the company's restrictive aftermarket practices." In such a case, summary judgment would be appropriate insofar as application of the *"per se* rule was concerned." *Id.*

There is nothing in the majority opinion to suggest that they disagree with either of these two hypotheticals of (1) an *express tie-in* or (2) an *announced* policy even though either hypothetical would foreclose ISO's from servicing Kodak machines. Justice Scalia notes that on the facts available to Kodak customers, at least after 1995, most of the purchasers of micrographic equipment and all of the

> purchasers of new Kodak copiers, could have been aware of Kodak's parts practices. The only thing lacking to bring all of these purchasers (accounting for the vast bulk of the commerce at issue here) **[*480]** squarely

> within the hypotheticals we have described is concrete evidence that the restrictive parts policy was announced or generally known.

Id. at 492.

In Justice Blackmun's majority opinion response to this assertion, there is absolutely no disagreement with the legal premise Justice **[**60]** Scalia uses. Rather, it is the lack of undisputed factual support in the record for the legal premise that Justice Blackmun determines is the bar to summary judgment. His majority opinion responds, "but the dissent's 'only thing lacking' is the crucial thing lacking -- evidence." Id. at 477 n.24. Again, Kodak was moving for summary judgment based solely upon its economic theory and had submitted no evidence to counter that of the plaintiffs. This footnote suggests that had there been adequate undisputed evidence that the restrictive parts policy was announced or generally known, the majority's concern over information and switching costs would no longer have existed, and summary judgment would have been granted to Kodak on the *per se* tie-in claim. [32]

[61]** If Kodak customers before purchasing their machines knew that parts would only be available to Kodak equipment owners who used Kodak's service or who serviced their own machines, these customers would also know that if they bought the Kodak machine, they would have to forego getting service from an ISO if their machine later failed. The reason most customers would know this is that if the Kodak restrictive parts policy is generally known, *it is obvious* to potential Kodak customers that ISO's would not have new replacement parts available. While this information may not solve the information cost problem of accurate life-cycle pricing, it at least gives enough information to a substantial number of potential Kodak customers *before they lock in* by purchasing a Kodak machine, that they face certain risks on future Kodak parts and/or service costs. Then these customers would have the freedom of: (1) shopping around with other equipment manufacturers to compare their price, parts and service policies and possibly find a better deal; or (2) seek contractual protections from Kodak through extended warranties or some price guarantees for parts and service either via fixed pricing **[**62]** lists or "most favored customer protections; or (3) knowingly gamble that their machine will not break down or Kodak will fix it without exploiting them on price for parts and/or service. Thus, in Kodak, if the restrictive parts policy were "generally known" before buying a Kodak machine, it is possible that there would be enough sophisticated potential Kodak customers around so that the equipment market would police and limit Kodak's aftermarket power to act opportunistically.

Yet, the *Kodak* majority immediately notes that this is not necessarily the case. If "acquiring the information is expensive," many may choose not to obtain it, limiting the number of informed customers. Id. at 474. Second,

> if the number of sophisticated customers is relatively small, the amount of profits to be gained by supracompetitive pricing in the [tied product] market could make it profitable to let the knowledgeable consumers take their business elsewhere. More importantly, if a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uniformed.

Id. at 475.

While Justice **[**63]** Scalia's hypotheticals would lessen the precontract information costs through an announced or generally known policy, they do not address those who learn the information after purchase where they are locked in by their sunk costs. While in some situations the need to attract new customers may protect those customers who are locked in, the majority notes that where "the **[*481]** number of locked in customers were high relative to the number of new purchasers" or where "the seller can price discriminate between its locked in customers and

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[32] The Areeda treatise notes that in considering a known policy of not making unique parts available to independent repairs,

> the *Kodak* dissent urged that me relevant tying product would be the machine if Kodak's policy of not selling repair parts to independent service organizations were generally known to machine buyers. The majority apparently agreed when it emphasized the absence of evidence that Kodak's policy was generally known.

AREEDA at 150, P 1740 (footnotes omitted).

potential new customers," the strategy of a tie-in and supracompetitive pricing for the tied product may "prove profitable." *Id. at 476*.

Thus, while the majority seems to agree with Justice Scalia's two hypotheticals where there is evidence that the tie-in policy is announced or generally known pre-contract, it suggests several additional scenarios where a seller could exploit pre-contract information deficiencies and post-contract switching costs and not be constrained in its opportunism by the need for new sales or by sophisticated customers.

The two hypotheticals noted by Justice Scalia -- with which the *Kodak* majority implicitly agrees if *and* **[**64]** *when* supported by actual evidence and not merely by economic theorizing -- are relatively simple because the market implications or risks of such announced or generally known information would be *obvious* to most consumers.

What is less clear from *Kodak* is whether its narrowed tying market definition is available when the implications or risks flowing from what is "announced" or "generally known" precontract are *not obvious* to most reasonable potential consumers, and will not apprise them of the potential risk of future seller opportunism prior to getting "locked in" by purchasing the product without shopping around or seeking contract protections. In such a case, particularly where new foremarket sales are less important or can be preserved by discounts or price discrimination, the foremarket competition will not protect substantial "locked in" customers from aftermarket opportunism and exploitation. [33]

[65]** The *Kodak* case evoked an avalanche of professional and academic writing seeking to determine its exact meaning and potential reach. It has also been a source of substantial litigation in federal courts. One academic commentator has asserted the *Kodak* case and its discussion of the impact of information costs and switching costs on market definition has raised an issue that is "one of the most conceptually difficult courts face in antitrust litigation." Warren S. Grimes, Antitrust Tie-In Analysis After Kodak: Understanding the Role of Market Imperfections, 62 Antitrust L.J. 263 (1994). [34]

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[33] As I note later, there may be in this case a disputed issue of material fact whether the mid-1990 Franchise Agreement disclosed enough for a reasonable potential consumer of LCE franchises to know (what the evidence suggests LCE knew) that (1) if many mid-1990 franchisees expose themselves to an LCE/Blue Line tie-in of logoed goods which was "generally known" or for most franchise shoppers fairly obvious from the language in the mid-1990 Franchise Agreement and other readily available facts); and (2) if LCE refused to sell logoed paper goods to alternative distributors, then (3) this would raise entry barriers and the ability to compete for alternative distributors because of many franchisees' preference for one stop shopping and the fact that logoed goods had higher profit margins than the other items in the "market basket" of products needed to operate a LCE franchise. This latter impact on potential alternate distributors' ability to enter the market and compete with Blue Line is not "so obvious" that this Court could, on this record, determine that it was "generally known" for purposes of granting partial summary judgment.

[34] Professor Grimes argues:

> The cases suggest the need to adopt a test for tie-ins that accounts for market imperfections. Making market power the exclusive key to anticompetitive injury pressures the courts to define the market narrowly to adjust for market imperfections that are present in tie-ins. A case such as Kodak presents the issue of a harmful tie because of market imperfections, not because of any fundamental structural problem with the micrographic industry. If the Court stretches market definitions to allow for these imperfections, market definitions are distorted. For example, when the Court defines the market to include only Kodak spare parts, this definition would have possible ramifications for merger analysis under Section 7 of the Clayton Act or for monopolization suits under Section 2 of the Sherman Act. Yet the structural remedies often used in merger or monopolization suits are surely inappropriate in a case like Kodak.
>
> Courts can reconcile this tension by simply decreeing that separate standards govern market definitions in tie-in cases. But such a declaration is likely to lead to more confusion on an issue that is already one of the most conceptually difficult courts face in antitrust litigation. If, instead, there is forthright recognition that market shares are not dispositive when the harm from a tie arises from market imperfections, much of the pressure to distort market definitions is reduced. Market definitions will still be critical in determining whether a tie is associated with cartel behavior or likely to raise competitors' costs. But in testing for such injury, there would appear to be no reason to define the tying product market any differently than would be done in a merger or monopoly case.

[66]** **[*482]** This author argues that "the confused and unsatisfactory state of current substantive law on tie-ins" could be improved with "a forthright recognition that market shares are not dispositive when the harm from a tie arises from market imperfections" and franchisor opportunism occurring after a franchisee is locked in. He argues that looking at market imperfections in light of the underlying policies and harms that antitrust tie-in law seeks to address would reduce "much of the pressure to distort market definitions . . ." *Id.* [35]

[67]** In other situations, the *Kodak* majority opinion is consistent with a reading that in light of what a defendant has announced and what is generally known the information concerning other consequences that the defendant may later be able to exploit is not sufficiently known, obvious or reasonably knowable so that in such a case, even with an announcement or general knowledge of certain facts, other substantial information costs remain and a *Kodak* lock-in theory market definition may still be possible.

In the present case, even if LCE's tying of logoed goods to continued operation of a Little Caesar franchise was announced or generally known pre-contract to the class plaintiffs, were most of these franchisees unaware pre-contract of the negative impact of this tie on alternate distributors' ability to enter the market and effectively compete with Blue Line? Would Little Caesar's awareness of these facts and later exploitation of locked in franchisees permit these franchisees to successfully assert a *Kodak*- type market definition because of their remaining information costs and switching costs even if they knew the logoed items were tied? Unlike Justice Scalia's two hypotheticals **[**68]** where the market consequences were *obvious,* here the consequences of an announced or generally known tie were not so obvious. While Justice Blackmun seems to implicitly agree with Justice Scalia's two hypotheticals (when actual evidence, and not just theory, supports them) his opinion clearly seems to leave the door open to a narrowed market definition where there remains substantial information and switching costs that are actively exploited by the defendant.

C. *PSI Repair Service v. Honeywell, Inc.*:

In the Sixth Circuit's PSI Repair *Services, Inc. v. Honeywell, Inc., 104 F.3d 811 (6th Cir. 1997)*, case, Honeywell, like Kodak, has a restriction on sale of its unique repair parts except as a part of its service. [36] In *Kodak* and *PSI,* the asserted market power came from the sunk costs or costs of abandoning expensive equipment and switching to other equipment. This "power" comes with any investment in something that later requires aftermarket goods or parts that are not available from sources other than the seller.

Id. at 316-17 (footnote omitted).

[35] The author notes that the ability of a buyer to negotiate with the seller for contractual protections before purchasing a tying product may not be an adequate pre-contract safeguard if market imperfections affect the buyer's motivation. "The real issue is not whether corrective mechanisms exist for knowledgeable buyers but how quickly and how pervasively knowledge of the unfavorable terms of the seller's tie will permeate the market." *Id. at 175 n.44*.

While consumer information pervades real world markets, that does not mean that certain information costs should not lead to antitrust remedies when they are exploited by sellers.

> The proper distinction here is that, as a policy matter, the law should address active and intentional behavior that creates new consumer injury even if a similar injury created by a seller's passive reliance on market imperfections is beyond the law. Like deceptive advertising or securities fraud, a seller's use of a harmful tie is voluntary and intentional behavior and it results in additional harm that would not occur if the seller were passively benefiting from market imperfections.

Id. at 280.

[36] As noted above, the Sixth Circuit found that notwithstanding Honeywell's denials, it was providing *service* as a separate product from its parts even though it immediately replaced a customer's defective control panel with a replacement panel. While it did not "service" all control panels, customers had to return the defective control panels. Honeywell then examined the returned defective panels and repaired many of them. These "serviced" control panel were placed in the inventory of control panels used to replace defective ones for their customers.

[69]** **[*483]** If the seller seeks and is financially dependent on continued sales in the foremarket, it risks substantial harm to its reputation and future sales if it uses aftermarket "leverage" to exploit its old customers by charging prices significantly above-market for aftermarket goods or by forcing a tie to another product or service. If prior to a purchase the customer knows of the existence of, or the reasonably foreseeable risk of, a tie or excessive pricing for needed aftermarket goods, that customer has the freedom to accept those terms and risks, seek a competitor's package without such risks, seek alternate contract protections, or forego the investment altogether. In such cases the concerns of antitrust tying law with either limiting a consumer's free choice in the market or excluding potential competitors from the market do not arise because competition in the foremarket should police opportunistic behavior in the aftermarket. What prevented this freedom of informed choice in *Kodak* was the fact that Kodak changed its policy after a substantial number of consumers had bought their machines and were locked in. [37]

[70]** In PSI, when considering the implications of *Kodak* for what an equipment manufacturer must do before a plaintiff can assert a single brand market as a tying product market, the Sixth Circuit focused on what actions the manufacturer undertook to increase or take advantage of the information costs faced by a potential consumer. It looked to what most consumers would have known. [38] *PSI* quotes Justice Blackmun's response to Justice Scalia's dissent regarding "the only thing lacking" is evidence that Kodak's "restrictive parts policy was . . . generally known." *104 F.3d at 819* (quoting *504 U.S. at 477 n.24*). It agreed with the interpretation of *Kodak* as holding that if

> its policy [of tying service to the availability of replacements parts] was generally known, the Court would have considered Kodak copiers as the tying product and service and parts combined as the product being tied. *See* 10 Phillip E. Areeda, et al., ***ANTITRUST LAW*** P 1740c, at 150 (1996).

104 F.3d at 819. The Sixth Circuit joined the First and Seventh Circuits in limiting the availability of a *Kodak* single brand tying market "to situations in which the seller's policy was not generally **[**71]** known." *Id.* It noted case authority holding that "the material dispute that called for a trial was whether the change in policy enabled Kodak *to* extract supracompetitive prices from customers who had already purchased its machines." *Id.* (citing *Digital Equip. Corp. v. Uniq Digital Techs, Inc., 73 F.3d 756, 763* ***[*484]*** *(7th Cir. 1996))*. The *PSI* panel found that in the facts of *Kodak* it was "the change in policy" by the defendant that was "the crucial factor in the Court's decision."

> By changing its policy after its customers were "locked in," Kodak took advantage of the fact its customers lacked the information to anticipate this change. Therefore, it was *Kodak's own actions that increased its*

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[37] In *Kodak*, any buyer of the equipment without an extended warranty or a service contract with fixed prices could, on a moment's reflection, realize that the manufacturer had the power to raise replacement parts to above-market prices or condition their availability on purchasing above-market price service from Kodak. The majority, however, did not use this "could have known" information about the risk to bar the potential availability of a narrowed tying market definition.

Assuming our inferences noted above about Justice Blackmun's footnote 24 response to Justice Scalia are correct, then the majority would have denied the narrowed tying market definition if this policy were announced or generally known. The narrowed market definition is not necessarily foreclosed if the risk is "knowable" but not obvious or generally known. The majority may have left this potential availability of a narrowed tying market definition because the general economic assumption is that a manufacturer's concerns about its reputation in the foremarket and its desire for future equipment sales would prevent its aftermarket opportunism. Thus, not only was its change of policy not "obvious," it ordinarily would not be anticipated because of its potential for harm to Kodak's reputation in the equipment market.

[38] The use of "generally known" in *Kodak* and *PSI* suggests that a narrowed tying product market definition would not be available if a sufficient number of reasonable customers knew enough pre-contract to be "sophisticated" and thereby "police" the market in some manner for the less sophisticated. Thus, the unsophisticated customer will not have an antitrust claim using a *Kodak* market definition if competitive forces in the market are maintained through what is known by a sufficient number of sophisticated customers. This situation might be different if the seller can identify the informed/sophisticated customers and discriminate in their favor by lower prices or exclusion from the tying arrangement. Yet, where the market operates with reasonable effectiveness and the informed consumers protect most of the uninformed consumers, any injury incurred by the ignorant, reckless or foolish consumer will have a legal remedy, if at all, in contract, fraud or consumer protection law but not in antitrust.

> *customers' information costs.* In our view, this was the evil condemned by the Court and the reasons for the Court's extensive discussion of information costs. While PSI's argument seems to suggest that *Kodak* supports a finding of market power whenever information costs are present, such a position cannot be reconciled with *Jefferson Parish.*

104 F.3d at 820 (emphasis supplied).

[72]** The Sixth Circuit then noted that plaintiffs in *Jefferson Parish* also argued that information costs should be considered in defining the market as the "single brand" East Jefferson Hospital instead of all the hospitals in the Jefferson Parish area. Yet, the Supreme Court rejected that argument noting that "while these factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying."

The PSI case interpreted this to mean that:

> Put another way, the Court rejected the premise that imperfect consumer information resulting from basic market imperfections could be used as a basis to infer market power for purposes of the Sherman Act.

Id. at 820.

The Sixth Circuit concluded:

> In light of our reading of *Jefferson Parish* and *Kodak*, we thus hold that an antitrust plaintiff cannot succeed on a Kodak-type theory when the defendant has not changed its policy after locking-in some of its customers, and the defendant has been otherwise forthcoming about its pricing structure and service policies. This rule should encourage manufacturers to divulge all relevant information at the time **[**73]** at sale. While we recognize that some information costs will still exist even with full disclosure by a seller . . . these additional information costs stem from the fact that our economy is not one of perfect information, a factor that alone should not invoke antitrust condemnation. Accepting PSI's argument would expose many manufacturers of durable, expensive equipment to potential antitrust liability for having inherent power over the aftermarkets of their products, a result certainly not intended by *Kodak* and not consistent with *Jefferson Parish.*

Id. at 820 (emphasis supplied). [39]

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[39] While the Sixth Circuit in *PSI* said that the "evil" that the *Kodak* decision condemned "was Kodak's own actions that increased its customers' information costs" (*104 F.3d at 820*), this is not a complete statement of what *Kodak* seems to condemn. It would be true that "Kodak increased its customers' information costs only if *prior to sale* (1) it had already changed its parts policy but few customers yet knew this, or (2) it had already decided to change its parts policy in the future but chose not to disclose it. In these two situations, "Kodak's own actions," or rather inaction by a choice not to disclose to each potential customer, would have increased the customers' cost of finding out this information. Full disclosure by Kodak would have lowered the information costs. *PSI* noted how Honeywell's disclosures actually "reduce[d] the information costs faced by its customers." *104 F.3d at 821*. What appears to have occurred for many of Kodak's equipment customers is that after they bought Kodak equipment, Kodak took advantage of these customers' sunk costs and switching costs by its post-sale action of changing its parts policy.

The *Kodak* majority opinion seems to leave open an ***antitrust law*** condemnation of this use of market power even if Kodak did not decide to change its parts policy until after the contract and would, therefore, not be subject to any common law claim for misrepresentation by knowing concealment of a material fact. Rather than "Kodak's own actions . . . increasing its customers information costs" (*id.*), Kodak's post-contract action took advantage of many customers switching costs. The *Kodak* majority's discussion of lock-in and switching costs makes it clear that this is what the majority opinion would, on certain facts, condemn. It is also clear in other language of *PSI* that the Sixth Circuit agrees with this. It suggests that "an antitrust plaintiff can[] succeed on a Kodak-type theory when the defendant has . . . changed its policy after locking-in some of its customers." *Id. at 820*. It suggests further that where the seller's policy change was made pre-contract but kept secret, or at least was not "generally known," a *Kodak-type* theory might be available where "the defendant has [not] been otherwise forthcoming about its [change in or plan to change] policies." *Id.*

[74]** These passages make it clear that for a *Kodak* single brand or other narrowed market definition to be available to plaintiffs, **[*485]** only some of the consumers need to have become locked in at a time they lacked certain critical information. Yet, in most situations, that lack of information needs to be something more than the result of general market information deficiencies or market uncertainties that are normally recognized. Thus, even these ignorant consumers who get "locked in" and become exploitable cannot claim a *Kodak*-type tying market if the information that they lacked was "generally known" to others or if their lack of information was not caused or made relevant by some action of the defendant. It can be assumed that the "generally known" language that *PSI* uses three times means information that is available to the "reasonably prudent consumer," because antitrust is not intended to protect the careless or imprudent consumer but to protect competition by considering what the reasonable consumer would know, or could know if it made economic sense to do more research. [40] **[**76]** For antitrust purposes, the reasonable consumer can protect the efficient workings of the market **[**75]** and, to a certain extent, protect the carelessly ignorant and imprudent consumer. If antitrust *per se* tie-in claims were available to every carelessly ignorant consumer who gets "locked in" to some investment, they would become the "all-purpose remedy" for the unweary whenever their damages were significant. [41]

Thus, in light of *PSI,* a *Kodak*-type lock-in definition of market power in the tying product is not available whenever there are information costs upon which a seller passively relies to its benefit. [42] Rather, ***HN12***[] the **[*486]** *Kodak*-type narrowed market definition is available for a *per se* tying claim when:

The information costs that *PSI* notes were discussed and dismissed in *Jefferson Parish* were not ones that the East Jefferson Hospital exploited by some post-lock-in change of policy as apparently occurred in *Kodak.* That is why *PSI* notes that "information costs tied in" from market imperfections "alone should not invoke antitrust condemnation." *Id. at 820*. But, a post-lock-in opportunistic change in policy to exploit these market imperfections could trigger a Kodak-type approach to market power. (This seems to be what occurred in *Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660, 663 (6th Cir. 1993)* *("Virtual II")).* It is also a caveat highlighted in *PSI:*

> If there were any evidence in the record that Honeywell took advantage of its customers' imperfect information in order to reap supra-competitive profits in the aftermarkets for its equipment, we would not hesitate to allow a Kodak-type theory to be submitted to the jury. However, we can find nothing in the record or PSI's brief that alleges that Honeywell engaged in such activity.

104 F.3d at 821.

Thus, *PSI* and *Kodak* seem consistent with Professor Grimes' analysis of the post-*Kodak* scope of ***antitrust law***. Professor Grimes notes that "the proper distinction here is that, as a policy matter, the law should address active intentional behavior that creates new consumer injury even if a similar injury created by a letter's passive reliance on market imperfections is beyond the law." Grimes, *supra,* at 280. See full quote above at footnote 36.

In *Jefferson Parish,* the market imperfections that the Court dismissed for antitrust market power purposes were those that worked to the advantage of all the rival hospitals in the area. Thus, East Jefferson Hospital was a "passive" beneficiary of these market imperfection, and it derived no significant market power for antitrust purposes from these market imperfections that also benefitted its rival hospitals. The Court noted that the one "profit enhancing" factor which resulted from East Jefferson's use of nurse-anesthetists was not related to any market imperfection and was a common practice "utilized in all hospitals in the area." *466 U.S. at 28 n.47*.

[40] The Areeda authors note that "***antitrust law*** does not seek to protect the foolish consumer who can fully protect himself by taking the steps that most similarly situated consumers take (or are presumed to take)." AREEDA, ET AL., P 1735d2, p. 67. "We conclude that any power resulting from consumer failure to use readily available information, as used by most buyers, is not the kind of power that triggers the per se rule." *Id.* at P l735d, p. 69. The Areeda authors suggest that a buyer's indifference or ignorance about market prices or the seller's opportunistic exploitation of an incomplete contract does not constitute "market power unless buyer ignorance was the result of a general 'market failure' making the necessary information too costly for most buyers to obtain efficiently." *Id. at 69, 104*, PP 1735d3 and 1738c.

[41] *Cf. Kodak, 504 U.S. at 503* (Scalia, dissenting).

[42] Other similarly situated sellers could also obtain these benefits flowing from basic market imperfections.

> 1. there are information costs that prevent certain information from being "generally known;" and
> 2. these information costs are sufficiently high that a reasonable consumer would not anticipate (and it would not be cost efficient to invest more in the acquisition of additional information on) the risk of some change of policy post-contract that would expose the consumer to a burdensome tie involving above market pricing; [43] and
>
> 3. after a substantial number of customers have sunk significant costs that are not recoverable and face other switching costs, the seller takes some action changing its policy (or acting on a prior undisclosed policy) that takes advantage of its locked in customers' lack of information in order **[**77]** "to reap supracompetitive profits" by imposing a burdensome tie-in.

While not discussed in *PSI* a *Kodak*-type market may be available even where a significant number of consumers in the pre-contract market may be sophisticated and knowledgeable, but these consumers will not police post-contract exploitation of locked customers either because new sales in the pre-contract market are of lesser financial concern to the seller or the seller can price-discriminate or take other steps to assure the knowledgeable customers they will not be exploited post-contract.

D. Areeda. Hovenkamp and Elhauge on *Kodak:*

1. The *Kodak* Analysis:

Before allowing *Kodak's* "market imperfections" **[**78]** and "lock-in" arguments to be used to define a narrow aftermarket for purposes of defining market power, Professors Areeda, Hovenkamp and Elhauge would require four conditions:

> I. A substantial number of customers must have made brand-specific investments that still have a useful life but that are substantially unrecoverable if they shift to other brands.
> II. A substantial number of those customers must be too ignorant of "lifecycle" prices to protect themselves by judicious interbrand comparisons or by contract before they become locked in . . . . (This ignorance can be caused by the rational consumer who determines that the cost of acquiring relevant information exceeds its benefits).
> III. The knowledgeable customers who can protect themselves must either be unimportant to the defendant or be protected by effective price discrimination from above-market prices paid by the ignorant . . . . [44]
> IV. The . . . resulting ability to exploit the ignorant must be "substantial."

AREEDA, ET AL., at 138, P 1740 (references to paragraph subsections omitted).

[79]** The authors concluded that:

> Courts should not infer substantial market power simply from the information imperfections that are common in the world's numerous product-differentiated markets. The courts should continue to find a lack of power, even at the summary judgment stage, in most cases in which appliances, office and household electronics, and other products with a significant "design" component are sold in a reasonable competitive market in which many purchasers are reasonably well-informed, especially when substantial price discrimination is not feasible.

Id. at 141, P 1740.

This conclusion is consistent with *PSI's* and *Jefferson Parish's* acceptance of certain information costs as well as with the holding of *Kodak,* if the latter ruling is read and limited in light of the procedural posture in which the case was presented. In the absence **[*487]** of much discovery and any evidentiary submissions, the Supreme Court merely rejected Kodak's position that "the Court should accept, as a matter of law [the] 'basic economic reality,' . . .

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[43] Thus, a consumer pre-contract is deprived of the opportunity to shop around with rivals, seek contract or other protections from the seller, knowingly accept the risk or forego the investment.

[44] Areeda, et al., note that "higher prices . . . do not reflect [market] power when they disfavor the knowledgeable . . . ." *Id. at 138*, P 1740.

that competition in the equipment market necessarily prevents market power in the aftermarket." *Kodak, 504 U.S. at [**80] 470*. "Kodak argues that such a rule would be *per se,* with no opportunity for respondents to rebut the conclusion that market power is lacking in the parts market." *Id. at 466 n. 11*.

The Areeda treatise argues that courts should read *Kodak* merely as rejecting the irrebuttable nature of the presumption from the "basic economic reality" and rather make it a rebuttable presumption. *Kodak, 504 U.S. at 470*. This was the "second best alternative" that Kodak argued and the position asserted by the United States government as *Amicus Curiae.* 504 U.S. at 467 n. 11. ***HN13***[] In the general case, a lack of market power in a competitive pre-market will prevent market power in the derivative aftermarkets. This general economic presumption, if unrebutted, would allow summary judgment for the defendant. Under this rebuttable presumption, "the burden would then shift to the plaintiffs to 'prove ... that there is a specific reason to believe that normal economic reasoning does not apply.'" *Id.* In the *Kodak* case, the defendant offered no evidence at all, whereas the ISO plaintiffs submitted substantial evidence inconsistent with the general economic presumption. As noted above, these **[**81]** included supracompetitive prices for the tied package, price discrimination in favor of the potentially "more knowledgeable" purchasers of the equipment that did their own service and an increase in service prices for Kodak customers, but no evidence that Kodak equipment sales dropped. *504 U.S. at 477, 476* and 472 respectively. Finally, there existed significant information and switching costs which "costs could create a less responsive connection between service and parts prices and equipment sales." *Id. at 473*.

The Areeda authors argue that *Kodak's* majority did no more than determine that in light of this evidence produced by the plaintiffs and the lack of a fully developed record, the plaintiffs for purposes of Rule 56(c) had come forward with sufficient evidence to allow a jury to rebut the presumption that competition in the foremarket will "preclude[] any finding of monopoly power in derivative aftermarkets." *Id. at 466*.

2. *Kodak* and Franchises:

Because consumer choices to buy a product or other item such as a franchise always limit future choices because of a "lock-in," the authors suggest that market power should be determined at the time "the customer **[**82]** became committed to the tying arrangement." AREEDA, ET AL., at 147, P 1740. In considering the franchise situation under *Kodak,* the Areeda treatise notes that in the foremarket a franchisor's trademark generally carries no market power at the outset of the franchise relationship. [45] **[**83]** When the tie-in is established at the beginning of the relationship, making that the relevant time to measure market power, the franchisor has no additional power to induce this tie. [46] AREEDA, **[*488]** ET AL. at 145, P 1740c2. Yet, they note that a franchisee may become "locked

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[45] In another section, the Areeda authors note:

> We should not presume that fast-food restaurants lie in different markets from all other restaurants or that separate markets should be defined according to menus of hamburgers, chicken, seafood, pizza, and so on. While some courts defined narrow franchise markets, most of the franchise tying cases preceded the Supreme Court's insistence on genuine proof of power.
>
> The standard market definition methodology requires proof that fast-food restaurants or those with particular fare could maximize profits by charging significantly more than the competitive level. Such proof would be rare. If, as seems likely, the pre-fast-food restaurant business was highly -- perhaps even perfectly -- competitive, then fast food must have made its way with better quality (in terms of speed or consistency) or lower prices. Were prices to rise significantly, many patrons would return to nonfranchised fast-food establishments -- diners, coffee shops, "family" restaurants, and the like. Hence we would presume, for example that fast-food pizza franchises are not a market.

AREEDA, ET AL., at 101, P 1737e3 (footnote omitted).

[46] This is clearest when the tying and tied products are purchased simultaneously, but the authors contend "the same can be true for continuing future purchases. For example, suppose that the defendant conditions a permanent trademark license on the franchisee's agreement always to buy consumable supplies . . . from the defendant at prices specified in the original contract," even when these prices exceed market prices. *Id. at 146-47*. The franchisee can compare this premium in payment to the cost that would be necessary to obtain a rival franchise. The fact that the franchisee may later become locked in is irrelevant because he was not yet locked in when he accepted the tie.

in" after investing in realty, training, advertising, and development of goodwill for the franchise product, which sunk costs may not be "wholly or even partially useful for any alternative occupation." *Id. at 146*. Thus, a later threat to withdraw the trademark can acquire coercive force after the franchisee invests substantially and irreversibly in developing the franchise. Nonetheless, courts should presumptively assess the defendant's power at the outset of the relationship in the absence of those special and limited circumstances in which the *Kodak* factors might apply.

Of greater significance is the authors' position that:

> We should also measure power at the outset, even when the original trademark license does not specify the prices for the consumables that the franchisee is obliged to take, though it allows him to terminate the relationship if he objects to future prices. To be sure, the defendant might raise the price of the tied product above (or further above) market **[**84]** prices once a lock-in inhibits walking away from the franchise. Nevertheless, the tie did arise simultaneously with the trademark license, and franchisees knew at the outset that the tie allowed the franchisor to force them to choose between sacrificing nonsalvageable investments and accepting very high prices for the tied product. Moreover, all the justices in the *Kodak* case seemed to agree that a generally known commitment, de facto or by contract, to purchase the second product from the defendant implicates the defendant's power (if any) at the time that commitment was made.

Id. at 147, P 1740 (footnotes omitted).

The authors acknowledge that when the tie is imposed after the franchisee has become locked in, *e.g.* at a renewal period for the franchise license, the

> franchisee's nonsalvageable "switching" costs in abandoning the franchise, if substantial, might induce him to accept a tie . . . that he would have rejected at the outset of the franchise. . . . Measuring the defendant's power at the time this tie was entered makes switching costs relevant. 23
>
> 23 While this franchisee could have initially foreseen that he would become vulnerable to future **[**85]** ties, the cost of obtaining and processing the relevant information could be high. . . .

Id. at 148. [47]

[86]** Areeda, et al. note that there is substantial difference on whether the defendant's policies are generally known before the buyer commits to the product.

> Thus the key difference . . . is the degree of knowledge conveyed by the defendant or his rivals or otherwise reasonably available to the buyer when [the product] is purchased.

Id. at 151. While this portion of the Areeda text deals with a situation involving the sale of machines and repair parts with possible tie-ins for service, the authors make it clear that their analysis would be similar for a **[*489]** franchise situation. [48] When lifecycle pricing is not predictable and a claimant knows that certain goods are only available from the defendant at the time the contract is entered, the buyer

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[47] The authors later stress that the case for market power being measured after lock-in is particularly strong when there is a change in policy and "if that [new] policy creates a tie. . . ." *Id. at 151 n.37*. The authors also note that in order to show that a lock-in is "substantial," there must be proof of substantial switching costs involving unrecoverable value and that this unrecoverable value in sunk costs exceeds the alleged above-market premium to be paid for the tying and more particular the tied product for the remaining useful life of the primary product or investment. *Id. at 152*. The authors reason that "even if switching costs allow the defendant to extract some premium, it may be too small to constitute the substantial power that ***antitrust law*** usually demands." *Id. at 153*. The authors also point out that a defendant can gain little from trying to exploit "locked in" customers unless they are a substantial group as well as a substantial share of all of defendant's customers unless the defendant can price discriminate in favor of new customers that the defendant wishes to attract.

[48] *See* AREEDA at 155 n.47.

> can protect himself by purchasing elsewhere or by conditioning his purchase from the defendant on such contract guarantees as market prices for [the item] or prices no higher than those charged the defendant's most favored customers.

Id. at 151.

[87]** The author also noted that a defendant's own market situation downstream may put "a ceiling on a locked-in customer's exploitability." If the locked in customer is already selling his or her product at a short-run marginal cost, they cannot pay an above-market price to the seller on an ongoing basis and survive in the market. [49]

With respect to the degree of ignorance in a pre-contract situation that the buyer must have, the authors note:

> All that the buyers need to know when making an initial purchase is that they may be at risk with respect to **[**88]** repair-part pricing or that the seller knows more than they do about the lifecycle price to them. There is no significant market failure unless (a) buyers fail to know that and (b) the relevant uncertainties cannot be made the subject of prior bargaining.

Id. at 154. The authors add that "the knowledge required for this purpose need not be perfect . . ." *Id.* The knowledgeable machine buyer or franchise trademark licensee

> has both the incentive to learn the lifecycle price of that purchase and the ability to learn -- from the market, the defendant, or his own experience -- the future volume and price of supplies and services needed to maintain the machine over its useful life. This knowledgeable customer cannot be exploited via high prices on unique repair parts because he took them into account in comparison with rival brands and their lifecycle prices when he bought the machine.

Id. at 155. [50]

> Knowledge does not eliminate . . . switching costs. Rather, it means that the estimated [future] costs . . . -- including the risk that the defendant may change its . . . policies -- are taken into account at the time of its initial purchase in **[**89]** comparison with rival [opportunities] . . . .
>
> * * *
>
> For such contracts, both theory and all the justices in *Kodak* agree that the defendant's power would be measured in terms of his machine (or trademark) relative to reasonable substitutes at the time of the initial purchase regardless of any subsequent switching costs.
>
> While the knowledgeable customer's estimate will be less precise than an explicit contract specifying lifecycle payments, the perfectly knowledgeable customer recognizes his uncertainty about the future, quantifies the post-lock-in risk of future exploitation and its magnitude, and discounts that quantity to the present when he chooses the defendant's machine in preference to rival machines.

Id. at 155 (footnotes omitted).

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[49] In the franchise situation, even where the franchisor is no longer selling new franchises and is merely profiting off of royalties and the sales of goods and services to existing franchises, the franchisor has little incentive to put these franchisees at a competitive disadvantage with respect to their competitors and to put them out of business because that will reduce the defendant's profit and possibly put the defendant out of business altogether.

[50] The authors note the rare exception to this is the liquidating defendant who has no need to maintain a reputation to continue foremarket sales, or to maintain the goodwill of existing aftermarket customers, or the individual who has the capacity to price discriminate in favor of the new customers and against the old customers to allow the new customers to protect themselves from post-contract exploitation. Id. at 155 n.48.

[90]** The Areeda authors conclude "very imperfect knowledge suffices to date the tie from the outset of the parties' relationship and to make decisive the defendant's assumed lack of power in the interbrand [foremarket]." *Id. at 157*.

[*490] A buyer knowing an announced or generally understood restrictive policy, or even a buyer who could reasonably anticipate the risk of future policy can compare whether similar risks were faced with alternate competitors in the foremarket, or whether contractual protections would be available in the contract with the seller. Thus, the authors suggest that in order to invoke the *Kodak* narrow market definition for application of the *per se* tie-in rule,

> the plaintiff must prove that they are "ignorant" in the sense that they could not reasonably anticipate later "exploitation" when they bought the machine or entered the dealership or franchise and that they could not reasonably protect themselves in the marketplace by obtaining, say, contract guarantees or warranties from the defendant or his rivals.

Id. at 158. Again the authors suggest that the courts should look to the ignorance of the "reasonable buyer" rather than the particularly **[**91]** foolish buyer. "[A] reasonable buyer standard considers the relative ease and cost of acquiring the necessary information or protection relative to the potential savings." *Id.*

V. ANALYSIS:

A. Facts Known to Franchisees Signing the mid-1990 Franchise Agreement:

The starting point for determining what class plaintiffs knew pre-contract is what was in the mid-1990 Franchise Agreement and Offering Circulars. In section V.A. of this August 1990 Franchise Agreement, the franchise owner acknowledges that LCE owns the "Little Caesar" trade name and affiliated trademarks and service marks. The franchisees "shall use such applicable trademarks, service marks, trade names and copyrights ("Proprietary Marks") only in the manner and to the extent specifically licensed by this Agreement." (Franchise Agreement, Section V.A.)

The franchisee also acknowledges in section V.B. that any goodwill that arises "in the future through the activities of any Licensee of LITTLE CAESAR, inures directly and exclusively to the benefit of LITTLE CAESAR."

In section V.D., the franchisee covenants:

> 4. To use only the recipes, methods and trade secrets developed by LITTLE CAESAR and licensed **[**92]** hereunder in the preparation of pizza and other food items sold or offered for sale to the public by Franchise Owner.
> 5. To feature, sell or offer for sale only such menu items and other products or services as shall first have been approved in writing by LITTLE CAESAR as consistent with the image and quality standards of the LITTLE CAESAR System . . . .
> * * *
>
> 7. To use only paper products including carryout containers which strictly conform to the design and quality specifications of LITTLE CAESAR as to size, quality, quantity, texture, absorbency, strength, and appearance and other characteristics in compliance with section VII of this Agreement as may from time to time be prescribed by LITTLE CAESAR's operating manual. Said containers shall bear various Proprietary Marks of LITTLE CAESAR.

(Emphasis supplied.)

Section VII dealing with "SUPPLIES," notes that except for secret spices and dough mixes which

> shall be purchased only from LITTLE CAESAR or its designated distributor, Franchise Owner may purchase foods, ingredients, and other supplies, including paper goods as approved by LITTLE CAESAR from any source of its choosing, provided that said **[**93]** source has been previously approved as a supplier by LITTLE CAESAR in accordance with its standard practice and the food, ingredients and supplies adhere to LITTLE CAESAR's specifications and quality standards. *With the exception of suppliers of signage and other products*

> *bearing the LITTLE CAESAR name and Proprietary Marks,* Franchise Owner may request that LITTLE CAESAR place a supplier on LITTLE CAESAR's approved supplier list. LITTLE CAESAR shall not deny approval of **[*491]** any item which complies in all material respects with LITTLE CAESAR's specifications. The cost of any testing of said items by LITTLE CAESAR shall be borne solely by Franchise owner.

(Emphasis supplied to note the exclusion of logoed goods.)

The Offering Circular adds:

> LITTLE CAESAR does not require the Franchisee to purchase or lease any goods, services or supplies from a specified source, with two exceptions.
>
> The formula for the LITTLE CAESAR spice mix and the Pan! Pan! Pizza dough mix are trade secrets that LITTLE CAESAR will not disclose to the Franchisee.
>
> * * *
>
> OBLIGATIONS OF FRANCHISEE TO PURCHASE OR LEASE IN ACCORDANCE WITH SPECIFICATIONS OR FROM APPROVED SUPPLIERS
>
> It is important to **[**94]** LITTLE CAESAR that, to the greatest extent possible, there be uniformity throughout the LITTLE CAESAR franchise system with respect to format, methods of operation, and food preparation, taste, texture and quality of the products sold to the public.
>
> * * *
>
> In connection with these products, LITTLE CAESAR has specific standards of quality and product identity which apply to the principal ingredients of all pizza and other products used and sold in the LITTLE CAESAR franchise system. As to food products, these standards and specifications apply to flour, oil, sauce, cheese and other products associated with the various items that the public likes to have put on its pizzas. . . .
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> * * *
>
> As in the case of food products, paper goods come in varying quality ranges, some of which are less suitable for LITTLE CAESAR Restaurants than others, and many of which bear LITTLE CAESAR proprietary marks or symbols specifically imprinted thereon for use in LITTLE CAESAR establishments. There are, therefore, also grade or quality standards for these non-food products.
>
> These food and non-food product specifications are maintained at LITTLE CAESAR's principal office and are available on request for **[**95]** examination. The Franchisee is required (Franchise Agreement, Section VII.) to use only those products which comply with these food and non-food standards and specifications in the operation of the franchise.
>
> * * *
>
> Except in the case of LITTLE CAESAR trade secret spice mix and dough blend mix referred to in the immediately preceding section of this Offering Circular, the Franchisee is free to purchase its supplies and equipment for use in the franchised business from any source of the Franchisee's choosing, provided that the Franchisee can demonstrate that the supplies and equipment conform to the specifications pertaining to them in each instance. The demonstration of compliance with LITTLE CAESAR specifications and standards will be by laboratory analysis and, since it is the responsibility of the Franchise to demonstrate compliance with such standards and specifications, all costs associated therewith shall be paid by the Franchisee. Where a Franchisee has successfully demonstrated that a product conforms to LITTLE CAESAR product and ingredient standards, that product and supplier shall be kept on an approved list by LITTLE CAESAR, which list shall be available for inspection **[**96]** on demand. . . .
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> * * *
>
> Blue Line Distributing, Inc., a wholly-owned subsidiary of LITTLE CAESAR, to whom LITTLE CAESAR has granted an exclusive license to contract for the manufacture and distribution of certain supplies, derives substantial income from the sale of supplies to Franchisees as well as to LITTLE CAESAR-owned Restaurants. The audited financial statements of Blue Line Distributing, Inc. are consolidated with the audited financial statements of LITTLE CAESAR for the years ended December **[*492]** 31, 1986, 1987, and 1988 which are

> included in the financial information section of this Offering Circular. The profit earned by Blue Line Distributing, Inc. does benefit LITTLE CAESAR.

The 1995 Franchise Agreement has removed the restriction on the right of a franchisee to seek an alternative supplier of logoed goods that existed in section VIII of the mid-1990 Franchise Agreement. The Offering Circular listed the names, addresses and phone numbers of over 500 Little Caesar franchisees owning in excess of 1,500 carry-out outlets in 1989. The December 31, 1988, financial statements show LCE's earnings included $ 225 Million from its food service sales compared to $ 30 Million in royalties **[**97]** and franchise fees. The Offering Circular also disclosed that LCE owned 520 additional carryout outlets.

B. Other Facts Relevant to *Kodak* Lock-in Market:

In the Report on class certification that was adopted by this Court, it was noted that:

> LCE in June 1989 entered into a licensing agreement that gave Blue Line the exclusive right to distribute logoed products to franchisees . . . those items that bear the Little Caesar registered mark, such as items on logoed paper products (bags, cups, napkins), packaging, and condiments such as salad dressing . . . .

172 F.R.D. at 240.

In August 1990, LCE began using the form Franchise Agreement noted above. The earlier decision noted:

> The mid-1990 Franchise Agreement makes it clear that the franchisee can purchase logoed goods from an alternate source if one is approved other than Blue Line. If no other distributor of logoed goods is approved, however, the franchisee cannot ask that an alternate distributor of these goods be approved.

Id. at 243.

> This contract expressly prohibits the franchisees from requesting an alternate supplier of logoed paper products in a market in which Blue Line was **[**98]** at the time the sole distributor of such products.
>
> While the Little Caesar/Blue Line exclusive license agreement was not known to the parties at the time, its consequences were apparent in the marketplace at least to the extent that no other entities had produced or attempted to distribute logoed paper products to Little Caesar franchisees.

Id. at 260. [51] **[**99]**

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[51] In reviewing a submission from defendants' January 31, 1995, Second Supplemental Brief Opposing Class Certification (which dealt with plaintiffs' initial class certification for pre- and post-mid-1990 franchisees), Exhibit 2 shows that as of August 1990 Blue Line had opened warehouses and began acting as a distributor in 10 of the current 16 regions. The other regions were served by LCE approved associate distributors. Four of the six distribution warehouses Blue Line opened between August 1990 and December 1992, when it opened its final warehouse, were more conveniently located warehouses for Little Caesar franchise units already being serviced by Blue Line from more distant warehouses. Yet, two of the warehouses opened after August 1990 (Stockton, California in September 1991 and Fife, Washington in July 1992) did begin servicing 243 franchise units who before then bought from associate distributors Leprino Foods and Food Service of America, respectively. Also, in November 1990, Blue Line began servicing 107 franchise units in the Kansas City area from its Dallas warehouse, whereas before then these units bought supplies from associate distributor Pegler Sysco. There is no evidence in the record of how many owners of these 350 units signed a mid-1990 Franchise Agreement at a time prior to Blue Line becoming the sole distributor in their area. Those class members who did sign the mid-1990 Franchise Agreement at a time they were still being serviced by an associate distributor are hereinafter referred to for purposes of identification as the "Associate Distributor Class Members." Plaintiffs' experts in their December 1996 declaration indicate there were 2,440 independent Little Caesar franchisees as of September 1993. By the fall of 1992, nearly all regions of the country were being served by Blue Line. Thus, it is likely that the substantial majority of Little Caesar franchisees signing the mid-1990 Franchise Agreement did so at a time when Blue Line was the sole distributor in their region. The associate distributor franchisees who signed the mid-1990 Franchise Agreement at a time that an Associate Distributor operated in their region are in the certified class. Yet, much of my analysis in this Report of what was "generally known" pre-contract -- which is necessary to do a *Kodak-PSI* determination of how the tying market is defined -- will not apply to these Associate Distributor Class Members. They will be considered separately.

> Thus, franchisees with a mid-1990 franchise agreement who chose to continue **[*493]** purchasing product A (continuing as a Little Caesar franchisee) knew they were required to continue buying paper products from Blue Line and could not seek an alternate supplier of such goods.

Id. at 259. [52]

> In the present case, the buyer's state of mind of proposed class members knew there were no competitors offering logoed goods or other supplies needed to operate a franchise. The reasonable franchisee with the post-mid-1990 Franchise Agreement also knew (even Gary Smith reasonably must have known) that he had contractually given up the right to seek an alternate supplier of logoed goods. All of this was because of defendants' intended acts.

Id. at 265. [53]

[100]** The earlier Report notes evidence that would support a finding that LCE's 1989 Exclusive Licensing Agreement and its mid-1990 modification of its Franchise Agreement were part of a plan to use LCE's proprietary rights and its trademark and copyright protections over logoed goods to improve its competitive position against other potential distributors once Blue Line entered a regional market.

> [In a] September 22, 1988, memorandum from Deal to Ilitch dealing with Blue Line's expansion into the southeast United States where it would compete with the existing distributor, PYA Monarch, Deal noted that the approach used in the past of merely disapproving the competitive distributor would not work because PYA had been doing a credible job in the southeast at the time. It appears another competitor, Sysco, would be disapproved. In dealing with the franchisees, the tone of the announcement was to state an expectation that the franchisees would swing over to Blue Line or "in the PYA area, we are going to fight them (albeit with a stacked deck)," apparently referring to the exclusive access to logoed products that Blue Line would have. Plaintiffs' Exh. 8 at p. 1.

Id. at 260. **[**101]** Lockridge August 31, 1995, Declaration, Ex. 8, Docket # 195, filed September 1, 1995, in support of Second Motion for Class Certification (hereinafter "Lockridge August 1995 Declaration").

In an internal memo of March 27, 1989, from David Deal to LCE Board Member Jay Bielfield, he notes his work with the Director of LCE's Legal Department:

> As you are aware, Gil Simon and I have been working on a number of issues to more effectively posture Blue Line vis-a-vis its competition, for example, we are proposing an agreement with Little Caesar whereby Blue Line becomes the exclusive distributor of all trademarked items.

Perry April 1, 1997, Declaration, Ex. 3 at p. 2, Docket # 257, filed April 1997, in support of Plaintiffs' Second Supplemental Brief in Opposition to Defendants' Motion for Partial Summary Judgment (hereinafter "Perry April 1997 Declaration"). This memo also notes that it was Blue Line that was principally involved in approving alternative distributors. [54] Mr. Deal acknowledged that the 1990 Franchise Agreement was changed "because we wanted to

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[52] Again, for the Associate Distributor Class Members, as noted in footnote 52 above, this would not be apparent to them because they were buying their logoed and other goods from an associate distributor, not Blue Line, when they signed the mid-1990 Franchise Agreement.

[53] As noted in the earlier Report, the critical question for antitrust purposes is whether these "intended acts" "were legal competitive behaviors" or "impermissible restraints on the market choice of consumers or on alternate potential distributors' ability to enter the market and compete with Blue Line" and ". . . whether the actions of defendants impermissibly dissuaded potential alternate distributors from entering the market or from competing as effectively with Blue Line …." ***Id. at 265-66***. These questions were reserved in the class certification motion. "While plaintiffs may ultimately fail to prove defendants' actions were illegal, or fail to prove any effect on prices, or fail to prove the tie-in of logoed products leveraged a larger tie-in, all of these are merit questions that should not affect the class certification question." ***Id. at 266***.

[54] "Approved Distributors and Approved suppliers: While we are moving toward Little Caesar involvement in approving distributors through the Franchise Option Committee, this remains principally as a Blue Line function." *Id.*

conform the Franchise **[*494]** Agreement to the business intent we had to control distribution of our trademarked goods." **[**102]** Lockridge July 28, 1997, Declaration, Ex. 1, Docket # 265, filed July 29, 1997, in support of Plaintiffs' Motion Pursuant to *Fed. R. Civ. P. 54(b)* to Amend the August 7, 1995 Order Granting Partial Summary Judgment on the Tying Claim of Plaintiffs Hennessy and Fields (hereinafter "Lockridge July 1997 Declaration"); Deal November 30, 1994, Deposition at 186; Lockridge August 1995 Declaration, Ex. 14.

In a November 12, 1991, memo from David Deal to David Kushner, he notes:

> The original intent of the agreement was to provide an exclusive arrangement for Blue Line to distribute paper products and other supplies to Little Caesar restaurants so that Little Caesar would be able to exclude third parties from these offerings. It was not contemplated at that time to put in place an even **[**103]** broader agreement to involve products that do not ultimately find their way to the customer, such as uniforms, signage, etc.
>
> Plaintiff's Exh. 21.

172 F.R.D. at 261. Lockridge August 1995 Declaration, Ex. 21.

When Blue Line entered the Atlanta area in early 1989, the associate distributor PYA Monarch did not stop competing as apparently occurred with associate distributors in other areas.

> Little Caesar withdrew the rights to distribute logoed paper products from at least one of the prior competing distributors, PYA Monarch, and . . . this was known to be a strategic business tactic that made it more difficult for competing distributors to compete with Blue Line and satisfy the franchise preferences for one-stop shopping.

172 F.R.D. at 260. Mr. Deal wrote Michael Ilitch on January 9, 1989:

> Atlanta construction is on schedule and we continue to hold to our February 1st date. A decision will be made by week's end whether this date is final so we can notify franchisees in the area and cut PYA off from our proprietary products and national contracts.
>
> In retaliation, PYA/Schloss & Kahn continues to prospect our Florida franchisees. Bob Brewer (Tallahassee) **[**104]** has moved three stores and effective today, John Kronberg is moving 11 Orlando stores to PYA. In both cases we have notified the distributor that this behavior is unauthorized and could cause them loss of approved status. While these losses are unsettling, it still remains to be seen whether PYA will be competitive once they are denied access to our contracts and proprietary/trade-marked products.

Deal December 2, 1994, Dep. Ex. 275; Lockridge August 1995 Declaration, Ex. 10.

On January 17, 1989, Mr. Deal again wrote Mr. Ilitch, noting:

> The Atlanta warehouse opening date has been finalized as February 8th. A letter of announcement has gone out to our franchisees and Matt, Rod Bathurst (our warehouse manager) and I will be making sales solicitation calls over the next few weeks.
> In addition, it is our intent to proceed with the program we discussed in Ft. Lauderdale whereby our approved suppliers are advised that PYA may no longer purchase product under our national contracts and they will also be denied access to our super-proprietary items of square dough mix, spice mix and logoed packaging.
> We will also deny them access to our sauce due to very tight supplies.
>
> This **[**105]** approach, which will require those franchisees to place twice weekly food orders in the event they choose not to give us all of the business, is bound to generate some degree of resentment among certain franchisees. Over time, however, I believe that they will not begrudge us our right to totally control distribution of our proprietary items and this move will put us in the best possible competitive situation.

Deal Dep. Ex. 274; Lockridge August 1995 Declaration, Ex. 9.

This strategy had been planned since the prior fall. In a September 22, 1988, memo, Mr. Deal wrote Mr. Ilitch about a planned meeting with their franchisees in Ft. Lauderdale:

> **[*495]** I do not expect PYA to go quietly. They will battle us for the business. To maximize our penetration with the franchisees I am suggesting the following approach:
> 1. Phone call from me to the top eight to ten franchisees prior to the regional meetings advising them of Blue Line warehouse announcement to be made at the meeting.
> [Handwritten] Tone of the announcement to franchisees -
> - Say nothing unless asked about PYA still approved & Sysco not.
>
> - Expectation that they will all swing over or, in the PYA area **[**106]** we are going to fight them (albeit with a stacked deck)?

Deal Dep. Ex. 273; Lockridge August 1995 Declaration, Ex. 8.

At his deposition, when asked to explain what he meant when he said he was going to fight PYA Monarch "albeit with a stacked deck," Mr. Deal admitted: "That we were going to leverage every business advantage we had seen." *Id. at 400*. He later noted that the competitive strategy intended "Pushing our business advantages within the limit of the law." *Id. at 404*. He noted that one of those advantages was the fact that Blue Line had exclusive access to logoed items. *172 F.R.D. at 261*; Lockridge August 1995 Declaration, Ex. 14.

At his deposition, David Deal also acknowledged that PYA Monarch was denied access to logoed goods so that Little Caesar franchisees remaining with them would have to take two deliveries, one for logoed goods from Blue Line and one for other items from PYA Monarch. Lockridge July 1997 Declaration, Ex. 1, Deal December 1994 Deposition at 408. Blue Line was "leveraging" its exclusive right to distribute logoed products to develop a competitive edge. *Id. at 76, 378, 388-89, 400, 404*.

While the PYA Monarch early 1989 situation was **[**107]** prior to the limitations period for this class litigation, [55] plaintiffs have submitted other evidence which they contend is relevant to LCE attempting to extend its leverage over logoed goods against potential rival distributors in order to maintain its tie over the entire "market basket" of goods franchisees need to continue as a Little Caesar franchise.

At the time **[**108]** LCE was granting Blue Line the exclusive license, LCE wrote its suppliers to explain the new system. John Lay, LCE's Vice President for Franchise Operations, wrote Bill Koch of Henri's Food Products on May 16, 1989:

> Little Caesar Enterprises, Inc. has granted the exclusive license to Blue Line Distributing, Inc. to allow Blue Line to contract with third parties for the manufacture and production of certain supplies and paper products which utilize the Little Caesars proprietary trademarks. These items include, but are not limited to, carry out bags, wrappers, dishes, napkins, cups and boxes, salad containers, dressings and all Little Caesar logoed products.
> Blue Line will be the sole entity to enter into any agreements with third party manufacturers to produce and distribute Little Caesar logoed products as outlined on attachment A.
> Blue Line will be responsible for purchasing these Little Caesar logoed products for sale and distribution through Blue Line Distributing centers and for direct shipments to authorized Blue Line Associate Distributors.
>
> Effective May 17, 1989, Blue Line will accept orders from Authorized Associate Distributors and place shipment orders **[**109]** with you, the manufacturer, for direct shipment to the designated Authorized Associate Distributor's distribution center. No manufacturer of logoed products should accept shipment requests or purchase orders **[*496]** direct from any Associate Distributor or anyone else.
> Blue Line will purchase the product, give shipping directions, and will pay the manufacturer or supplier invoice for merchandise shipped against the Blue Line purchase orders.

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[55] PYA Monarch and Schloss & Kahn stopped competing in the Atlanta area in 1989, and no class claims regarding the mid-1990 Franchise Agreement effecting a tie-in directly involve these former Atlanta associate distributors. These LCE/Blue Line involvements with PYA Monarch are relevant to LCE's motive concerning its more recent action. It might also be relevant if plaintiffs could prove that these events, coupled with other LCE acts with the statute of limitations period, contributed to alternate distributors not seeking to enter the market and competing with Blue Line after class members were locked in to their mid-1990 Franchise Agreements.

> * * *
>
> The cost and pricing of merchandise should NOT appear on any document provided to the Associate Distributors. All costs and pricing will be displayed on correspondence forwarded to Blue Line only.

Lockridge June 9, 1994, Declaration, Ex. F, Docket # 30, filed June 13, 1994, in support of Plaintiffs' First Class Certification Motion. An attachment clearly identified the "LOGOED/TRADEMARKED ITEMS" subject to the exclusive Blue Line license. [56]

[110]** Plaintiffs submit a June 15, 1990, memo from David Deal to all LCE approved suppliers of food and packaging notifying them that Blue Line will begin servicing its Salt Lake City area outlets from its existing Denver warehouse, and that the existing Salt Lake City area Associate Distributor, Nicholas & Company, Inc. could no longer purchase under the existing supply contracts nor purchase logoed goods:

> From that time, Nicholas must negotiate their own contracts with your company for food and paper products. Nicholas will no longer be authorized to purchase any Little Caesar product under a Blue Line Distributing negotiated contract.
>
> Little Caesar logoed and/or proprietary products CAN NOT be sold to Nicholas by a Little Caesar supplier. All suppliers of Little Caesar logoed and/or proprietary products should call Bob Ames if any orders are placed by Nicholas for shipment beyond June 18, 1990.

Defendants' January 30, 1995, Addendum, Ex. 18 at p. 1, Docket # 127, filed January 31, 1995, in support of Defendants' Second Supplemental Brief Opposing Class Certification (hereinafter "Defendants' January 1995 Addendum").

A June 22, memo from a Jon McClain, apparently **[**111]** with one of the LCE meat suppliers, approved a final ham order to Nicholas on June 29, 1990, and added:

56

> Slice!Slice! Folding Carton
>
> Single Slice Folding Carton
>
> Bread and Bonus Bread Bags
>
> 8, 12, 20 # Printed Bags
>
> Baby Pan!Pan!
>
> Single Bags
>
> Double Bags
>
> All Miscellaneous Logoed Bags
>
> Salad Convenience Packs
>
> Salad Containers
>
> Little Caesar Dressings
>
> Cold and Hot Cups and Lids
>
> Crazy Sauce Cups and Lids
>
> Napkins
>
> Straws
>
> Cup Carriers

This Court has earlier noted that the scope of the exclusive licensing agreement applies only to these typed of logoed goods and not to the meats, cheeses, and other supplies on which wholesale packaging the manufacturer or suppliers may stamp a LCE logo to identify them as being LCE specification products.

> EFFECTIVE JULY 16, 1990 BLUE LINE DISTRIBUTING WILL BEGIN SERVICING ALL LITTLE CAESAR'S UNITS CURRENTLY SERVICED BY NICHOLAS, INC. OF SALT LAKE. NICHOLAS WILL NO LONGER BE AUTHORIZED TO PURCHASE ANY LITTLE CAESAR'S PRODUCTS....

Id. at Ex. 18, p. 2.

Later in 1990, when Blue Line began servicing the Kansas City area franchisees out of its existing Dallas warehouse, David Deal on November 20, 1990, sent LCE approved suppliers a similar memorandum regarding Associate Distributor Pegler Sysco.

> Effective November 26, 1990 Blue Line Distributing will begin servicing all Little Caesar units currently serviced by Pegler Sysco.
>
> From that time, Pegler must negotiate their own contracts with your company for food and paper products. Pegler will no longer be authorized to purchase any Little Caesar product under a Blue Line Distributing negotiated contract.

Id. at Ex. 18 p. 3.

Supplier Tony Alonso on November 23, 1990, forwarded the November 20 Deal **[*497]** memo and notified Jon McClain and David McConnell:

> As you can see by the attached memo from **[**112]** Blue Line, effective immediately Blue Line will be servicing all of the Little Caesars units that are currently serviced by Pegler Sysco in Omaha. For this reason, we are no longer authorized to ship Pegler Sysco any authorized Little Caesars product.
>
> By copy of this letter, Jon should delete anyone receiving Little Caesars pricing by teletype, or other means, in the Omaha area. If Pegler continues to request ham, pepperoni, or any other product, let's make sure that Blue Line has been communicated of their request and positively, under no circumstance, are we to sell Pegler Sysco at the same pricing as Blue Line.

Lockridge December 23, 1996, Declaration, Ex. 3, Docket # 249, filed December 27, 1996, in support of Plaintiffs' Brief in Opposition to Defendants' Motion for Partial Summary Judgment (hereinafter "Lockridge December 1996 Declaration").

A June 12, 1991, form letter from David Deal to the producers of its logoed goods explained that only Blue Line can authorize manufacturing and/or distributing of logoed materials:

> This is just a reminder that our franchisees do not have similar authority. In fact, if one of our franchisees contacts you directly asking **[**113]** you to produce items bearing LCE's proprietary marks, we are asking you to decline their request and contact the appropriate purchasing personnel as soon as possible.

Perry April 1997 Declaration, Ex. 4.

To follow up on a July 3, 1991, telephone call to Kathy Campbell of LCE's Associate Distributor Leprino Foods in California, Matt Ilitch wrote her an official letter informing her that Blue Line would begin distribution operations in California and Nevada from a warehouse in Stockton, California, by mid-September 1991. He added:

> Please know that Leprino Foods did not fail as our associate distributor. Rather, it is part of the Little Caesar master plan to control distribution of Little Caesar brand products through its Blue Line distribution division. In fact, of all of our past and present associate distributors, Leprino Foods' reputation is at the top.

Lockridge August 1995, Declaration, Ex. 7. He concluded that Blue Line would purchase unsold LCE specification inventory from Leprino Foods when Blue Line began operations in California unless "Leprino decides to retain the Little Caesar business."

In a November 26, 1991, internal memo to Al Thompson regarding **[**114]** franchisee Chuck Walls' request for an alternate distributor in the Madison, Wisconsin, area, Matt Ilitch notes:

> There is no formal approval process for outside food and paper distributors when there is an existing Blue Line distribution center in a market area.
>
> If a distributor, however, wants to compete with Blue Line they would be on their own to negotiate their pricing program. To get competitive pricing from our vendors they would have to meet minimums which I don't think

> the Chuck Walls stores would satisfy. In any event, Blue Line will not reveal to any distributor, information about Little Caesar products and how to get them without first establishing that Blue Line has not fulfilled both pricing and service obligations.

Lockridge December 1996 Declaration, Ex. 4.

Many of the submissions plaintiffs assert are relevant to the present motion are LCE's actions in response to plaintiff, and class representative, Gary Smith's 1992 failed effort to have LCE approve AmeriServ as an alternate distributor out of its Atlanta facility. Gary Smith operates three Little Caesar outlets in the Jacksonville, Florida, area. *895 F. Supp. at 887*.

On April 9, 1992, Gary **[**115]** Smith wrote certain LCE approved suppliers on A.L.C.F., Inc. letterhead:

> On behalf of A.L.C.F., Inc., (An Association for the Little Caesars Franchises), I hereby authorize the AmeriServ Food Company to obtain pricing for all Little Caesars propriety [sic] products into their Atlanta, Georgia and Charlotte, North Carolina facilities.

[*498] Defendants' January 30, 1995, Addendum, Ex. 15, p. 3.

> An internal memo from Mr. Deal to Mr. Ilitch on April 20, 1992, states:
>
> It now seems clear that AmeriServ is going to attempt, with Association support, to make a competitive play for our franchise business. Therefore I want to lay out my recommended strategy for addressing this challenge. Simply put, this strategy is grounded on the one hand in pushing our legal advantages to the limit while, on the other hand, upgrading our service commitment and adopting a more aggressive pricing approach. Key elements of this plan would include:
>
> 1. A hard-line position with supplier and ALCF that no information can be provided to AmeriServ until they have signed a confidentiality agreement and passed a first blush inspection. This will force AmeriServ to "come in through the front **[**116]** door."
>
> 2. Notification to all suppliers that AmeriServ will not have access to our national contracts.
>
> * * *
>
> The result of these elements will be to put us in the best competitive position and also require the stores to take two deliveries per week - one from us and one from AmeriServ. I am hopeful, that, over time, they will see that this inconvenience is not giving them any significant benefit. This was a fairly significant factor in our ability to wear down those stores that initially wanted to continue with PYA Monarch several years ago.
>
> * * *
>
> We must move to modestly reduce our margins on items we will be competing on. At this time, it is difficult to really know how good our pricing is. However, I do think it is high enough that we can be undercut [hand written insert] and AmeriServ still operate profitably. [end of insert] A percent or two we could respond to, but if they get really aggressive we run the risk of losing the credibility we have worked so hard to regain. To minimize the risk of this, I think we need to gradually move our margins down over the next two to three months, particularly in the southeast. Pricing would be adjusted on the high visibility **[**117]** items such as cheese, meats, boards and flour. Phasing this in over several months will reduce its visibility. I am suggesting price reductions which would lower our margin by 1.0 to 1.25 percentage points out of the Atlanta, Orlando and Greensboro, with reductions of about one-half that amount in other centers. This will probably not be enough to face down a competitive onslaught, but will reduce the attractiveness of our business and keep us within the credibility range.

Lockridge August 1995 Declaration at Ex. 11.

In response to Gary Smith's April 22, 1992, letter written as President of Smith Family Foods, Inc. requesting a list of approved suppliers, David Deal wrote on May 7, 1992, that the approved supplier list was sent to all Little Caesar franchisees in March 1990, and had not been updated since then. In reference to Smith's assertion concerning logoed goods, David Deal stated:

> In your April 22nd letter, you refer to the Franchise Agreement and state that you have the right to purchase supplies, including paper goods, from any source of your choosing, provided that source has been previously

> approved by Little Caesar as a supplier. Please note that Section **[**118]** VII of your Franchise Agreement reads, in part that:
>
> > "With the exception of suppliers of. . . products bearing LITTLE CAESAR name and Proprietary Marks, Franchise Owner may request that LITTLE CAESAR place a supplier on LITTLE CAESAR'S approved supplier list."
>
> Please be advised that Blue Line is the sole approved supplier of paper products containing the Little Caesar name or proprietary marks. It is my understanding that under the Franchise Agreement you do not have the right to request that any other suppliers be approved for those products.

[*499] Alterman September 29, 1995, Declaration, Ex. 4, Docket # 204, filed October 2, 1995, in support of Defendants' Response to Plaintiffs' Second Motion for Class Certification.

On May 14, 1992, David Deal for LCE responded to an April 21, 1992, letter and telephone contact from William Burgess, President and CEO of AmeriServ Food Company.

> In connection with your effort to obtain price quotes from approved suppliers, we have the following policy. Our specifications are proprietary and confidential, as is the price that Blue Line pays to the suppliers. We have reminded suppliers that they are not authorized to give out **[**119]** this information. We have no position as to you discussing potential prices with approved suppliers that they would charge to you if you were an approved distributor. Such discussions are presumably part of your source review. Please note, however, that logoed items, Pan!Pan! Dough Mix and our Spice Blend must be purchased from Blue Line.

Defendants' January 1995 Addendum, Ex. 15, p. 4.

Written notes of a David Deal oral presentation to a meeting of LCE approved suppliers responding to AmeriServ's and Gary Smith's inquiries state:

> I know that many of our food suppliers have received inquiries from Gary Smith and AmeriServ concerning our products as they attempt to develop alternative distribution to Blue Line. Our position on this is the same as it has been for years when it comes to distribution of our products. I outlined this for all food and packaging suppliers in a letter last month but I want to take this opportunity to restate it:
>
> 1. At this time, AmeriServ is not an authorized distributor for Little Caesars.
>
> 2. We expect all of you to respect the confidentiality agreements you have signed with us that preclude you from releasing pricing on our contracts, **[**120]** product specifications or details on upcoming promotions to anyone other than our approved distributors, and that means franchisees as well.
>
> 3. The contracts that we have negotiated with you are ours exclusively and cannot be drawn against by any other approved distributor or franchisee without our specific approval.
>
> I am not aware of any supplier who has indicated they have a problem in following our direction on these few points. I have also been advised that many of you have been solicited to quote on generic, house-branded products or near-specification substitutions. Whether you choose to quote on these types of products is again up to you. However, I want to remind all of you that we take our specifications very seriously. I have had a conversation with most of you, at one time or another, where you have told me that we use some of the highest quality ingredients in the industry and that if we were willing to compromise here we could lower our costs. Unlike our competition, we have steadfastly ignored this siren's call and we firmly believe it is one of the reasons for our success. So you can quote what you want on generic or house-branded products but we are not going **[**121]** to allow our system to deviate from the quality standards we have adhered to for the last 30 years. None of you should use the knowledge of our specifications to undermine the quality of our products.
>
> However, there appears to be some confusion on whether you can quote prices to AmeriServ on Little Caesar products. The decision to quote is up to you. However, if you supply us with logoed items, Pan!Pan! Dough Mix, or any element of our secret Spice Blend, then you cannot quote prices because these must be purchased from Blue Line. Moreover, no products can be sold to AmeriServ at this time because they are not an authorized distributor.

Perry April 1997 Declaration, Ex. 4.

While plaintiffs have not submitted the May 8, 1992, letter of class representative Gary Smith (apparently written of A.L.C.F. letterhead), they do provide by cover letter of November 7, 1997, the June 5, 1992, response from LCE's Vice Chairman Charles Jones to Gary Smith as President of "SMITH FAMILY FOODS, INC.":

> **[*500]** This is in response to your letter of May 8, 1992. I note that your letter was written on ALCF stationary. I have, however, assumed that you were writing that letter in your capacity **[**122]** as a Little Caesar franchisee. Therefore, this responsive letter is written to you in your capacity as a franchisee and not in any capacity you may hold with ALCF.
>
> * * *
>
> With regard to your request that a letter be sent to all approved Little Caesar suppliers regarding AmeriServ, I must, unfortunately, inform you that Little Caesar cannot accommodate such request. AmeriServ is not currently approved as a distributor by Little Caesar. In the event AmeriServ is approved as a Little Caesar distributor at some future date, you can re-raise this request.

Bates # 00371, September 2, 1994, Deposition Ex. 109.

> In an internal memo of September 23, 1992, from Mr. Deal to Mr. Ilitch, he notes:
>
> A supplier has just contacted us indicating he received the attached letter from AmeriServ. The letter indicates they may have support from franchisees representing 50-60 units and want quotes on generic products that meet our spec. I believe this is a response to Smith's recent newsletter.
>
> * * *

I feel support is coming from units that would be serviced out of AmeriServ's Atlanta facility which MIGHT include the following franchisees[.] Mr. Deal then lists Gary Smith, **[**123]** non-class plaintiff Sharon Fields, and fifteen other franchisees who together operated 111 Little Caesar units. Lockridge July 1997 Declaration.

On December 28, 1992, Marketing Vice President Jere Lehr of AmeriServ wrote Gary Smith as President of A.L.C.F., outlining an AmeriServ presentation to be given to Little Caesar franchisees at the upcoming A.L.C.F. convention. Siwek and Nelson August 4, 1994, Declaration, Docket # 59, filed August 4, 1994, in support of Plaintiffs' Motion for Class Certification.

A January 21, 1993, internal AmeriServ memo from Marketing Vice President Lehr noted:

> Attached is the final version of the presentation that was made to the A.L.C.F. group. The program is very exciting to the franchisees, but until someone in the organization take[s] a stand for their contract rights against the corporation, we will not be able to purchase/stock logo products. Without the logo products, it will be very difficult to make a successful program.
>
> The A.L.C.F. attorneys were present and discussed options with the franchisees, but at this time they did not agree on a plan for proceeding. It is going to continue to be a slow process!

Turnbull October **[**124]** 16, 1995, Declaration, Ex. 19, Docket # 206, filed October 16, 1995, in support of Plaintiffs' Reply to Defendants' Response to Plaintiffs' Second Motion for Class Certification (hereinafter referred to as "Turnbull October 1995 Declaration").

As noted in the earlier Report:

> William Burgess of AmeriServ, in his Declaration of August 3, 1994, noted that:
>
> Without the ability to distribute logoed products as part of the full-line distribution program, it is not economically possible to compete [with Blue Line] because the food items are traditionally sold on very low margins and to achieve an economic blended profit margin, it is necessary to be able to also sell the higher profit paper and packaging.
>
> Lockridge Exh., Burgess Declaration at P 17.

172 F.R.D. at 262. Lockridge August 1995 Declaration, Ex. 2.

C. <u>Testimony of Plaintiffs' Experts:</u>

Plaintiffs' economic experts, Stephen Siwek and Philip Nelson, Ph.D., have provided four declarations relevant to this lawsuit.

Plaintiffs' experts define the "tying product" in the present case as the right to continue operation as a Little Caesar franchise. Siwek and Nelson August 1994 Declaration at 11, P38. They **[**125]** define the "tied product" as "the purchase of food and nonfood **[*501]** supplies, including at least paper and other logoed products, from Blue Line Distributing, Inc. and/or Little Caesar Enterprises" (noting that Blue Line was merged into LCE in January 1994). Id. They note that the LCE franchise agreement requires each franchisee to purchase logoed products, and the franchisees are tied in to buying these products from Blue Line because it is the sole supplier of these logoed goods under an exclusive 1989 Licensing Agreement from Little Caesar. Id. Each franchisee has "the contractual right to use qualified distributors other than Blue Line, they had the right to 'shop' the market for distribution services." *Id. at 14, P44*. They accuse LCE of being involved in anticompetitive activities by refusing "requests by franchisees to approve alternate sources of distribution." *Id. at 11*, P38e. They assert further that:

> LCE's control over logoed products gives it control over other non-logoed products, since distributors find it uneconomic to distribute non-logoed products without also distributing logoed products. In addition, franchisees find "one stop shopping" for weekly supplies to be **[**126]** efficient.

Id. at 12, P38f. "By retaining only one approved distributor in each area [Blue Line] and by blocking franchisees' access to competitive distributors, LCE excluded competitive sources of distribution throughout the United States." *Id. at 13*, Pb.

Siwek and Nelson claim that LCE's and Blue Line's profit margins are higher than those of competitors. Had alternate distributors not been excluded from the market, some franchisees would have negotiated better prices with these alternate distributors than from Blue Line, resulting in competition that would lower the price of the aggregate "market basket" of goods necessary to operate a Little Caesar franchise. This lower profit would benefit not only the franchisees who would wish to switch to a different distributor but also those who remained with Blue Line, who would benefit from the new, more competitively priced, and lower aggregate cost of a market basket of goods necessary to operate a franchise.

The focus of this August 1994 declaration was primarily to show that all of these claims could be established through common proofs for a nationwide class.

In response to the current motion for summary judgment with **[**127]** respect to the certified class of franchisees who have signed mid-1990 Franchise Agreements, plaintiffs' experts prepared a declaration relevant to the definition of market and market power. [57]

[128]** After analyzing the facts to determine that there is a separate market for the tied products, thus demonstrating that the tying and tied products are "separate products," which is discussed in Section III above, plaintiffs' experts analyze first whether a tie exists for franchisees who have pre-mid 1990 Franchise Agreements, and further whether LCE and its affiliate Blue Line have "market power in the relevant market." *Id. at 2, P 3*. With respect to the former question, they assert that:

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[57] In their December 1996 declaration at p. 4, P5b, they state:

> Under all Franchise Agreements (both Pre-Mid 1990 and Post-Mid 1990), franchisees are allowed to request approval of third-party suppliers. . . . While the Franchise Agreements do not specifically define the term "suppliers" as including "distributors," the fact that LCE has historically approved third-party distributors and also indicated that it would approve qualified independent distributors suggests that there is no dispute over whether franchisees (both under the Pre-Mid 1990 and Post-Mid 1990 contracts) had the right to seek approval of qualified third-party distributors and to expect that these distributors would be approved.

Siwek and Nelson December 1996 Declaration at 4-5, P5(b), referring to Alan Harnisch's June 30, 1993, letter to L.D. Klenda noting that "Little Caesar is prepared to and will continue to review requests to approve other potential distributors, and that each request is individually considered." For purposes of this motion, I will consider that there is no dispute of material fact that each franchisee does have the contractual right to seek an alternate distributor which is derivative from its express contractual right to seek the approval of third-party suppliers.

> The confidential June 1989 agreement between LCE and Blue Line that gave Blue Line the exclusive right to distribute logoed products had the practical economic effect of preventing "hybrid franchisees" from successfully exercising this right. Put simply, the combination of the Post-Mid 1990 Franchise Agreements, the June **[*502]** 1989 LCE/Blue Line agreement, and LCE's control over the supplier approval process meant that no third-party distributors of logoed products would be approved without litigation. Since franchisees need logoed products to fulfill their contractual commitments and it is uneconomic to operate as a distributor without access to logoed products, continued operation as a "hybrid franchisee" **[**129]** is tied to the purchasing of distribution services and Goods (including logoed products) from Blue Line.

Id. at 8-9, P9.

The bulk of this declaration by plaintiffs' experts deals with the issue of Little Caesar's market power under a lock-in theory. They note that each franchisee invests up front costs in excess of $ 100,000 to acquire a franchise, which includes a $ 15,000 initial franchise fee, as well as the leasehold improvements, equipment, initial inventories and other items. These sunk costs, as well as the good will developed by the efforts of a franchisee, locked these franchisees in and- exposed them to the franchisor charging supracompetitive prices for goods and services that it controls. *Id. at 9-10, 12 n. 13*. See also 12-13, PP15-16.

> Franchisees that are "locked in" have only legal remedies, since their contractual commitments, the nature of their investment in their franchise, and the presence of economic rents make it uneconomic for them to close down their franchise operation.

Id. at 10, P12. [58]

[130]** The experts note:

> The franchisor will find it profitable to exploit the existing franchisees if the franchisor is not punished legally by the franchisees and if the franchisor does not have to worry that its exploitation of the franchisees will adversely affect its efforts to recruit new franchisees. A franchisor will not have to worry about an adverse effect on the recruiting of new franchisees if potential new franchise recruits are unaware of the franchisor's anticompetitive behavior, if the franchisor has grown its franchise operation to the point where it no longer needs to recruit large numbers of new franchisees, if the franchisor lowers its franchise fee to future franchisees that are aware of the explotive behavior, or if the franchisor can convince prospective franchisees that its franchise operation is less risky and more remunerative than was the case when the existing franchisees signed up.

Id. at 11, P13.

Plaintiffs' economic experts acknowledge that:

> Once a Little Caesar franchisee is "locked in" to its contract with LCE, there are two possible factors that could protect it from monopolistic pricing by LCE/Blue Line: (1) LCE/Blue Line will not **[**131]** raise prices to its "locked in" franchisees if it wants to recruit additional franchisees that are not yet locked in and that would be discouraged by supra-competitive pricing by Blue Line. (2) LCE/Blue Line will not be able to raise prices to its "locked in" franchisees if these franchisees have the ability to turn to competitive distributors and suppliers. In this case, neither factor prevents LCE/Blue Line from raising prices.

Id. at 13-14, P17.

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[58] The authors use the standard definition of economic rent as:

An economic rent is any payment to a factor that exceeds what would be required to bring that factor into existence. Economic rents arise in various contexts. For example, an economic actor may earn economic rents when he is more efficient than the marginal supplier that determines the market price.

Id. at 10 n.11.

While noting they have not yet been able to obtain certain discovery, including detailed LCE and Blue Line financial information, to allow them to understand the defendant's cost structures, over charges, and profitability, they assert that the factual record that they have reviewed contains evidence that LCE franchisees are locked in and that LCE has exploited them by forcing them to use Blue Line and allowing LCE and Blue Line to extract rents from its franchisees. *Id. at 12, P14*.

Plaintiffs' experts note that while LCE/Blue Line expanded the number of franchises **[*503]** to over 2,000 by the early 1990's, it now operates at a scale necessary to support national advertising and feels less pressure to grow rapidly. They note that **[**132]** two or three years prior to LCE's President David Deal's deposition of December 2, 1994, Little Caesar had stopped offering new franchises under a moratorium. Deal Dep. at 322; Lockridge December 1996 Declaration, Ex. 6. LCE added some outlets in the early 1990's, although some of these were corporate outlets, and others were purchased back from existing franchisees. *Id. at 14-15, P18*. [59]

As a result of this lessened demand for new franchises, plaintiffs' experts state that "LCE/Blue Line could be less sensitive to possible adverse reputational effects that might result from disputes with locked-in franchisees than it was earlier in its history." *Id. at 14*, P18a. Plaintiffs' experts also claim that:

> For "locked in" franchisees the investment in additional Little Caesar's outlets **[**133]** would be relatively attractive compared to the investment in other businesses because they can spread common costs across several Little Caesar operations and because contractual terms such as non-compete clauses, limit their investment opportunities.

Id. at 15, P18b. [60]

Plaintiffs' experts note that under the supply clause of the post-mid 1990 franchise agreements the franchise owners could purchase any goods,

> "including paper goods as approved by LITTLE CAESAR from any source of its choosing, provided that said source has been previously approved as a supplier by LITTLE CAESAR in accordance with its standard practice and the foods, ingredients and supplies adhere **[**134]** to LITTLE CAESAR specifications and quality standards. With the exception of suppliers of signage and other products bearing the LITTLE CAESAR name and Proprietary Marks, Franchise Owner may request that LITTLE CAESAR place a supplier on LITTLE CAESAR's approved supplier list. LITTLE CAESAR shall not deny approval of any item which complies in all material respects with LITTLE CAESAR's specifications." (Section VII of Franchise Agreement; Attachment # 3).

Id. at 19-20.

Siwek and Nelson acknowledge that while the mid 1990 Franchise Agreement does not allow franchisees to request LCE to approve a logoed product supplier, it does not indicate that Blue Line is the only distributor to whom franchisees could turn. They argue that in post-mid 1990 contract reference to the franchisees' ability

> to turn to "previously approved" sources of supply, it refers to LCE's approval of "in accordance with its standard practice" (which arguably refers to LCE's obligations under its earlier contracts),

and thus there is a basis in the contract for concluding that LCE was committed to allow franchisees to use competitive distributors. They note further that the offering circulars **[**135]** did not clarify that Blue Line had an exclusive license for trademarked good nor the implications of that licensing. They also note that the offering

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[59] The experts do not note that David Deal also testified that a new franchise offering circular was being prepared in December 1994, and that LCE did expect to be offering new franchises for sale. Deal Dep. at 308.

[60] The August 1990 Franchise Agreement, Section XVII C.3, precludes a franchisee during and for two years following the termination of the franchise agreement from engaging in a fast food operation in market areas selling pizza, pasta, submarine sandwiches or related products similar to those sold by a Little Caesar outlet.

circular indicates that the franchisees will have access to "food and non-food specifications" so they can arrange to have competitive suppliers manufacture and distribute these products. In June 1993, LCE's attorney wrote to plaintiff Smith's attorney indicating the specifications for processed foods as well as logoed paper would not be available to Gary Smith. *Id.* at 16-17, P 20.

> Plaintiffs' experts conclude that because the supply clauses in both the Pre-Mid 1990 and Post-Mid 1990 contracts suggest that a prospective franchisee would be protected from post-lock in, supra-competitive pricing of Goods and **[*504]** distribution services, the behavior of LCE/Blue Line and statements contained in Blue Line documents indicate that franchisees were not really protected absent legal action. By not fulfilling the terms of the Franchise Agreements, LCE/Blue Line was in a position to exclude third-party distributors and charge supra-competitive prices to Little Caesar franchisees. While the modification of the "supply clause" in Mid-1990 revealed **[**136]** a contractual tie and provided some hint of LCE's overall strategy, the fact that LCE would use the explicit tie as part of a plan to exclude rival distributors and charge supra-competitive prices was not clearly revealed to prospective franchisees. Indeed, it continues to be denied by LCE, despite comments to the contrary in its documents.

Id. at 18, P21 (footnotes omitted).

The experts assert that:

> Once the franchisees signed the Post-Mid 1990 Franchise Agreement, they were locked into buying logoed products from Blue Line. Blue Line's control over logoed products and LCE's control over the approval of suppliers forced Plaintiffs to use Blue Line as their distributor.

Id. at 19, P22. They note that these behaviors of LCE/Blue Line were anticompetitive and if the Court approves this behavior,

> it will be approving behavior that threatens efficient franchising. <19> Specifically, efficient franchising requires franchisees to be able to count on the sanctity of the contracts they sign before they sink time and money into their franchise operations. To allow the franchisor to use its post-lock in market power to extract higher payments from franchisees **[**137]** (in this case through unannounced changes in distribution policies that give an affiliate a near monopoly) would make franchising riskier for franchisees and undermine efficient franchising.

<19> If the Court allows LCE/Blue Line to take the rents that would have flowed to the franchisee under an appropriate interpretation of the Franchise agreement, the Court would in essence be allowing LCE to change the rules of the game after the franchisee is locked in. This is similar to allowing merging pipelines to change the transportation costs that a "wildcatter" faces after it chose to prospect in an area because of the competitive transportation costs in the area. In both cases, approval of an anticompetitive practice would make the investment in socially-valuable risk taking activities less attractive by making it less likely that a successful effort will be rewarded. This will chill investment in socially valuable risk-taking. Approval of LCE's use of Blue Line as the exclusive distributor has the added adverse effect of encouraging LCE to use a relatively inefficient distributor, which wastes resources.

Id. at 19, P23b.

Based upon the limited financial data available to **[**138]** the experts and AmeriServ's estimates of its competitive pricing (which is that each franchise is overcharged $ 165 per week per outlet), and given the 2,400 independent franchisees as of September 1993, plaintiff's experts estimate the annual overcharges would exceed $ 20 million per year. *Id. at 21, P25*.

The experts then go on to discuss that the alleged overcharge by LCE/Blue Line's supracompetitive pricing has an impact and causes economic damages to all of the franchises. They note that the defendant has shown no evidence that LCE has lowered its initial franchise fee and royalty fees in anticipation of and to adjust for its later charging of supracompetitive prices on goods supplied for the operation of the franchise. *Id. at 22, P27*.

Plaintiffs' experts also argue that LCE/Blue Line do not have the economies of broad scale distributors that serve multiple restaurant chains. These entities buy substantially larger quantities of food than Blue Line, and make substantially larger "drops" of food to restaurants, and do so with more efficient transportation costs because of servicing more restaurants per trip. The experts assert that in a competitive market, LCE would **[**139]** earn below a competitive rate of return. They argue that the franchise agreement and the presentations by LCE to franchises that the franchisees would have a right to turn to competitive sources of supply, the fact that the franchise agreement did not disclose that potential franchisees should expect to pay above-market prices for goods, as well as other evidence suggests

> that LCE was using the market power it obtained through post-contract lock-in effects **[*505]** to force its franchisees to pay supra-competitive prices that were not required by the Franchise Agreements or envisioned at the time the Plaintiffs' Franchise agreements were signed.

Id. at 24, P30.

D. Legal and Factual Analysis and Conclusion:

On the present record a reasonable jury would, as a matter of law, have to find that the facts noted below were generally known, and therefore readily knowable with minimum information costs, to anyone considering signing a mid-1990 Franchise Agreement at a time after Blue Line had become the regional distributor in their area. [61]

[140]** 1. Little Caesar franchises had to use logoed goods and other foodstuffs and supplies meeting LCE specifications in order to operate a Little Caesar franchise.

2. Little Caesar franchisees could only obtain logoed and other specification goods from an approved source, which in effect meant an approved distributor who obtained the logoed and other products from an approved source.

3. Franchisees are free to purchase supplies, including logoed goods, from any source that the franchisee could demonstrate provided supplies that conformed to LCE specifications.

4. The LCE Offering Circular assured franchisees that "food and non-food product specifications are maintained at LITTLE CAESAR's principal office and are available on request for examination."

5. At the time of signing the mid-1990 Franchise Agreement, the only approved distributor of logoed goods still doing business in the region was Blue Line.

6. While other approved distributors in the past had distributed logoed goods, none of them were currently in the regional marketplace nor was there any reason to assume any of them would be entering that market in the near future.

7. Blue Line Distributing, Inc. is "a wholly owned **[**141]** subsidiary of LITTLE CAESAR, to whom LITTLE CAESAR has granted an exclusive license to contract for the manufacture and distribution of certain supplies."

8. Blue Line "derives substantial income from the sale of supplies to Franchisees as well as to LITTLE CAESAR-owned Restaurants."

9. The audited financial statements of Blue Line are consolidated with those of LCE for recent years and are available with the Offering Circular and for 1988 show that LCE derives more than seven times the income from food service sales for operation of Little Caesar franchises than from the combined sales of new franchises and collection of royalties obtained from its existing franchises.

10. Blue Line's profits benefit LCE.

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[61] As noted above, those few class members who were in areas not being serviced by Blue Line at the time they considered signing a mid-1990 Franchise Agreement, the "Associate Distributor Class Members," warrant separate consideration.

11. LCE has a copyright on its trademark and other distinctive logos and marks used in its business and on its logoed products needed to operate a Little Caesar franchise.

12. LCE can control entirely who manufactures and/or distributes products with its copyrighted logo and marks. It could limit the manufacturing and/or distribution of logoed items to a single source which could be itself or Blue Line.

13. A list of approved suppliers who provide LCE foodstuffs and other **[**142]** products meeting LCE specifications is available.

14. Franchisees can request an alternate supplier be placed on LCE's approved list for all items meeting LCE specifications except for secret spices and dough mixes and "products bearing the LITTLE CAESAR name and Proprietary Marks.

15. While LCE secret spice mix and dough mixes are the only products that the franchisees are expressly bound to purchase from LCE through Blue Line, Blue Line is the only source in the regional market from which franchisees can purchase logoed products, and franchisees signing the mid-1990 **[*506]** Franchise Agreement had no rights under that contract to request an alternate source for those products.

16. Unless LCE approves an alternate source of logoed products on its own, or in response to a request from someone having a pre-mid-1990 Franchise Agreement, the franchisee runs the risk of having their continued right to operate a LCE franchise tied to their purchasing logoed products from LCE through its Blue Line distribution division.

17. LCE through Blue Line sets the price for logoed products and could set prices for logoed products that are higher than similar generic products.

18. Other carry out pizza **[**143]** franchises and other fast food franchises in which one might invest may have less restrictive provisions and fewer risks of a tie-in than the LCE franchise.

19. LCE has the legal right to charge more for logoed products through Blue Line than similar such products might cost if the potential Little Caesar investor obtained an alternative carry out food franchise.

20. The market for carry out food franchises is a competitive market for investors.

21. The retail fast food carry out markets, including the pizza carryout food market, are extremely competitive.

22. Because LCE franchises compete in a very competitive carry out food market, LCE through Blue Line is limited in the extent it could overcharge for logoed products (or any other products for which an alternative competitive distributor is not available) because either: (a) LCE could not sell new franchises on the existing terms if it became generally known that it exploited its existing franchisees; or (b) because even if it stopped selling new franchises and cared little about its reputation in the franchise sales market, it is dependent for substantial portions of its income and profits not only on royalties but more significantly **[**144]** on Blue Line sales profits from its franchisees, which would be lost if it charged supracompetitive prices of such a magnitude that its franchisees could not cover their marginal costs in the competitive fast-food and carryout market.

In addition to the above facts that would be generally known or knowable at minimum cost prior to the signing of a mid-1990 Franchise Agreement, the only change that LCE apparently implemented after the franchisees signed a mid-1990 Franchise Agreement was to change any policy it had not to permit alternate approved distributors to have access to logoed products. The three alternate distributors approved in 1995 were given access to logoed goods. [62] This change did not adversely affect Little Caesar class member franchisees. Each franchisee had

[62] While LCE denies the allegation that it had a policy in the early 1990's of not approving alternate distributors to rival Blue Line, if that was the policy, then there was a second change in that policy when in 1995 it approved the three alternate distributors

contractual protections against excessive franchisor opportunism post-contract by raising the price of goods in the market basket because each of them had a contractual right to seek approval of a second source of supplies for any and all items except Pan!Pan! Dough, Spice Mix, and logoed products.

[145]** Thus, prior to signing a mid-1990 LCE Franchise Agreement it was either generally known or easily knowable [63] to the non-Associate Distributor class members that to operate an LCE franchise there was a risk that one would be forced to purchase logoed products from LCE through Blue Line possibly at supracompetitive prices.

If class plaintiffs were suing LCE for charging supracompetitive prices for its logoed goods, class plaintiffs would have no claim under ***antitrust law*** to a Kodak-type market definition even though they might have some state claims under contract law. Based on the current record this Court could **[*507]** find as a matter of law that LCE made sufficient disclosures prior to signing a mid-1990 Franchise Agreement which, when evaluated in light of other generally known **[**146]** or readily available information, would put a reasonably prudent franchise purchaser on notice of the risk that logoed goods would be tied in with the franchisee having no contractual or other limitations on price. This information would be available to a prospective franchisee even though the mid-1990 Franchise Agreement does not expressly tie logoed products to the continued operation of a Little Caesar franchise. This would be known with or without knowledge of the exclusive June 1989 Licensing Agreement. [64] **[**147]** Thus, the evidence is such that no reasonable jury could conclude that it was not generally known to potential franchisees pre-contract in mid-1990 and thereafter that LCE, either directly or through Blue Line, could restrict their access to logoed goods from any source other than Blue Line. [65]

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who applied in 1993 and 1994 -- PYA Monarch, Schloss and Kahn, and Gordon Food Service. Defendant notes that these three approved alternate distributors that were approved in 1995 have not entered the market to compete with Blue Line.

[63] The LCE Offering Circular provided potential investors not only the number and location of other LCE carryout franchises, but also the names of the owners so that any prospective franchisee could contact existing franchise owners.

[64] The exclusive licensing agreement and other documents obtained during discovery would support a finding that it was LCE's intention to use its legal monopoly over its proprietary marks to improve its competitive position vis-a-vis alternate potential distributors. While a potential franchise might not know that LCE intended to use its power in this manner, they would know LCE had that power to exercise if it chose to do so.

[65] In most areas of the country from mid-1990 on, Blue Line was the sole source of such items. This would be known to any franchisee who signed the mid-1990 Franchise Agreement to renew their franchise. It could also readily be determined by any potential new franchisee, who had never had a Little Caesar franchise, by either inquiring of Little Caesar during their franchise negotiations or calling any of the hundreds of franchisees listed in the Offering Circular. This is the case even though the mid-1990 Franchise Agreement does not expressly tie logoed products to the continued operation of a Little Caesar franchise.

Defendant argues in this Motion for Partial Summary Judgment that sufficient disclosures were made pre-contract to inform potential franchisees that signing the mid-1990 Franchise Agreement exposed the franchisee to a requirement that to continue as a Little Caesar's franchisee logoed products would have to be purchased from Blue Line. Plaintiffs in their Second Supplemental Brief note that defendant in its earlier efforts to defeat the plaintiffs' first motion for class certification argued that:

> **LCE intended that only one category of items, logoed products, be purchased only from Blue Line.** (Deal Decl. P 10) Although this intent was expressed in an internal document and in letters to logoed paper suppliers and third party distributors, the intent was never communicated in any uniform written or oral communication to the franchisees (Id.) The franchise agreement was amended in mid 1990 to provide that a franchisee could not request additional sources for logoed products, **but does not Inform franchisees who signed the new agreement that Blue Line was the only existing source of logoed paper products. . . . thus, a franchisee would have to be a mind reader to have discerned that Little Caesar's intent was that logoed products be purchased only from Blue Line.**

Plaintiffs' Second Supplemental Brief in Opposition to Defendants' Motion for Partial Summary Judgment at 3, filed April 4, 1997, quoting Defendant's Brief in Opposition to Class Certification, pp. 9-10, filed July 13, 1994, Docket # 43. (Emphasis supplied by plaintiffs' counsel.) This "mind reader" argument was later repeated in oral arguments.

Defendant responds that plaintiff's lead counsel argued in the second class certification motion that

[148]** Yet, the class plaintiffs are not claiming damages for paying supracompetitive prices for logoed goods. Rather, they are claiming that the defendant used its power over its logoed goods to extend its tie-in over these goods to the entire market basket of goods necessary to operate a Little Caesar franchise for which supracompetitive prices are being charged. As noted above, this claim is **[*508]** based on the assertion that denial of access to logoed goods raises the market entry level and reduces the ability to compete of potential rival distributors, both because of the higher profit margin on logoed goods and the preference of many franchisees for "one-stop shopping." Thus, according to plaintiffs' claim, LCE's denial of access to logoed goods keeps alternate distributors from competing with Blue Line in a manner similar to Kodak's denial of access to its unique repair parts kept independent service operators from competing with Kodak in providing service on Kodak machines. Resolving all disputed issues of fact in plaintiffs' favor, it must be assumed (as plaintiffs' expert contend and AmeriServ's Burgess stated) that a rival distributor could not enter the market and compete successfully **[**149]** without access to logoed goods. [66]

On the current record, it cannot be said as a matter of law that a potential franchisee in mid-1990, even an existing franchisee, would know or could reasonably anticipate that a rival distributor would be unable to enter the market and compete with Blue Line in the absence of having access to logoed products.

Thus, the record is such that there is a disputed issue of material fact as to whether any potential franchisee **[**150]** considering signing a mid-1990 Franchise Agreement could anticipate that the lack of access to logoed products would preclude alternate distributors from entering the market to compete with Blue Line. Each franchisee had contractual protections against excessive franchisor opportunism post-contract by raising the price of goods in the market basket because each of them had a contractual right to seek approval of a second source of supplies for any and all items except Pan!Pan! Dough, Spice Mix, and logoed products. (Franchise Agreement Section VII.) Thus, on the present record, and for purposes of considering whether a Kodak-type market definition is applicable, there is an unresolved factual question concerning whether a potential franchisee could anticipate that its contract protections in Section VII of the Franchise Agreement to obtain a second source was effectively undermined by its relinquishing of a right to seek a second source for logoed products. Unlike Kodak and PSI, where it would be obvious that an independent service provider could not compete with service being provided by the original equipment manufacturer if the independent service provider did not have access to **[**151]** replacement parts, it is not obvious that an alternate distributor cannot compete with Blue Line without access to logoed goods. [67] Not only is it not obvious, but defendant contends that it is not even true. Thus, under *Kodak* and *PSI,* there is a potential that the franchisor could take advantage of the franchisees' ignorance on this non-obvious

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> As a practical matter, most of the franchisees, generally speaking, were aware of the fact that they didn't have any options, that there was no place else to go other than Little Caesar's. Certainly up until 1995, no other distributor was ever approved, not ever, so they had to go buy all their goods -- I mean, they had no place else to go.

July 22, 1996 Hearing Transcript at 45.

Plaintiffs' experts also acknowledge that "the modification of the 'supply clause' in Mid-1990 revealed a contractual tie . . ." although the use of it to exclude rival distributors was not disclosed.

While defendant's earlier adversarial arguments serving the moment may later appear inconsistent with current arguments, this Court must determine the facts and the legal implications from the facts based on the record and its best assessment of the legal interpretation that can be placed on the facts. It is not appropriate in doing so to seek to punish any past rhetorical overstatements. As my initial Report and Recommendation on Class Certification indicated, I did not accept defendant's "mind reader" argument then, nor do I feel bound by it now.

[66] This issue is disputed by the defendant that contends AmeriServ was willing to enter the distribution market without logoed goods. Defendant also contends that the number of franchisees in each distribution area are insufficient to make it economically feasible for there to be more than one distributor. Again, for purposes of this motion it will be assumed that if approved and provided access to logoed goods, a rival distributor could enter the market in each region or in some other geographical market combining or modifying existing distribution regions.

[67] Obviously at some level of supracompetitive pricing a rival distributor could enter the market and compete without logoed goods because it could "beat" the blended margin overcharges of Blue Line on the market basket of goods, and the preference of franchisees for "one stop" shopping will fade if it becomes too expensive.

fact by implementing an unanticipated change of policy to preclude rival distributors from entering the market by denying them access to logoed products after franchisees had signed their mid-1990 Franchise Agreement and become "locked in."

Defendant notes that the three 1993-1994 alternate distributor applications that were approved **[**152]** in 1995 were given access to logoed products. In addition, the newest form Franchise Agreement again allows a franchisee to seek an alternate source of logoed products. Yet, notwithstanding this, the facts are such that a reasonable jury could conclude that from mid-1990 until at least the filing of this lawsuit LCE/Blue Line had a policy that would deny access to logoed products to alternate distributors, similar to the policy it implemented against PYA Monarch when Blue Line entered the Atlanta area in 1989.

[*509] The fact that LCE had such a policy during the relevant time periods is not all that is necessary to resolve the question of whether plaintiffs are eligible for a Kodak-type market definition. The caveat expressed in PSI noted:

> If there were any evidence in the record that [the defendant] took advantage of its customers' imperfect information in order to reap supracompetitive profits in the aftermarket for [its product], we would not hesitate to allow a Kodak-type theory to be submitted to the jury.

104 F.3d at 821. PSI then stated that it could not find evidence that the defendant "engaged in such activities. In this situation a Kodak-type theory is not **[**153]** applicable." *Id.*

Thus, the critical question in the present case is whether LCE "engaged in such activities." Is there sufficient evidence in the record from which a reasonable fact-finder could conclude that during the relevant time periods LCE implemented this policy to exclude any potential alternate distributor from the market? During the relevant time period, only AmeriServ in the southeast (and possibly nationwide) and Chopping Block in Wisconsin sought to become alternate distributors. Yet, both did not become alternate distributors because LCE did not approve them. With respect to the denial of approval to Chopping Block, plaintiffs do not appear to contest the legitimacy of LCE's reasons for denial that Chopping Block did not offer a full line of products to Little Caesar franchisees. Plaintiffs do assert that the withholding of approval of AmeriServ was wrongfully undertaken to exclude competition. The issue of whether this was or was not a wrongful withholding of permission will be resolved in Gary Smith's individual case.

As noted above, the class certification deals with whether LCE violated antitrust laws by tying in its logoed paper products or by extending that **[**154]** tie to the entire market basket of goods needed to operate a Little Caesar franchise. There is no evidence that Chopping Block did not enter the market because of lack of access to logoed products. There is no evidence that Chopping Block even wanted to sell logoed products. There is evidence that had LCE approved AmeriServ, it did intend to deny them access to logoed goods. Yet this never occurred because the denial of AmeriServ was done for other reasons. Thus, as a matter of law, this Court can determine that no reasonable jury could find that AmeriServ did not become an alternate distributor in the southeast United States or other places because of its lack of access to logoed goods. While this situation might have occurred had AmeriServ been approved by LCE, and while such an action might be an antitrust violation because in such a hypothetical case the plaintiffs could make a viable claim to a Kodak-type tying market, the reality is that this hypothetical possibility (or probability) did not occur.

While the present case does involve information and switching costs of sufficient magnitude to warrant invocation of a Kodak-type market definition if the defendant took advantage **[**155]** of the franchisees' ignorance, the evidence does not show that during the limitations period for this lawsuit the defendant used its restrictive policy on the availability of logoed goods to alternate distributors to exclude any potential distributor from the market. Nor during the limitations period has any potential alternate distributor been precluded from entering the market to compete with Blue Line because of LCE's restriction on the availability of logoed goods.

While plaintiffs' economic experts assert that there is a need for logoed goods in order to enter the market and compete with Blue Line, the above analysis assumes, for purposes of this motion, that plaintiffs will prevail on this factual dispute. Yet, the economic experts do not point to any evidence of what occurred in the marketplace to put factual flesh on the bones of their economic theory. During the relevant time periods for the class, there is no proof that LCE's exercise of its power to deny access to logoed goods to an alternative distributor prevented any distributor from entering the market or remaining in the market. Nor is there evidence any potential rival to Blue Line failed to seek approval because **[**156]** of this LCE policy. One thing that Kodak stressed was that courts should look to the "market realities" and "particular facts disclosed by the record" **[*510]** and not depend solely on the theories of economists. To do so would allow juries to substitute their speculations for the evidence necessary to make out a Kodak-type showing of power in the tying market.

Resolving all facts in plaintiffs' favor, even if this Court assumed that LCE fully intended to deny AmeriServ access to logoed goods if they approved them, and assuming further that LCE fully intended to violate the antitrust laws in doing this, these intentions never materialized because AmeriServ was never granted approval to be an alternate distributor. Thus, LCE never got to the point where it implemented its "wrongful" plan concerning denial of access to logoed goods. [68] Nor is there any evidence that LCE's denial of access to logoed goods to alternate distributors actually contributed to any alternative distributors during the statute of limitations period for this litigation: (1) having to leave the market; (2) not being able to enter the market, or (3) being dissuaded from applying to be an alternate distributor. [69] Thus, **[**157]** on the present record, no reasonable jury could find that during the limitations period LCE used its power to deny access to logoed goods to alternate distributors to handicap or exclude any rival distributors. Thus, this Court can determine as a matter of law that plaintiffs have not made a sufficient showing from which a reasonable fact-finder could conclude that class plaintiffs are entitled to a Kodak-type market definition because of defendant implementing a change in policy to the detriment of "locked in" franchisees.

[158]** With respect to the Associate Distributor Class Members who had a distributor other than Blue Line in their region when they signed the mid-1990 Franchise Agreement, these class members may not have had sufficient knowledge prior to signing the mid-1990 Franchise Agreement to know that they would later be "tied in" to Blue Line as the sole distributor of logoed goods. At the time of their signing of the Franchise Agreement, they would have had a distributor of logoed goods other than Blue Line. Yet, as with the majority of the class, the critical question is whether LCE "engaged in . . . activities" taking advantage of the Associate Distributor Class Members' imperfect information. The associate distributors who ceased serving as distributors after LCE began using its mid-1990 Franchise Agreement were Pegler Sysco in the Kansas City area in 1990, Leprino Foods in California in 1991, and Food Services of America in Washington state in 1992.

There is no evidence in the record that Pegler Sysco sought to continue competing with Blue Line, nor that it sought but could not obtain logoed goods. While the evidence is such that a jury could find that Pegler Sysco, if it had asked, would **[**159]** have been denied continued access to logoed goods once Blue Line/Dallas began to distribute goods in the Kansas City area, that is not sufficient evidence to support a jury finding that Pegler Sysco was driven from the Kansas City market by LCE's restrictive policy concerning logoed goods. Similarly, there is no evidence that Leprino Foods or Food Services of America were forced to exit the Little Caesar distribution market because of lack of access to logoed goods. Thus, there is not sufficient evidence in the record from which these Associate Distributor Class Members could claim a Kodak-type market for the tying product.

Plaintiffs argue that *Collins v. International Dairy Queen, 939 F. Supp. 875 (M.D.Ga. 1996)*, rejected summary judgment arguments similar to those of defendant LCE both on the market definition issue as well as the sufficiency of the evidence of coercion on the tie-in claim. As in the present case, Collins is a franchise case involving the franchisor approval of products and supplies used in Dairy Queen franchise outlets to maintain the reputation for quality of Dairy Queen products. The district court acknowledged **[*511]** that "an approved source requirement can constitute **[**160]** an illegal tie if a franchisee is coerced into buying products from a company in which a franchisor has a financial interest." *939 F. Supp. at 881* (quoting *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 712 (11th Cir. 1984)*.

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[68] As noted above, any other possible "wrongful plan" of illegally denying approval to a qualified alternative distributor will be litigated in Garyt Smith's individual case.

[69] While Burgess says that he could not compete without access to logoed goods, plaintiffs have submitted no evidence that any other distributors in the United States were dissuaded from seeking to become a competitor of Blue Line because of their awareness of this policy of LCE denying them access to logoed goods.

Dairy Queen made substantial profits by selling equipment, produce and supplies which they purchased for resale to authorized warehouses which paid Dairy Queen a commission and resold the items to franchisees. Dairy Queen also sold certain items directly to franchisees including its soft-serve ice cream mix. Dairy Queen received a fee of a half percent on all warehouse sales whether the warehouse obtained the items from Dairy Queen or from a manufacturer that met Dairy Queen specifications. The Dairy Queen Operators' Cooperative ("DQOC") had designated certain manufacturers who produced products meeting Dairy Queen's specifications. Dairy Queen also received a commission even when the warehouse bought these products directly from the DQOC-endorsed manufacturers rather than from Dairy Queen. DQOC also sought to operate as a purchasing cooperative for franchisees. *Id. 939 F. Supp. at 881*.

While the franchise agreement required that the "Franchisor [is] **[**161]** to consider requests of Licensee for approval of specific alternate sources of supply and to cooperate with Licensee in this regard," plaintiffs alleged that Dairy Queen routinely delayed and frustrated efforts to have alternate suppliers approved and refused to recognize DQOC as the agent of the franchisees and had refused to consider DQOC's requests for approval of alternate suppliers. *Id. at 881*.

The district court in *Collins* denied summary judgment for defendant. First, it rejected defendant's argument that "an illegal tying arrangement cannot exist as a matter of law between a franchisor and its existing franchisees." *Id. at 883*. Second, it rejected defendants' arguments that the relevant tying market is the pre-contract market for all fastfood sandwich franchises, of which Dairy Queen constituted less that 3% of that market. *Id. at 878*. It did this using traditional market definition analysis and concluded that a jury could determine that relevant tying market was "the market for soft-serve ice cream franchises" of which Diary Queen controlled over 90%. *Id. at 879*. The court also found that a "lock-in" could be found on the existing facts, but its analysis **[**162]** of this issue is a single paragraph. *Id. at 883*. The case also provided a greater number of incidents of the defendant taking steps to frustrate efforts to have alternate suppliers approved than have been shown in the present case.

Thus, while agreeing with the *Collins* court that an illegal tying arrangement can in certain circumstances be found in the franchisor-franchisee relation, this Court is facing a different fact situation where LCE does not have a 90% share of the potentially relevant tying market. The Collins court's brief analysis of lock-in is less significant than the PSI/Kodak analysis needed in this case where an intermediate tied product (logoed goods) is allegedly being used to extend the tie to the entire market basket of goods needed to operate a Little Caesar franchise.

Another recent franchise case dealing more extensively with a Kodak-type market definition is *Wilson v. Mobil Corp., 984 F. Supp. 450 (E.D.La. 1997)*, involving the franchisees of SpeeDee Oil Change Systems, Inc. ("SpeeDee"). During one period of time the franchise agreement noted that Castrol was the exclusive lubricant supplier for all SpeeDee outlets. The franchise agreement required **[**163]** the franchisee to use only approved brand named items in their outlets. In June of 1988, SpeeDee and Mobil entered into a contract whereby Mobil became the approved supplier. The new franchise agreement indicated this and again reiterated the requirement that the franchisees use only approved brand name items, including lubricants. *984 F. Supp. at 454*. At the time of the litigation, Mobil was the only company meeting SpeeDee's standards which included certain advertising contributions and equipment financing arrangements for the franchise outlets.

The defense filed a motion for summary judgment arguing that the tying market was the market for all franchises for which operation does not require specialized knowledge, and the initial investment is comparable of **[*512]** that of the SpeeDee franchise. While plaintiffs had initially argued that the defendants' market power was based in its "statutory trademarks, trade names, and copyrights which possess economic distinctiveness," the Court noted that plaintiffs had "apparently abandoned these contentions, now asserting in their opposition to Mobil's summary judgment motion that the relevant market is limited to the SpeeDee franchise network." **[**164]** The district court noted that other courts and commentators had urged that the Kodak-type narrowed market definition be utilized only when there has been a unilateral change in policy by the defendants. *Id. at 458*. The *Wilson* court concluded that the franchisees had not made out a Kodak-type showing and

> defendants' market power should be measured at the precontract stage because each plaintiff had sufficient information to evaluate the SpeeDee franchise opportunity before they "locked-in" to the franchise. Before signing their contracts, each potential franchisee knew that the franchise agreement was for fifteen years, there was a single approved brand of lubricants, that SpeeDee, not the franchisees, had the contractual authority to determine the number and identity of approved brands and/or suppliers, including lubricant brands and/or suppliers, and that if a franchisee chose to take advantage of equipment programs offered by the approved lubricant suppliers (Castrol and later Mobil), the franchisee must purchase certain amount of product from the approved suppliers. Thus, franchisees had sufficient information to conclude that they would be required to purchase **[**165]** from a single lubricant supplier indefinitely, that there was a possibility that SpeeDee's choice of supplier might differ from their own preferred choice, and that to take advantage of certain equipment packages, the franchisee would be required to buy specific volumes of lubricants each year from the approved suppliers.

Id. at 460-61.

Plaintiffs also complained about the lack of disclosures concerning current and future prices, but the Court rejected these arguments noting that:

> At the precontract stage, these plaintiffs were aware that prices for lubricants would vary, that the selection of the supplier was not theirs, and that if they accepted the equipment package they would be required to purchase specific volumes of lubricants from the designated supplier. These plaintiffs had sufficient information to determine whether this franchise opportunity was too risky to venture into and to compare it with other franchises. In addition, compared to a copier purchaser who is only buying one piece of equipment, a person about to venture long-term into a new business should have a strong incentive to shop around and to determine if he needs more information to make **[**166]** a decision. . . . Plaintiffs have not shown any evidence that information about Mobil's products or current prices was not available from other sources. . . . These plaintiffs have suggested no reasons why they could not have contacted Mobil, existing franchisees, or market sources about the pricing and desirability of Mobil's package. The offer circulars even listed names and addresses of other SpeeDee franchisees.

Id.

The *Wilson* analysis of Kodak-type definition is more detailed than that of Collins and supports a finding that class plaintiffs have no per se tying claim with respect to the logoed goods. Neither Collins nor Wilson, both of which involved a direct alleged tie-in, are of much help to this Court in analyzing the alleged two-step tie of using the tie over logoed goods to tie in the entire market basket of goods. Neither case suggests that the above analysis on that issue is flawed.

Thus, on the present record, class plaintiffs cannot use a Kodak-type analysis to define the relevant tying market as the continued operation of a Little Caesar franchise. Rather, the relevant tying market is no smaller than the pre-contract market for pizza or other fast-food **[**167]** carry out restaurants.

Given the fact that plaintiffs have not countered defendant's assertion that LCE lacks sufficient market share in the pre-contract market for pizza or fast food franchises to trigger a per se tying claim, and given the fact that the plaintiffs have failed to provide **[*513]** sufficient alternate evidence of market power (see n. 10 above), defendant should be granted summary judgment on the class tying claim because plaintiffs cannot prove prima facie element # 2 of its per se tying claim -- that defendant has sufficient market power over the tying product to restrain appreciably competition in the tied product market.

Because defendant is entitled to summary judgment against all class plaintiffs based on this market power argument, this Court need not address the alternate arguments made by defendant in its motion.

V. RECOMMENDATION:

For the reasons stated above, IT IS RECOMMENDED that defendant's Motion for Partial Summary Judgment be DENIED on the issue of there being one product and not two, and that defendant's motion be GRANTED on the issue that plaintiffs have insufficient proof of market power in the tying product market.

Any objections to this Report **[**168]** and Recommendation must be filed on or before May 11, 1998. *28 U.S.C. § 636(b)(1)*; E.D. Mich. LR 72.1(d)(2). Failure to file objections within the specified time constitutes waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985)*; *Ivey v. Wilson, 832 F.2d 950, 957-58 (6th Cir. 1987)*; *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*. Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

On or before June 1, 1998, the opposing party may file a response to any objecting party's timely filed objections. The response shall address specifically, and in the same order raised, each issue contained within the objections.

STEVEN D. PEPE

UNITED STATES MAGISTRATE JUDGE

Dated: March 31, 1998

Ann Arbor, Michigan

Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.

United States Court of Appeals for the Ninth Circuit

April 10, 1997, Argued, Submitted, Pasadena, California ; March 31, 1998, Filed

No. 95-56706

Reporter
140 F.3d 1228 *; 1998 U.S. App. LEXIS 6439 **; 1998-1 Trade Cas. (CCH) P72,102; 98 Cal. Daily Op. Service 2342; 98 Daily Journal DAR 3217

LUCAS AUTOMOTIVE ENGINEERING, INC., Plaintiff-Appellant, v. BRIDGESTONE/FIRESTONE, INC.; THE FIRESTONE TIRE AND RUBBER COMPANY, of New Zealand, LTD., Defendants, and COKER TIRE COMPANY, Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Central District of California. D.C. No. CV-93-5016 JGD. John G. Davies, District Judge, Presiding.

Disposition: AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Core Terms

Tire, vintage, antitrust, purchaser, brand, Clayton Act, manufacture, competitor, acquisition, distribute, summary judgment, distributor, divestiture, original equipment, district court, indirect, anti trust law, market power, monopoly, damages, treble damages, worldwide, output, standing to sue, lack standing, barriers, equitable relief, Sherman Act, injunction, alleges

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN2[] **Clayton Act, Claims**

See *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] Standing, Clayton Act

15 U.S.C.S. § 15(a) of the Clayton Act provides a private cause of action for parties injured by violations of 15 U.S.C.S. § 18 of the Act.

Civil Procedure > ... > Justiciability > Standing > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Torts > ... > Elements > Causation > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

HN4[] Justiciability, Standing

There are several factors courts to consider in determining whether an antitrust plaintiff has standing to sue. As a threshold matter, the court must determine whether the plaintiff has met the requirements for standing under U.S. Const. art. III - that is, whether the plaintiff has suffered an injury which bears a causal connection to the alleged antitrust violation. If the plaintiff meets the requirements for standing under Article III, the court must then determine whether the plaintiff also meets the more demanding standard for antitrust standing. In deciding whether antitrust standing has been established, courts are to consider: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] Antitrust & Trade Law, Clayton Act

In order to demonstrate that it has suffered "antitrust injury," a plaintiff must prove that its alleged injury flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN6[] **Remedies, Damages**

An indirect or remote purchaser lacks standing to seek damages relief against the manufacturer for alleged violations of federal antitrust laws. The indirect purchaser rule serves to avoid the complications of apportioning overcharges between direct and indirect purchasers and to eliminate multiple recoveries.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN7[] **Clayton Act, Claims**

See *15 U.S.C.S. § 26*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] **Private Actions, Standing**

To maintain an antitrust divestiture suit, a private plaintiff must generally meet all the requirements that apply to the damages plaintiff, except that the injury itself need only be threatened, damage need not be quantified, and occasionally a party too remote for damages might be granted an injunction.

Counsel: Maxwell M. Blecher, John E. Andrews, Blecher & Collins, P.C., Los Angeles, California, for the plaintiff-appellant.

Richard W. Bethea, Jr., Stophel & Stophel, P.C., Chattanooga, Tennessee, for the defendant-appellee.

Judges: Before: Diarmuid F. O'Scannlain and A. Wallace Tashima, Circuit Judges; Robert H. Whaley, * District Judge. Opinion by Judge O'Scannlain. TASHIMA, *** Circuit Judge, with whom WHALEY, District Judge, concurs. O'SCANNLAIN, Circuit Judge, dissenting only as to Part II.B.2.

Opinion by: DIARMUID F. O'SCANNLAIN

Opinion

[*1230] OPINION

* The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

*** Writing for the court as to Part II.B.2 only.

O'SCANNLAIN, [**] Circuit Judge:

[2]** We must decide whether a distributor and downstream purchaser of vintage automobile tires has standing to bring an antitrust action under the Clayton Act against a competitor and supplier for damages and divestiture.

I

Coker Tire Company, Inc. ("Coker Tire") and Lucas Automotive Engineering, Inc. ("Lucas Automotive") sell vintage automobile tires to customers worldwide. Vintage tires are different from tires used on modern automobiles in terms of their size, dimensions, structure, design and manufacturing. They are replicas of the tires which originally were sold on vintage, antique and collector cars, and are no longer made for use on modern cars. Vintage tires are typically bias ply tires, whereas modern automobile tires are radial construction. Vintage tires are distributed through specialty tire channels of distribution.

Lucas alleges that the relevant market for purposes of this action is limited to original equipment ("OE") major brand vintage tires. These tires bear the trademarks of tires which originally were sold on vintage cars. For American cars, the OE major brands in vintage tires are Firestone, B.F. Goodrich, U.S. Royal and Goodyear. Coker Tire is the exclusive supplier **[**3]** for all of these OE brands except Goodyear, which comprises less than 10% of the market. There are approximately 40,000 tire dealers in the United States for the retail sales of OE major brand vintage tires. Following the district court, we assume that the relevant market is limited to original equipment brand name vintage tires. *See* Order Granting Defendant's Motion for Summary Judgment at 3 n.1.

Coker Tire is the world's largest supplier of vintage tires, with distributors in 27 countries and distribution sites in Chattanooga, Tennessee and Santa Fe Springs, California. There are more than 25 brands of vintage tires being sold in the world. Lucas Automotive, headquartered in Long Beach, California, initiated the Firestone Vintage Tire Program in the 1970s, operating since then as the importer and distributor of Firestone vintage tires worldwide. Prior to August 7, 1991, both Coker Tire and Lucas Automotive distributed Firestone brand vintage tires: Coker Tire distributed "wide ovals," vintage tires for "muscle cars" (those made primarily in the 1960s and 1970s), while Lucas Automotive distributed Firestone tires for antique cars. Firestone Tire and Rubber Company of New Zealand, **[**4]** Inc. ("FNZ"), a subsidiary of Bridgestone/Firestone, Inc. ("BFI") and operating under a license agreement with BFI, manufactured and sold the Firestone vintage tires in New Zealand, supplying them to Lucas Automotive for distribution and sale to end users. Because vintage tire production became unprofitable for FNZ in the late 1980s, it decided to cease manufacturing vintage tires in New Zealand. BFI sought to relocate production to a new facility in North America.

On August 7, 1991, BFI invited Lucas Automotive and Coker Tire to submit bids for an exclusive license to manufacture and distribute Firestone brand vintage tires worldwide. BFI limited the bid process to these two companies because they were the two principal sellers of vintage tires and because it was familiar with both organizations. BFI informed Lucas Automotive and Coker Tire of its goals in seeking bids: (1) to maximize the Firestone brand's exposure and to insure the continuity of the business; (2) to move production from New Zealand to North America; and (3) to organize for efficiency and profitability to Firestone. Lucas Automotive resisted the bid process; its final proposal lacked the required financial statements **[**5]** and business and credit references.

In January 1992, BFI selected Coker Tire as its new worldwide manufacturer and distributor of Firestone vintage tires. With the **[*1231]** exclusive Firestone distributorship, Coker Tire now controls approximately 75% of the vintage tire market and 90% of the original equipment market, with exclusive rights to all but one of the major brands. [1] BFI contends that Coker Tire's bid proposal was superior to Lucas Automotive's for several reasons. First, Coker Tire's multi-brand marketing approach was consistent with the approach used by BFI at its own stores.

[**] Writing for the court except as to Part II.B.2.

[1] Coker Tire disputes this market percentage: "Arriving at a determination of market share in the vintage tire business would be almost impossibly difficult, requiring as it would the contacting of 'every single seller . . . [for the purpose of] getting their gross [sales] numbers all over the world.'" Appellee's Brief at 12 (internal citation omitted).

Second, the license fee proposed by Coker Tire was based on a sliding percentage which decreased as sales went up, providing an incentive for Coker Tire to increase volume which was consistent with BFI's goal of greater name recognition. Lucas Automotive's license fee, on the other hand, was based on a straight percentage of cost of goods which provided no incentive in reduced expense for Lucas Automotive to increase its sales volume. Third, Corky Coker demonstrated "far superior public relations skills" than Stanley Lucas. And finally, Coker Tire had several management-level employees whereas Stanley Lucas **[**6]** was the sole management-level employee at Lucas Automotive. On April 2, 1992, BFI entered into a License & Lease Agreement with Coker Tire, giving it permission to manufacture and to distribute certain classic-vintage tires exclusively worldwide in accordance with BFI's trademarks and patents on classic-vintage Firestone brand tires.

On August 20, 1993, Lucas Automotive filed an action against BFI, FNZ and Coker Tire. The complaint contained six different counts, with each containing a separate cause of action: (1) antitrust violations based on *§ 2* of the Sherman Act, *15 U.S.C. § 2*, and *§ 7* of the Clayton Act, *15 U.S.C. § 18*; (2) breach of express contract; **[**7]** (3) breach of implied contract; (4) fraud; (5) tortious interference with prospective economic advantage; and (6) bad faith denial of existence of contract. Only the first count pertained to Coker Tire. The complaint alleged that Coker Tire, BFI and FNZ had conspired to monopolize the worldwide market for the "marketing and sale" of vintage automobile tires in violation of *§ 2* of the Sherman Act. The complaint also alleged that Coker Tire's acquisition of vintage tire molds and worldwide distribution rights from BFI violated *§ 7* of the Clayton Act, in that the acquisition would substantially lessen competition and create a monopoly in the marketing and sale of these tires throughout the world.

On December 19, 1994, BFI and FNZ filed a motion for summary judgment with respect to all the claims against them. On February 21, 1995, the district court awarded summary judgment to BFI and FNZ on all counts pertaining to them, including the alleged conspiracy violations by BFI and FNZ of *§ 2* of the Sherman Act and *§ 7* of the Clayton Act contained in the first count. The district court ruled that there was no specific intent to monopolize on the part of BFI and FNZ and that there were **[**8]** legitimate business reasons for BFI to prefer Coker Tire over Lucas Automotive as its exclusive licensee to manufacture and distribute Firestone vintage tires. Lucas Automotive did not appeal from this ruling. Thereafter, only that part of the first count pertaining exclusively to Coker Tire remained pending before the district court.

On June 27, 1995, Coker Tire, the remaining defendant, filed its summary judgment motion. The district court granted summary judgment in favor of Coker Tire on October 17, 1995. It concluded that: (1) Lucas Automotive has not produced evidence to show that its losses flow from any alleged monopoly by Coker Tire; (2) the fact that Coker Tire has the exclusive distribution rights to other major brand vintage tires does not transform Lucas Automotive's unsuccessful bid for the Firestone line into an antitrust injury; (3) Lucas Automotive has not produced any evidence to show that Coker Tire has in fact raised prices on the brand name vintage tires it distributes; and (4) Lucas Automotive also lacks standing to bring this claim because it has not actually purchased any tires from Coker Tire.

Lucas Automotive timely appealed.

[*1232] II

Lucas Automotive alleges **[**9]** that Coker Tire violated *§ 7* of the Clayton Act when it acquired the exclusive right to manufacture and to distribute Firestone brand vintage tires worldwide. ***HN1***[] *Section 7* provides in pertinent part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18. Pursuant to that allegation, Lucas Automotive seeks to recover treble damages and to compel divestiture of the Firestone distributorship.

Lucas Automotive is both a potential competitor of Coker Tire at the distributor level and a purchaser at the subdistributor level. Therefore, we must ask whether Lucas Automotive has either competitor standing or purchaser standing to assert either a treble damages claim or a divestiture claim against Coker Tire.

A

We first examine whether **[**10]** Lucas Automotive has standing to bring an action for treble damages against Coker Tire, either as a competitor of Coker Tire at the distributor level or as a downstream purchaser. ***HN2***[] The treble damages provision of the Clayton Act, § 4, reads in material part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a). ***HN3***[] Section 4 of the Clayton Act thus provides a private cause of action for parties injured by violations of *section 7* of the Act.

As we noted in *Amarel v. Connell, 102 F.3d 1494 (9th Cir. 1997)*, the Supreme Court has identified ***HN4***[] several factors courts are to consider in determining whether an antitrust plaintiff has standing to sue. As a threshold matter, the court must determine whether the plaintiff has met the requirements for standing under Article III - that is, whether the plaintiff **[**11]** "has suffered an injury which bears a causal connection to the alleged antitrust violation." *Amarel, 102 F.3d at 1507*. If the plaintiff meets the requirements for standing under Article III, the court must then determine whether the plaintiff also meets "the more demanding standard for *antitrust* standing." *Id.* (emphasis added). In deciding whether antitrust standing has been established, courts are to consider: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *Id.* (citing *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*).

1

We first examine whether Lucas Automotive has standing under § 4 as a competitor of Coker Tire at the distribution level. [2] Lucas Automotive alleges that Coker Tire's purchase of the manufacturing and distribution rights for Firestone vintage tires increased Coker Tire's share of the vintage tire market **[**12]** from 49% to 74%, and increased Coker Tire's **[*1233]** share of the original equipment vintage tire market to 90%. Lucas Automotive claims that it has been injured by Coker Tire's gain in market share because it has been excluded from participating in the vintage tire market at the distribution level.

HN5[] In order to demonstrate that it has suffered "antitrust injury," Lucas Automotive must prove that its alleged injury "flows from that **[**13]** which makes defendants' acts unlawful." *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*). In *Brunswick,* three bowling centers brought suit against Brunswick, one of the two largest manufacturers of bowling equipment in the United States, claiming its acquisition of a large number of failing bowling centers violated antitrust laws. The plaintiffs alleged that the acquisitions might substantially lessen competition or tend to create a monopoly in violation of *§ 7* of the Clayton Act and thus sought treble damages under § 4 and a divestiture order under § 16. *See id. at 480-81*.

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[2] At oral argument, counsel for Lucas Automotive stated:

> Judge Davies did note on page 7 of his memorandum decision granting summary judgment: "Lucas has also been unable to re-enter the market for the original equipment major brand vintage tires because it has been unable to secure the exclusive distributor rights to another major brand vintage tire. Lucas argues that these losses flow from the acquisition of monopoly power by Coker." So he understands what we're saying - that we've been excluded from effective, meaningful participation in the market at the distribution level.

The Court held that loss incurred because of an unlawful acquisition that would also have been incurred had the acquisition been lawful is not antitrust injury because it does not flow from that which makes the defendant's conduct unlawful. *See id. at 487-88*. The Court explained:

> If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet respondents' injury **[**14]** - the loss of income that would have accrued had the acquired centers gone bankrupt - bears no relationship to the size of either the acquiring companies or its competitors. Respondents would have suffered the identical "loss" - but no compensable injury - had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents . . . . Thus, respondents' injury was not of "the type that the statute was intended to forestall."

Id. at 487 (internal citations omitted).

As a competitor of Coker Tire, Lucas Automotive's alleged injury is that it has been foreclosed from serving as a primary-line supplier of vintage tires. However, Lucas Automotive would have suffered the same injury had a small business acquired the exclusive right to manufacture and to distribute Firestone tires. Because it cannot demonstrate "antitrust injury" as defined in *Brunswick,* Lucas Automotive lacks competitor standing to sue Coker Tire for treble damages under § 4. *See Brunswick, 429 U.S. at 487-89*.

2

Lucas Automotive also claims to have standing to assert its § 4 claim as a downstream purchaser of vintage tires. Lucas Automotive alleges that it must now purchase **[**15]** tires from Coker Tire or another primary-line distributor in order to resell them at the subdistributor or retail level. However, since Coker Tire acquired the right to manufacture and to distribute Firestone tires on August 7, 1991, Lucas Automotive has not purchased any tires from Coker Tire. Instead, Lucas Automotive has bought tires from Universal Tire Company, which in turn purchases from Coker Tire.

Construing § 4 of the Clayton Act, the Supreme Court has held that ***HN6***[] an indirect or remote purchaser lacks standing to seek damages relief against the manufacturer for alleged violations of federal antitrust laws. *See Illinois Brick Co. v. Illinois, 431 U.S. 720, 728-29, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*; *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 492-93, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*. The indirect purchaser rule serves to avoid the complications of apportioning overcharges between direct and indirect purchasers and to eliminate multiple recoveries. *See Kansas v. Utilicorp United, Inc., 497 U.S. 199, 208, 212, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990)*. The Supreme Court has applied the indirect purchaser rule in § 4 cases involving **[**16]** section 1 of the Sherman Act, *see Illinois Brick, 431 U.S. at 728-29*, and *section 2* of the Sherman Act, *see Hanover Shoe, 392 U.S. at 492-94*. Although the Supreme Court has never applied the indirect purchaser rule in a § 4 case involving **[*1234]** *§ 7* of the Clayton Act, its decisions construing the scope of the rule suggest that it applies to § 4 actions generally. *See Utilicorp United, 497 U.S. at 217 (1990)* ("We think it an unwarranted and counterproductive exercise to litigate a series of exceptions [to the indirect purchaser rule]. Having stated the rule in *Hanover Shoe,* and adhered to it in *Illinois Brick,* we stand by our *interpretation of § 4.*") (emphasis added); *Illinois Brick, 431 U.S. at 729* ("We decline to abandon the *construction given § 4* in *Hanover Shoe* - that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the section . . . .") (emphasis added); *see also Alaska v. Chevron Chemical Corp., 669 F.2d 1299, 1300-01 (9th Cir. 1982)* (applying indirect purchaser rule to *§ 7* claim). Therefore, we hold that, as an indirect **[**17]** purchaser, Lucas Automotive lacks standing to bring a § 4 action charging Coker with a violation of *§ 7* of the Clayton Act. [3]

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[3] Even if the indirect purchaser rule did not apply in this case, Lucas Automotive has not shown that it has paid higher prices as an indirect purchaser as a result of Coker Tire's acquisition of the Firestone line. We examine whether Lucas Automotive has succeeded in demonstrating that it is *threatened* with higher prices as an indirect purchaser in Part II.B.2.

Lucas Automotive argues that it falls within the exception to the indirect purchaser rule for sales made pursuant to "cost-plus" contracts. *See* *Illinois Brick, 431 U.S. at 735-36*. We disagree. *Illinois Brick* recognized that pass-on damages can be easily measured when a direct purchaser sells to his customers under a "pre-existing cost-plus contract." *Id.* However, Lucas Automotive offers no evidence that its purchases from Universal Tire Company were made pursuant to a fixed-quantity, cost-plus contract entered **[**18]** into prior to Coker Tire's obtaining the Firestone distribution rights.

B

We next examine whether Lucas Automotive has "antitrust standing" to bring an action to compel divestiture of the Firestone distributorship acquired by Coker Tire. ***HN7***[] The injunctive provision of the Clayton Act, § 16, reads in material part:

> Any person, firm, organization or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .

15 U.S.C. § 26.

HN8[] To maintain an antitrust divestiture suit, a private plaintiff must generally meet all the requirements that apply to the damages **[**19]** plaintiff, except that the injury itself need only be threatened, damage need not be quantified, and occasionally a party too remote for damages might be granted an injunction. *See* 2 Areeda & Hovenkamp, ***Antitrust Law*** Par. 360, at 193-94. Although the Supreme Court did not address equity actions when it defined "antitrust injury" in *Brunswick,* the Court held in *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*, that threatened antitrust injury was a prerequisite to equitable relief. *Id. at 113*. Comparing § 16 of the Clayton Act with § 4, it said:

> Sections 4 and 16 . . . are best understood as providing complementary remedies for a single set of injuries . . . [and it] would be anomalous . . . to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred.

Id. at 112-13. The *Cargill* Court further acknowledged that "the legislative history of Section 16 is consistent with the view that Section 16 affords private plaintiffs injunctive relief only for those injuries **[**20]** **[*1235]** cognizable under Section 4." *Id. at 112*.

We now examine whether Lucas Automotive has standing to bring a divestiture suit either as a competitor of Coker Tire or as a downstream purchaser of vintage tires.

1

Lucas Automotive lacks standing to assert a § 16 claim as a competitor of Coker Tire for the same reason that it lacks competitor standing to assert a § 4 claim. Lucas Automotive alleges that, as a result of Coker Tire's acquisition of the Firestone line, it is threatened with being permanently excluded from competing at the distributor level. [4] However, read in conjunction with *Cargill, Brunswick* compels the conclusion that, because Lucas Automotive cannot show that it would not be similarly threatened had a small business acquired the right to manufacture and to distribute Firestone tires, Lucas Automotive lacks competitor standing to sue for divestiture under § 16. *See* *Brunswick, 429 U.S. at 487*; *Cargill, 479 U.S. at 113*; *see also* 2 Areeda & Hovenkamp, ***Antitrust***

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[4] At oral argument, Lucas Automotive's counsel stated, "If the defendant is able to exclude you through its pricing practices from competing, then you lose sales." Because Lucas Automotive has not specifically alleged that Coker Tire has engaged or threatens to engage in predatory pricing, we decline to address this issue on appeal.

Law Par. 349.2a, at 480-81 ("Standing is inappropriate when the plaintiff is a competitor challenging the expansive or typically competitive behavior or a rival.").

[21]** 2

TASHIMA, *** Circuit Judge, with whom WHALEY, District Judge, concurs:

The district court, without distinguishing Lucas Automotive's equitable claim from its treble damage claim, granted Coker Tire summary judgment on both claims because "Lucas has not produced any evidence to show that Coker has in fact raised these prices [on brand name vintage tires]. Therefore, it has not suffered any actual injury." Order Granting Defendant's Motion for Summary Judgment at 8 (Oct. 17, 1995) (citing *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995))*. It further held that "Lucas also lacks standing to bring this claim because it has not actually purchased tires from Coker. Lucas does not buy its Firestone vintage tires directly from Coker." Citing *Illinois Brick, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*, the district court held that "Lucas must buy directly from Coker to have standing to sue for any price increases Coker puts into effect as a result of its alleged **[**22]** monopoly." The district court concluded the portion of its opinion on antitrust standing: "The Court therefore finds that Lucas has not suffered an antitrust injury because its losses are not due to any anti-competitive acts by Coker. Therefore Lucas lacks standing to sue under the antitrust acts." The district court erred in failing to distinguish Lucas Automotive's standing to sue for equitable relief under *§ 7* of the Clayton Act from its standing to sue for treble damages.

First, indirect purchasers are not barred from bringing an antitrust claim for injunctive relief against manufacturers. *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 856* (3d Cir.), *cert. denied, __ U.S. __, 117 S. Ct. 86, 136 L. Ed. 2d 42 (1996)*; *In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1167 (5th Cir. 1979)*; *Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 590-94 (3d Cir. 1979)*; *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 497 F. Supp. 218, 228-29 (C.D. Cal. 1980)*. Second, an antitrust plaintiff seeking injunctive relief need only show a *threatened* injury, not an actual one. *See* 2 Areeda & Hovenkamp, ***Antitrust Law*** Par. 360, at 193-94.

[23]** Lucas Automotive forthrightly states in its opening brief that "this is not a 'terminated distributor' case - Lucas does not claim injury flowing from the loss of the Firestone distribution rights against Coker . . . Lucas' injury flows from the fact that it is a purchaser and reseller of vintage original equipment tires and Coker now controls the supply of vintage tires. *Lucas thus is forced to operate in a market controlled by a monopolist* **[*1236]** *rather than by market forces*." (Emphasis added.)

The undisputed facts on summary judgment showed that after its acquisition of the Firestone vintage tire line, Coker Tire controlled 75 percent of the vintage tire market, and 90 percent of the original equipment market. Coker Tire controlled all major American vintage tire brands, except one, Firestone, B.F. Goodrich and U.S. Royal. Kelsey Tire Company, with less than 10 percent of the market, controlled the remaining Goodyear brand. Goodyear vintage tires, however, are limited in terms of available sizes.

The undisputed facts also established that there are insurmountable barriers to entry into the primary-line market for vintage tires, particularly the original equipment market. This is **[**24]** because what is acceptable to the consuming public as a vintage tire brand, by definition, was fixed many years ago. All of the trademarks and the tire molds necessary to manufacture vintage tires have been committed to existing manufacturers. *See generally Rebel Oil, 51 F.3d at 1439* (analyzing barriers to entry factor).

These undisputed facts, at the summary judgment stage, are sufficient fairly to support Lucas Automotive's claim that "Coker has monopoly power in the marketing and sale of vintage tires in the United States with the power to exclude competition and raise prices," *i.e.,* they make out a *prima facie* case. We held in *Rebel Oil* that a market share of 44 percent was "sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing." *Id. at 1438* (footnote

*** Writing for the court as to Part II.B.2 only.

omitted). *Accord* Oahu Gas Serv., Inc. v. Pacific Resources Inc., 838 F.2d 360, 366 (9th Cir. 1988) ("A firm with a high market share may be able to exert market power in the short run, but 'substantial market power can persist only if there are significant and continuing barriers **[**25]** to entry.'") (citation omitted).

It is a fair inference from the facts on summary judgment that, with the acquisition of the Firestone line of vintage tires, Coker Tire controls the supply of original equipment vintage tires; there no longer is virtually any competition at the primary level since Coker has a 90% market share; there are insurmountable barriers to entry; and it may be inferred that the sole remaining competitor in the original equipment vintage tire market, Kelsey Tire Company, is unable to increase output since the Goodyear brand of vintage tires controlled by Kelsey is limited in terms of size. [5] Coker Tire can now control prices and output, and exclude competition. Section 7 prohibits an acquisition the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Lucas Automotive has shown, *prima facie,* that Coker Tire's conduct threatens "substantially to lessen competition" and "tends to create a monopoly" at the primary line level of the vintage tire market. That is precisely the antitrust harm § 7 was intended to protect against. As the Supreme Court has noted:

> Indeed, the evident import of Congress' **[**26]** reference to "*threatened* loss or damage" is not to constrict the availability of injunctive remedies against violations that have already begun or occurred, but rather to expand their availability against harms that are as yet unrealized.

California v. American Stores Co., 495 U.S. 271, 282 n.8, 109 L. Ed. 2d 240, 110 S. Ct. 1853 (1990) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 & n.24, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)). *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.32, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) (recognizing that § 7 "was intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act").

[27]** **[*1237]** We conclude that Lucas Automotive, as a competitor at the secondary level, *i.e.,* as a customer in a market controlled by a monopolist, has standing to assert a § 7 claim for equitable relief, including divestiture, under § 16. It established a *prima facie* case, both that it was an active participant in the vintage tire market and that Coker Tire's conduct in that market violated § 7. This showing was thus sufficient to avoid summary judgment on Lucas Tire's Clayton Act § 7 claim for equitable relief.

III

We affirm the district court's grant of summary judgment dismissing Lucas Automotive's claim for damages under § 4 of the Clayton Act. As for Lucas Automotive's claim for equitable relief under § 16, we reverse the district court's grant of summary judgment and remand for further proceedings consistent with this opinion. Each side shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Dissent by: DIARMUID F. O'SCANNLAIN

Dissent

O'SCANNLAIN, Circuit Judge, dissenting only as to Part II.B.2.

I respectfully dissent from Part II.B.2 of the opinion, written by Judge Tashima.

[5] The dissent faults Lucas Automotive for not having offered "a shred of evidence as to the cross elasticity of demand between original equipment vintage tires of different sizes." What there is not a shred of evidence on is that there is any substitutability between original equipment vintage tires of different sizes. Moreover, in these circumstances, the burden to show cross elasticity of demand to defeat plaintiff's *prima facie* case would seem to fall on Coker Tire. Lucas Automotive should not be required to prove a negative - the non-existence of a cross elasticity of demand.

The majority holds that Lucas Automotive has consumer standing to assert **[**28]** a *section 7* claim for equitable relief, including divestiture, under section 16 of the Clayton Act. However, our decision in *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995)*, viewed in conjunction with the Supreme Court's decision in *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*, compels the opposite conclusion.

As the Supreme Court held in *Cargill,* in order to establish antitrust standing to sue for divestiture under section 16 of the Clayton Act, a plaintiff is required to "allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, 479 U.S. at 113* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. The majority concludes that, as a purchaser of tires at the subdistributor level, Lucas Automotive is threatened with antitrust injury resulting from Coker Tire's acquisition of market power at the distributor level. I respectfully disagree with the majority's conclusion, as it conflicts with our decision in *Rebel Oil*. **[**29]**

In *Rebel Oil,* we held that market power may be demonstrated in one of two ways. First, the plaintiff may offer "direct evidence of the injurious exercise of market power." *51 F.3d at 1434*. Lucas Automotive offers no direct evidence of a threat of the injurious exercise of market power by Coker Tire.

Second, the plaintiff may offer "circumstantial evidence pertaining to the structure of the market." *Id.* To demonstrate market power circumstantially, a plaintiff must: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry *and show that existing competitors lack the capacity to increase their output in the short run.*" *Id. at 1434* (emphasis added).

The majority concludes that, after its acquisition of the right to distribute Firestone tires, Coker Tire possessed market power at the distributor level. However, although the majority does offer support for its conclusions that Coker Tire owns a dominant share of the relevant market and that there are significant barriers to entry, it fails to point to evidence in the record sufficient to demonstrate that Coker Tire's competitors, **[**30]** including Kelsey Tire, lack the capacity to expand their output in response to a price increase by Coker Tire.

Lucas Automotive argues in its brief that "Coker . . . has the power to restrict output and raise prices without a competitive response, and to exclude competition." In support of this assertion, Lucas Automotive cites only a conclusory statement by Stanley Lucas. However, conclusory allegations unsupported by factual data are insufficient to defeat a motion for summary judgment. *See* *Angel v. Seattle-First Nat'l Bank, 653 F.2d 1293, 1299 (9th Cir. 1981)*.

The only support that the majority offers for its tenuous (but essential to its holding) conclusion that Kelsey Tire "lacks the capacity to increase [its] output in the short **[*1238]** run," *Rebel Oil, 51 F.3d at 1434*, is that "the Goodyear brand of vintage tires controlled by Kelsey is limited in terms of size." *See* Majority Opinion at 2898. Lucas Automotive has offered not a shred of evidence as to the cross elasticity of demand [1] between original equipment vintage tires of different sizes. Consequently, it is difficult to understand (based on the record before us) how the fact that Coker Tire distributes a greater **[**31]** range of tire sizes than Kelsey Tire suggests that Kelsey Tire cannot "increase [its] output in the short run" following a price increase by Coker Tire. [2] *See* *Rebel Oil, 51 F.3d at 1434*. Indeed, the majority's analysis only seems to underscore why Lucas Automotive failed to produce sufficient evidence to survive summary judgment.

I would affirm the district court's holding that Lucas Automotive lacks standing under section 16 of the Clayton Act.

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[1] The cross elasticity of demand measures the percentage change in the quantity of a good demanded for each one-percent change in the price of a substitute good. *See* H. Hovenkamp, *Economics and Federal* ***Antitrust Law*** Par. 1.1, at 62 (1985).

[2] I do not take the majority's analysis as challenging the district court's conclusion that the relevant market is that of original equipment vintage tires, as distinguished from original equipment vintage tires of a particular size.

Brokerage Concepts v. United States Healthcare

United States Court of Appeals for the Third Circuit

July 22, 1997, Argued ; April 2, 1998, Filed

NOS. 96-1891, 96-1892, 96-1922, 96-1923, 97-1013, and 97-1014

Reporter

140 F.3d 494 *; 1998 U.S. App. LEXIS 6591 **; 1998-1 Trade Cas. (CCH) P72,099; 49 Fed. R. Evid. Serv. (Callaghan) 518

BROKERAGE CONCEPTS, INC. v. U.S. HEALTHCARE, INC.; CORPORATE HEALTH ADMINISTRATORS, INC.; UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC., d/b/a THE HEALTH MAINTENANCE ORGANIZATION OF PENNSYLVANIA; RICHARD WOLFSON; SCOTT MURPHY; WILLIAM BROWNSTEIN, Richard Wolfson, Scott Murphy and William Brownstein, Appellants in No. 96-1891; U.S. Healthcare, Inc.; United States Health Care Systems of Pennsylvania, Inc., d/b/a The Health Maintenance Organization of Pennsylvania and Corporate Health Administrators, Inc., Appellants in No. 96-1892; U.S. Healthcare, Inc.; Corporate Health Administrators, Inc.; United States Health Care Systems of Pennsylvania, Inc., d/b/a The Health Maintenance Organization of Pennsylvania; Richard Wolfson; Scott Murphy; William Brownstein, Appellants in No. 96-1922; Brokerage Concepts, Inc., Appellant in No. 96-1923; U.S. Healthcare, Inc.; United States Health Care Systems of Pennsylvania, Inc., d/b/a The Health Maintenance Organization of Pennsylvania and Corporate Health Administrators, Inc., Appellants in No. 97-1013; Richard Wolfson; Scott Murphy; and William Brownstein, Appellants in No. 97-1014

Prior History: [1]** On Appeal From the United States District Court For the Eastern District of Pennsylvania. (D.C. Civ. No. 95-cv-01698).

Disposition: Judgment of the district court reversed and case remanded.

Core Terms

pharmacy, network, provider, extortion, market power, customers, defendants', tortious interference, antitrust, prescription drug, cases, competitors, switch, Hobbs Act, geographic, wrongful means, reciprocal, violence, matter of law, subscribers, rule of reason, membership, predicate act, purchasers, healthcare provider, economic loss, audit, lawful claim, quality assurance, antitrust claim

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

HN1[] **Hobbs Act, Elements**

Under the Hobbs Act, *18 U.S.C.S. § 1951*, extortion is defined as the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear. The fear may be of economic loss as well as of physical harm.

Criminal Law & Procedure > ... > Racketeering > Extortion > Elements

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

HN2[] **Extortion, Elements**

The claim of right defense to extortion (i.e., a defense based on a lawful claim to the property obtained by the allegedly extortionate acts) formulated by the Supreme Court is applicable in cases which involve solely the allegation of the use of economic fear in a transaction between two private parties.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3[] **Standards of Review, De Novo Review**

The legal foundation for the jury's verdict is reviewed de novo while the factual findings are reviewed to determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Tying Arrangements, Clayton Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying exists where a seller conditions the sale of one good (the tying product) on the buyer also purchasing another, separate good (the tied product).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Reciprocal Dealing

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN6[] **Exclusive & Reciprocal Dealing, Reciprocal Dealing**

Reciprocal dealing exists where two parties face each other as both buyer and seller. One party offers to buy the other party's goods, but only if the second party buys other goods from the first party.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Reciprocal Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN7[] **Exclusive & Reciprocal Dealing, Reciprocal Dealing**

The Sherman Act is concerned with what has been termed coercive reciprocal dealing, where a party uses its economic power as a purchaser in one market in order to restrict competition in another market where it is a seller.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Tying arrangements can be deemed illegal per se or be found to violate the rule of reason. Per se liability exists where the defendant is found to have appreciable market power in the tying market. In such cases, the ability to leverage this power to restrain trade in the tied market is presumed and no inquiry need be made into the actual prevailing market conditions in that market. Where appreciable tying market power cannot be shown, inquiry into the tied product market cannot be avoided, and the plaintiff therefore has the more difficult burden of showing that the arrangement violated the rule of reason because it unreasonably restrained competition in the tied product market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Reciprocal Dealing

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN9[] **Exclusive & Reciprocal Dealing, Reciprocal Dealing**

The per se test is used in cases where exploitation of leverage in the market for the tying product is probable. The elements of a per se claim are (1) the defendant seller must sell two distinct products; (2) the seller must possess market power in the tying product market; and (3) a substantial amount of interstate commerce must be affected. Where such elements are shown, the defendant's tying practices are condemned without further proof of anti-competitive effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In order to impose per se antitrust liability, it must be shown that the defendant had appreciable economic power in the tying market. Market power is defined as the ability to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.

Evidence > ... > Exceptions > Residual Exception > Trustworthiness

Evidence > ... > Hearsay > Exceptions > General Overview

Evidence > ... > Exceptions > Residual Exception > General Overview

HN11[] **Residual Exception, Trustworthiness**

Survey results offered as proof of the matter asserted are hearsay, and thus the results of a survey, and any testimony based on those results, cannot be admitted into evidence unless the survey falls into a recognized class exception to the hearsay rule or into the residual exception contained in *Fed. R. Evid. 803(24)*.

Evidence > ... > Exceptions > Residual Exception > General Overview

HN12[] **Exceptions, Residual Exception**

The circumstantial guarantees of trustworthiness are for the most part satisfied if a poll is conducted in accordance with generally accepted survey principles. Several factors must be examined in determining whether a poll meets generally accepted survey principles. A proper universe must be examined and a representative sample must be chosen; the persons conducting the survey must be experts; the data must be properly gathered and accurately reported. It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In order to demonstrate tying market power through evidence of the widespread acceptance of a tie, the plaintiff must show that the tie was accepted by an appreciable number of buyers within that market, and that there is an absence of other explanations for their willingness to purchase the package.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN14[] **Price Fixing & Restraints of Trade, Tying Arrangements**

To succeed on a rule of reason claim the plaintiff must prove that the alleged tie unreasonably restrained competition.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN15[] **Trials, Judgment as Matter of Law**

Under *Fed. R. Civ. P. 50(a)*, a pre-verdict motion for judgment as a matter of law shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. Further, a post-trial motion for judgment as a matter of law made pursuant to *Fed. R. Civ. P. 50(b)* must be preceded by a *Fed. R. Civ. P. 50(a)* motion sufficiently specific to afford the party against whom the motion is directed with an opportunity to cure possible defects in proof which otherwise might make its case legally insufficient.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN16[] **Regulated Practices, Market Definition**

Before it can be determined whether there was harm to competition in a tied market, that market must be defined.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN17[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Any person employed by or associated with an enterprise is prohibited from conducting or participating in the conduct of that enterprise's affairs through a pattern of racketeering activity. 18 U.S.C.S. § 1962(c) A pattern of racketeering activity requires at least two acts of racketeering activity, 18 U.S.C.S. § 1961(5). Racketeering activity is defined as an act or threat chargeable as one of a variety of state felonies or any act which is indictable under specifically listed federal criminal statutes. 18 U.S.C.S. § 1961(A)-(B). 18 U.S.C.S. § 1962(d) outlaws any conspiracy to violate the other subsections of 18 U.S.C.S. § 1962.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN18[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See 18 U.S.C.S. § 1964(c).

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN19[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

A plaintiff's right to sue under RICO, 18 U.S.C.S. § 1964(c), as under the federal antitrust laws, requires a showing that the alleged violation is the proximate cause of the plaintiff's injury.

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Robbery > Unarmed Robbery > Elements

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Penalties

HN20[] Hobbs Act, Elements

The Hobbs Act (Act) imposes criminal penalties on whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so. 18 U.S.C.S. § 1951. Extortion is defined in the Act as the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. 18 U.S.C.S. § 1951(b)(2). The term fear includes the fear of economic loss.

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

HN21[] Racketeering, Extortion

The ability to defend against an extortion charge based on a lawful claim to the property obtained has been dubbed the claim of right defense to extortion.

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

HN22[] Criminal Offenses, Racketeering

The use of economic fear in business negotiations between private parties is not inherently wrongful.

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

HN23[] Hobbs Act, Elements

The reach of the Hobbs Act is limited in cases, which involve the use of economic fear in a transaction between two private parties. The limitation is that a defendant is not guilty of extortion if he has a lawful claim to the property obtained.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN24[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

Use of fear of economic loss is wrongful when employed to achieve the wrongful purpose of obtaining property to which one is not entitled.

Criminal Law & Procedure > ... > Racketeering > Extortion > Elements

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

HN25[] Extortion, Elements

In a hard bargaining scenario the alleged victim has no pre-existing right to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant, but in an extortion scenario the alleged victim has a pre-existing entitlement to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant.

Criminal Law & Procedure > ... > Racketeering > Extortion > Elements

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

HN26[] Extortion, Elements

Any intentional exploitation of fear by defendants is only part of hard bargaining in a deal which results in plaintiff receiving a benefit to which it is not otherwise entitled by law. Accordingly, defendants do not obtain property from plaintiff to which they have no lawful claim and therefore do not commit extortion.

Insurance Law > Industry Practices > General Overview

HN27[] **Insurance Law, Industry Practices**

The Pennsylvania insurance fraud statute provides that a health care provider may not compensate or give anything of value to a person to recommend or secure the provider's service to or employment by a patient or as a reward for having made a recommendation resulting in the provider's service to or employment by a patient. *18 Pa. Cons. Stat. Ann. § 4117(b)(2)* (1997).

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

HN28[] **Commercial Bribery, Elements**

The Pennsylvania commercial bribery statute states that a person who holds himself out to the public as being in the business of making disinterested selection, appraisal, or criticism of commodities or services violates the law if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism. *18 Pa. Cons. Stat. Ann. § 4108(b)* (1983).

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN29[] **Wire Fraud, Elements**

The federal mail and wire fraud statutes, *18 U.S.C.S. §§ 1341* and *1343*, prohibit the use of the mails or interstate wires for the purpose of carrying out any scheme or artifice to defraud. A scheme or artifice to defraud need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Criminal Law & Procedure > ... > Arson > Simple Arson > General Overview

Criminal Law & Procedure > ... > Racketeering > Travel Act > General Overview

Criminal Law & Procedure > ... > Racketeering > Travel Act > Elements

HN30[] **Hobbs Act, Elements**

To make out a violation of the Travel Act, *18 U.S.C.S. § 1952*, a plaintiff is required to prove interstate travel or use of an interstate facility with the intent to promote unlawful activity. Unlawful activity is extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. *18 U.S.C.S. § 1952(b)(2)*.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN31[] **Intentional Interference, Elements**

Pennsylvania recognizes both interference with existing contractual relations and interference with prospective contractual relations as branches of the tort of interference with contract. While the two branches of tortious interference are distinct, they share essentially the same elements.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN32[] **Intentional Interference, Defenses**

In order to prevail on a claim for intentional interference with contractual or prospective contractual relations, a plaintiff must prove the existence of a contractual, or prospective contractual relation between itself and a third party; purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent the prospective relation from occurring; the absence of a privilege or justification on the part of the defendant; the occasioning of actual legal damage as a result of the defendants' conduct; and for prospective contracts, a reasonable likelihood that the relationship would have occurred but for the interference of the defendant.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN33[] **Intentional Interference, Elements**

One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if the relation concerns a matter involved in the competition between the actor and the other and the actor does not employ wrongful means and his action does not create or continue an unlawful restraint of trade and his purpose is at least in part to advance his interest in competing with the other. The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

Torts > ... > Commercial Interference > Contracts > General Overview

HN34[] **Commercial Interference, Contracts**

Competition is a necessary or desirable incident of free enterprise. Superiority of power in the matters relating to competition is believed to flow from superiority in efficiency and service. If the actor succeeds in diverting business from his competitor by virtue of superiority in matters relating to their competition, he serves the purposes for which competition is encouraged. If, however, he diverts the competitor's business by exerting a superior power in affairs unrelated to their competition there is no reason to suppose that his success is either due to or will result in superior efficiency or service and thus promote the interest that is the reason for encouraging competition. For this reason economic pressure on the third person in matters unrelated to the business in which the actor and the other compete is treated as an improper interference.

Torts > ... > Commercial Interference > Contracts > General Overview

HN35[] **Commercial Interference, Contracts**

Plaintiff is required to show that the defendant employed economic pressure and a superior power in the unrelated market as requiring evidence that the defendant used its economic power in that market to coerce the third party's decision in the competitive market. In order to show coercive pressure, the plaintiff must prove that the defendant exercised some market power in the unrelated market -- lest the third party simply ignore its demands. However, there is no reason why economic coercion cannot be generated by market power that, while not sufficient to violate the Sherman Act, is nonetheless not insignificant.

Torts > ... > Commercial Interference > Contracts > General Overview

HN36[] **Commercial Interference, Contracts**

Unlike federal ***antitrust law***, state tortious interference law is designed to protect competitors not competition. In this regard, it bases liability for competitors, in part, on the means of competition employed and their effect on a single competitive interaction.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

Civil Procedure > ... > Jury Trials > Verdicts > General Verdicts

HN37[] **Judgments, Relief From Judgments**

Where a jury has returned a general verdict and one theory of liability is not sustained by the evidence or legally sound, the verdict cannot stand because the court cannot determine whether the jury based its verdict on an improper ground.

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN38[] Jury Instructions, Objections

Fed. R. Civ. P. 51 requires any objections to the jury charge to be made at the close of the charge.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

Civil Procedure > ... > Jury Trials > Verdicts > Special Verdicts

HN39[] Jury Trials, Right to Jury Trial

Fed. R. Civ. P. 49(a) provides that if, when submitting special interrogatories to the jury, the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Trials > Jury Trials > General Overview

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

Civil Procedure > ... > Jury Trials > Verdicts > Special Verdicts

HN40[] Jury Trials, Jury Instructions

Fed R. Civ. P. 49(a) provides that the court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Civil Procedure > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN41[] **Damages, Punitive Damages**

Punitive damages will lie only in cases of outrageous behavior, where defendant's egregious conduct shows either an evil motive or reckless indifference to the rights of others.

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Judges: Before: BECKER, MANSMANN, and ROSENN, Circuit Judges.

Opinion by: BECKER

Opinion

[*500] OPINION OF THE COURT

BECKER, * *Chief Circuit Judge.*

* Honorable Edward R. Becker, United States Circuit Judge for the Third Circuit, assumed Chief Judge status on February 1, 1998.

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I. INTRODUCTION:

The revolutionary changes in the health care field over the past decade have spawned many novel market arrangements. Perhaps the most significant development is the ascendancy of managed-care driven health maintenance organizations ("HMOs"), whose hold over a large number of subscribers has permitted them **[**4]** to wield considerable economic power over health care providers. This antitrust, civil RICO, and state law tortious interference case against defendant U.S. Healthcare, one of the nation's largest HMO's, two of its wholly-owned subsidiaries, and three of its top officers, is an exemplar of the legal fallout from this development.

This appeal presents several quite difficult and important first impression questions for us, including: (1) whether the defendants' use of economic fear in the context of hard business bargaining constitutes wrongful conduct amounting to extortion for civil RICO purposes; (2) whether the inability of the plaintiff to prevail on antitrust and extortion-based civil RICO claims forecloses a successful state law tortious interference claim based on the same facts; and (3) whether the defendants' hard bargaining constituted "wrongful means" so as to forfeit the defense of privileged business competition to a tortious interference claim.

The lawsuit emanates from U.S. Healthcare's refusal to approve the application of a new Abington, Pennsylvania store of "I Got It at Gary's" ("Gary's"), a small southeastern Pennsylvania pharmacy, health and beauty aid chain, **[**5]** for membership in U.S. Healthcare's network of medical prescription providers. U.S. Healthcare conditioned membership in its provider network on Gary's agreement to discontinue its contractual relationship with plaintiff Brokerage Concepts, Inc. ("BCI"), a health care consulting firm whose specialty is serving as a Third Party Administrator ("TPA") for health benefit self-insurers (such as Gary's), and to give its TPA business to a U.S. Healthcare subsidiary, Corporate Health Administrators ("CHA").

U.S. Healthcare also applied pressure on Gary's in other ways -- through "hard-ball" negotiation tactics, which deliberately left Gary's "hanging" as to whether its new application would be approved, and a seemingly vindictive audit of Gary's generic prescription drug dispensing policy at one of its stores that was already part of the U.S. Healthcare network. Since U.S. Healthcare subscribers constituted a significant portion of its customer base, Gary's understandably yielded to the pressure and gave its TPA business to CHA. BCI thereupon sued in federal district **[*502]** court asserting Sherman Act and civil RICO claims, as well as a claim of tortious interference with contractual **[**6]** relations under Pennsylvania law. BCI sought compensatory and treble damages, injunctive relief, and counsel fees on its antitrust and civil RICO claims, and compensatory and punitive damages on its state law tortious interference claim. Gary's is not a party to the lawsuit.

The case proceeded to trial before a jury, which rendered a verdict finding U.S. Healthcare and its officers liable to BCI on all of BCI's claims, and awarding compensatory and punitive damages. On post-trial motions, the district court upheld the verdict but ruled that: (1) BCI must elect between the punitive damages awarded on its state law claim and the treble damages awarded on its federal claims (i.e., that it cannot recover both); and (2) if it elects the state law remedies, BCI cannot also collect the attorney's fees that are available under its RICO and antitrust claims. The defendants' appeal of the district court's denial of its post-verdict motion for judgment as a matter of law or, in the alternative, for a new trial, attacks the jury verdict on all fronts, asserting that the verdict is tainted by erroneous evidentiary rulings and jury instructions, and also that there is insufficient evidence to sustain **[**7]** any of the claims under proper instructions. BCI cross-appeals, contending that, under *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 218-19 (3d Cir. 1992)*, the district court erred in requiring BCI to elect which remedies it will recover, and also in refusing to award injunctive relief to BCI under either RICO or the antitrust laws.

Because all three of BCI's claims are grounded upon U.S. Healthcare's leveraging of its economic power, and because, under the jury instructions given by the district court, the RICO and state law claims may depend on the existence of a viable antitrust claim, the threshold doctrinal battleground has been over ***antitrust law***. This aspect of the case is quite complex, not because of the need for sophisticated economic analysis or the resolution of any close or cutting-edge trade regulation issue, but rather because of the difficulty of attempting to shoehorn into the traditional antitrust model a claim that resists such characterization.

The matter was presented to the district court primarily as a tying case, under which a plaintiff can assert both a *per se* and a "rule of reason" claim. In a typical tying case, a seller leverages **[**8]** its market power in the market for the tying product to require the buyer of the product to purchase an unwanted product in the tied market, thereby (unlawfully) foreclosing competition in that market. But Gary's, the party who has been "put upon," is a seller, not a buyer, in the tying product market: when U.S. Healthcare accepts Gary's into its network of providers, what Gary's gains is the opportunity to sell drugs to U.S. Healthcare subscribers. The defendants, in contrast, contend that the case is better viewed as one of reciprocal dealing which, they submit, carries with it less stringent antitrust standards.

As will appear, our disposition of BCI's antitrust claim will take us through a number of layers of analysis, dealing with both its *per se* and rule of reason claims, and in the course thereof treating such matters as product market definition (and the applicability *vel non* of the decision in *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992))*; geographic market definition (and the lack of utility of a flawed market survey in identifying the market); and above all, with the sufficiency of the record **[**9]** evidence (including the inferences which can be drawn therefrom) to support a legally viable antitrust claim. In the end, we conclude that, since the record before us does not support a finding that U.S. Healthcare exercised appreciable market power in a properly defined tying market, or that the arrangement at issue harmed competition in the tied market, the antitrust jury verdicts on both the *per se* and the rule of reason claims must be set aside.

In support of its civil RICO claim, BCI alleges a variety of predicate acts, as a civil RICO claim requires. Although we deal with all of the predicate acts invoked, rejecting defendants' contention that BCI lacks RICO standing, the only acts that arguably could come within RICO's ambit are alleged **[*503]** extortionate acts by the defendants. ***HN1***[] Under the Hobbs Act, *18 U.S.C. § 1951*, "extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." *18 U.S.C. § 1951(b)(2)*. The "fear" may be of economic **[**10]** loss as well as of physical harm. *See* *United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1972)*. In this case, the evidence is clear that U.S. Healthcare employed economic leverage in an effort to force Gary's to chose CHA as its TPA. However, while BCI contends that this conduct amounts to extortion through the wrongful use of the fear of economic loss, defendants assert that the conduct is merely hard business bargaining that cannot be made to fit within the statutory framework of Hobbs Act extortion.

As will be shown, resolution of BCI's extortion claim turns on whether the defendants' use of economic fear in the context of hard business bargaining was legally wrongful, an issue with which we have not previously had occasion to deal. We conclude that ***HN2***[] the "claim of right" defense to extortion (i.e., a defense based on a lawful claim to the property obtained by the allegedly extortionate acts) formulated by the Supreme Court in *United States v. Enmons, 410 U.S. 396, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973)*, is applicable in cases, such as this one, which **[**11]** involve solely the allegation of the use of economic fear in a transaction between two private parties. In so concluding, we are mindful of, and address, those cases that reject the broad application of *Enmons* outside of the labor context in which it arose for fear that it would "effectively repeal the Hobbs Act." *See* *United States v. Agnes, 753 F.2d 293 (3d Cir. 1985)*.

Having determined that the claim of right defense is available to the defendants in this case, we address the difficult problem of separating out lawful from unlawful claims to property. We make no effort to announce any broad principles in this difficult area. Drawing instruction from *Enmons* and *Viacom Int'l v. Icahn, 747 F. Supp. 205 (S.D.N.Y. 1990)*, we make a rule only for a very narrow subset of the potential universe of extortion cases: one involving the accusation of the wrongful use of economic fear where two private parties have engaged in a mutually beneficial exchange of property. We conclude that BCI's extortion claim can only survive if Gary's had a right to pursue its business interests free of the fear that it would be excluded from U.S. Healthcare's provider **[**12]** network. Albeit with misgivings, we find that since Pennsylvania, unlike other states, has no "Any Willing Provider" law that compels HMOs to allow *all* interested and minimally qualified providers into their network, BCI had no such right. If such a law was in force, Gary's would have had a legal entitlement to be a member of the provider network and thus to be free of the fear that it would be excluded from that network if it did not switch TPA providers. Having determined that BCI did not present a sustainable case of extortion, or establish any of the other predicate acts alleged, we set aside the jury verdict as to the civil RICO count.

That BCI's federal claims have fallen is not, however, the end of its case. BCI also alleges the defendants unlawfully and improperly interfered with its existing and prospective contractual relations with Gary's in violation of Pennsylvania tort law. While BCI must prove a number of things to prevail on a tortious interference claim under Pennsylvania law, only one is in serious dispute here. The battleground is over *Restatement (Second) of Torts § 768* which sets forth a competitors privilege, and in fact over only one facet of that section, **[**13]** *§ 768(1)(d)*, which withdraws immunity from liability if the competitor employs "wrongful means." The Pennsylvania Supreme Court has yet to define that term and hence we must predict how it would do so to resolve this case.

The parties' debate in this area was focused primarily on whether Pennsylvania would limit wrongful means to conduct that is independently actionable. While the parties have ably briefed that point, the disposition of BCI's claim does not require us to resolve it. Rather, we conclude, based upon a passage from *§ 768 comment (e)*, that even if the Pennsylvania Supreme Court were to require independently actionable means, it would not apply that requirement in cases, **[*504]** such as this one, where the defendant exerted "economic pressure" or "a superior power" in a market *unrelated* to the competitive market. Here, BCI proffered ample evidence from which a jury could conclude that U.S. Healthcare attempted to acquire Gary's TPA business by threatening Gary's with withdrawal of membership in the U.S. Healthcare provider network, an unrelated market. BCI also adduced evidence of heavy-handed tactics by U.S. Healthcare in that market for pharmacy customers.

[14]** In addition to our analysis of the substance of Pennsylvania tort law, we address defendants' more fundamental argument that tort liability is not appropriate here. The crux of that argument is that BCI's tort claims are predicated on the same conduct that underlie its federal claims, and that the law should therefore not permit BCI to repackage these failed claims as tortious interference. As will be shown, in our view, BCI has attempted just the opposite. That is, it has taken conduct that constitutes tortious interference with contractual relations and has attempted to turn it into a violation of both federal antitrust and racketeering laws. While these attempts have been frustrated on this appeal, that result does not foreclose BCI's state law claim. BCI's tortious interference claim does not require proof of criminal conduct as does its extortion claim, nor is it anchored in the same kind of market based considerations as is its antitrust claim. We see no need for congruence between federal ***antitrust law***, which is designed to protect competition and free access to markets, and state business tort law, which is designed to protect competitors.

Notwithstanding this conclusion, **[**15]** the tortious interference verdict cannot stand, and a new trial on the tort claims is necessary, because the jury instructions permitted the jury to find tortious interference based on antitrust and/or civil RICO violations which, we have concluded, did not exist. Hence, while we reverse outright on the antitrust and civil RICO claims, we will remand the tortious interference claims for a new trial. We intimate no view on the question whether defendants' behavior was outrageous enough to justify an award of punitive damages under Pennsylvania law; that will be for determination on remand. Since the antitrust and RICO claims are out of the case, we also need not address the question of the propriety of injunctive relief for either RICO or antitrust claims, or the interesting issues posed by the cross-appeal.

II. FACTS & PROCEDURAL HISTORY

A. The Parties

BCI serves as a TPA for employers who wish to self-insure for their health benefits and other insurance needs. In this capacity, BCI designs the employer's self-insured benefit plan and usually recommends a health services provider network. The providers in the network then supply the health care, and BCI reviews and processes **[**16]** the resulting claims for the employer. In addition, BCI typically helps the employer purchase "stop-loss" insurance policies that cap the employers' exposure for large individual and aggregate claims. BCI also serves as an insurance broker for employees who choose to purchase fully-insured policies.

U.S. Healthcare develops, owns, operates, and markets HMOs in many states in the eastern United States, including Pennsylvania and New Jersey. These HMOs are operated by wholly owned subsidiaries, including defendant United States Healthcare Systems of Pennsylvania, Inc., d/b/a The Health Maintenance Organization of Pennsylvania ("HMO PA"), which operates as U.S. Healthcare's HMO for Pennsylvania. As of December 31, 1994, U.S. Healthcare and its subsidiaries had approximately 1,695,000 subscribers enrolled in its insured plans.

CHA is also a wholly owned subsidiary of U.S. Healthcare. It is a TPA, and provides the same type of services for self-insured employers as does BCI. In the geographic areas in which U.S. Healthcare operates an HMO, CHA utilizes only the U.S. Healthcare network of doctors and hospitals. Similarly, U.S. Healthcare bars all TPAs other than CHA access to its network. **[**17]** At all times relevant to the present dispute, defendant Richard Wolfson was the Director of Pharmacy Programs and the Chairman of the Board of U.S. Healthcare, defendant William **[*505]** Brownstein served as the Regional Pharmacy Director for Pennsylvania, and defendant Scott Murphy was the Senior Vice President of U.S. Healthcare, and the senior marketing executive for CHA. We will at times refer to U.S. Healthcare, CHA, and HMO PA collectively as the "corporate defendants," and Wolfson, Brownstein and Murphy collectively as the "individual defendants."

B. *Gary's Decision to Self-insure*

U.S. Healthcare has established a network of health care providers which includes doctors, hospitals, and pharmacies in various geographic regions. Under the U.S. Healthcare prescription purchase program, individuals who enroll as subscribers in U.S. Healthcare's HMOs select one pharmacy from the network of providers at which they will purchase prescription drugs. Subscribers can change their pharmacy designation by filling out a form. Under this program, subscribers can purchase their prescription drugs for a small co-payment (such as $ 5.00), with the rest of the cost of the prescription **[**18]** reimbursed to the pharmacy by U.S. Healthcare. In addition, U.S. Healthcare pays the pharmacies that serve the prescription purchase plan a set monthly amount based on the number of U.S. Healthcare subscribers designating that pharmacy, without regard to the actual purchases of drugs from that pharmacy. Because subscribers seldom purchase prescription drugs from pharmacies other than those within the network, membership in the U.S. Healthcare network is highly coveted.

In 1991, Eagleville Pharmacy, Incorporated, d/b/a/ I Got It At Gary's ("Gary's") was a pharmacy chain of four stores in suburban Philadelphia. All four stores served as approved providers in the U.S. Healthcare pharmacy network. At this time, Gary's offered its full-time employees two options for their health insurance coverage: a Blue Cross/Blue Shield plan and a U.S. Healthcare HMO. Approximately 35 Gary's employees enrolled as U.S. Healthcare members. In 1991, to save costs, Gary's decided to terminate its relationship with Blue Cross/Blue Shield and U.S. Healthcare, and to self-insure.

In need of a TPA to process its claims, Gary's evaluated several contenders, and then entered a written contract with BCI, terminable **[**19]** upon 30 days prior written notice. Sandra Chen, the benefits manager at Gary's, sent termination letters to Blue Cross/Blue Shield and U.S. Healthcare. [1] **[**20]** In response to the letter, Chen testified that she received an angry and verbally abusive phone call from an unidentified U.S. Healthcare marketing executive. [2] So began the wrath of U.S. Healthcare. Upon receipt of Gary's letter terminating its insurance contract, David Rocchino, one of U.S. Healthcare's sales vice-presidents, telephoned Wolfson to inform him of the new development and expressed his displeasure. Wolfson became "upset" that Gary's had decided to self-insure, and knowing that Gary's was approved to serve as a pharmacy for U.S. Healthcare subscribers, promptly ordered an internal "quality assurance" review of the generic utilization rates of Gary's stores. Wolfson admitted at trial that his only reason for ordering such a review was that Gary's had terminated U.S. Healthcare coverage for its employees, but he testified that ordering a retaliatory review was not inappropriate. [3]

[*506] In August 1993, Gary's opened its fifth store, in Abington, Pennsylvania. Gary's applied for admission of the new store to U.S. Healthcare's pharmacy network. Wolfson, acting as director of U.S. Healthcare's pharmacy program, advised Brownstein not to process the application. **[**21]** U.S. Healthcare's executives acknowledged in their testimony that their motivation in refusing to process Gary's application was retaliatory, based on a belief that Gary's did not deserve U.S. Healthcare's business once Gary's had terminated U.S. Healthcare's contract in a manner that Wolfson and Brownstein found to be offensive. In compliance with Wolfson's instructions, Brownstein did not process the application. However, at this time, no one at U.S. Healthcare told Gary's of the decision to

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[1] The letter to U.S. Healthcare read:

> Dear Sirs:
>
> This letter is to advise U.S. Healthcare that effective June 30th, 1991, . . . Gary's will discontinue its medical insurance coverage with your organization. Please adjust your records to reflect this upcoming change and advise me of any information you may need to finalize our relationship.

[2] In contrast, Chen testified to the receipt of a polite and professional phone call from a Blue Cross/Blue Shield representative, inquiring if they could accommodate Gary's needs in anyway and as to the reason behind Gary's decision to cancel their health care contract.

[3] When asked by BCI's counsel whether he ordered the review of Gary's in response to Gary's decision to terminate with U.S. Healthcare, Wolfson responded:

> Well, I didn't think it was appropriate with an account that we had a relationship with just to send a "dear sir" letter [of termination] to a post office box . . . . I didn't feel that they were giving us due consideration and if they were operating in that fashion, I wanted to look to see if in fact there were any other issues related to the I Got It At Gary's Pharmacies.

refuse to process the application. Instead, Gary's was informed that the application would be processed in due course. As Wolfson conceded at trial, the plan was to "let [Gary's] hang . . . until they did something."

At the same time that Gary's Abington store applied for membership in the pharmacy network, U.S. Healthcare, at the instruction of Brownstein, performed a two-day, on-site audit of the utilization of generic drugs at Gary's store in Eagleville, Pennsylvania. The audit measured the pharmacy's compliance with the requirement of U.S. Healthcare's provider agreement that generic drugs be used whenever possible to contain costs. The audit results suggested that Gary's dispensed brand-name **[**22]** drugs instead of generic drugs at a rate higher than the median of the U.S. Healthcare provider, and lacked complete documentation of prescription requests. Brownstein's audit also demonstrated that the average cost-per-prescription to U.S. Healthcare at the Eagleville pharmacy was in line with the network median, so that the store's prescriptions were not costing U.S. Healthcare more on average than other pharmacies. Brownstein forwarded the audit results to the Quality Assurance Committee, which referred the matter to the Peer Review Committee. The Peer Review Committee, consisting of three outside pharmacists, had the power to recommend sanctions to Wolfson, who would then decide whether or not to impose them.

On November 16, 1993, the Peer Review Committee recommended that Gary's Eagleville store be put on "freeze" for three-months. The freeze was implemented and, as a result, U.S. Healthcare removed the Eagleville store from the list of approved pharmacies, and new U.S. Healthcare subscribers could not designate that store as their location for purchasing prescription drugs. In contrast to the treatment of Gary's, other pharmacies with generic drug utilization rates lower than **[**23]** the Eagleville pharmacy and less complete documentation of prescription requests, had not been "frozen," and instead had received lesser or no sanctions. In fact, the parties stipulated that out of the approximately 1300 pharmacies in the U.S. Healthcare network for southeastern Pennsylvania and southern New Jersey, the freeze sanction had been imposed for generic utilization reasons only four times (including its use against Gary's) in all of 1993 and 1994.

Although the extent to which Wolfson and Brownstein were involved in the implementation of the freeze sanction is unclear, both had participated regularly in Quality Assurance and Peer Review Committee meetings. Brownstein later cited the results of the audit on the Eagleville store as the reason for the delay in processing the Abington store's application for membership in the pharmacy network, stating that U.S. Healthcare had concerns about Gary's dispensing too many brand-name drugs at its stores.

Faced with a freeze on its Eagleville store and no movement on the Abington store's application for membership in the pharmacy network, Gary's President, Gary Wolf, set up a meeting with U.S. Healthcare officials, including Wolfson **[**24]** and marketing executive Scott Murphy, for December 1, 1993. Among the issues discussed were Gary's generic drug use and the admission of the Abington store to the U.S. Healthcare provider network.

U.S. Healthcare expressed its displeasure with Gary's termination of U.S. Healthcare coverage in 1991, and Wolfson commented that "we like to do business with people who do business with us." At the same meeting, U.S. Healthcare requested and received permission to bid on Gary's **[*507]** TPA business for the next annual contract period.

C. *Gary's Switch to CHA/U.S. Healthcare*

Following the meeting with U.S. Healthcare, Wolf instructed his sister, Robin Risler, the Director of Human Resources at Gary's, to "take a look at" switching to the TPA services offered by CHA at the anniversary date of Gary's contract with BCI (at which time the contract could be terminated with 30 days advance notice.) Concurrently, Wolf sent a letter to Wolfson (dated December 6, 1993) expressing, among other things, his "commitment that we will do everything possible to afford [U.S. Healthcare/CHA] the opportunity to service our company's needs as long as the programs are mutually beneficial", and requesting **[**25]** that U.S. Healthcare consider acting on the pending application for Gary's Abington store.

When the December 6 letter failed to produce any movement on the Abington store, Wolf explained to Chen that, in order to get the Abington store approved, Gary's needed to "appease" U.S. Healthcare, and instructed her to write a further letter to U.S. Healthcare assuring them that Gary's would consider CHA's bid for its TPA services. This letter, dated January 3, 1994, and addressed to Murphy, was more explicit then the December 6 letter. It stated:

> As you requested, I am writing you to acknowledge the agreement made between I got it at Gary's and U.S. Healthcare. We agree that as long as there are no additional costs to the plan or reduction in service, US Healthcare will assume the role of TPA for our self insured medical plan on July 1, 1994.
>
> * * *
>
> We also understand that in anticipation of our strengthening relationship, US Healthcare will release the provider number for our pharmacy in Abington, PA.

Chen testified that once this letter was written, it was a "foregone conclusion" that, as long as CHA's bid was comparable and for the same services, Gary's would **[**26]** switch to CHA. As of this time, CHA had not yet submitted a formal proposal to Gary's.

In January 1994, within weeks of Chen's letter, U.S. Healthcare had inspected the Abington pharmacy, and, without further ado, approved its participation in the provider network. Brownstein testified that he was informed that Gary's had agreed to switch TPAs to CHA, and "on the basis of that," was instructed to enroll Gary's Abington store in the provider network. U.S. Healthcare acted with such speed in approving the Abington store's application for membership in the provider network that it failed to follow its own standard approval procedures, and did not present the store's application to the Membership Application Credentials Committee until after the pharmacy was already participating as a provider.

In February 1994, U.S. Healthcare lifted the freeze on the Eagleville store. Similarly, Gary's sixth pharmacy in Aston, Pennsylvania, was accepted into the provider network without delay. At approximately this same time, Robin Risler, who testified that, ultimately, the selection of a TPA was her responsibility, hired an insurance broker to assist her in evaluating the competing TPAs. In early **[**27]** June 1994, both BCI and CHA submitted bids for Gary's TPA business, but CHA was given the opportunity to review BCI's bid before submitting its final proposal. In May 1994, even before Gary's had received a proposal from U.S. Healthcare, Risler told Lori Manley, the BCI customer service representative, that Gary's would be switching to CHA/U.S. Healthcare. Manley testified that Risler confided that she felt she was being "strong-armed" by U.S. Healthcare, that "she herself did not want to leave BCI" and that the decision "was out of her control." Two other BCI employees similarly testified that in the spring of 1994, Risler denied having any real choice in the decision to give Gary's TPA business to CHA in light of the loss of U.S. Healthcare's business that Gary's would suffer if it failed to switch TPAs. The testimony with respect to Risler of Manley and the two additional BCI employees was admitted over U.S. Healthcare's objection as state of mind evidence. *See infra* note 31.

As the time for Gary's formal switch to CHA drew near, U.S. Healthcare scheduled **[*508]** another on-site "quality assurance" audit, this time of Gary's Lansdale store for June 16, 1994. In the second **[**28]** week of June, Risler officially informed BCI of Gary's decision to give its TPA business to CHA. After Gary's decision was officially announced, the audit of the Lansdale store uncovered no problems. Moreover, there were no further audits of Gary's pharmacies.

The reasons behind Risler's decision to switch to CHA are in dispute. BCI's TPA expert, Carlton Harker, testified that for the one year period of 1994-95, the BCI proposal would have saved Gary's approximately $ 64,000, or 14%, compared to the proposal submitted by CHA. Harker further testified that he did not perceive any significant differences in the services provided under the respective plans that would explain the cost differential. Risler testified that, in making the decision to give Gary's TPA business to CHA, she was motivated by non-price, quality of service reasons. She also acknowledged, however, that she had been satisfied with BCI's services. At all events, the results of the decision are clear -- BCI lost its contract with Gary's.

In March 1995, BCI filed the present suit challenging the defendants' actions that preceded Gary's decision to terminate its TPA contract with BCI. BCI proceeded at trial against defendants **[**29]** on four counts. Count I alleged that U.S. Healthcare, HMO PA, and CHA violated *Section 1* of the Sherman Act, *15 U.S.C. § 1*, by tying the participation by Gary's in the U.S. Healthcare pharmacy network to the purchase of CHA's TPA services for Gary's employees. In Count II, BCI alleged that all defendants violated the Racketeer-Influenced and Corrupt

Organizations Act ("RICO"), *18 U.S.C. § 1961 et seq.*, by engaging in or conspiring to commit at least two acts of racketeering activities, among them extortion, bribery, mail and wire fraud, and violations of the Travel Act.

In a Count III, BCI also contended that, to the extent that defendants Wolfson, Murphy, and Brownstein were not principal wrongdoers, they are liable for aiding and abetting under RICO. Finally, in Count IV, BCI alleged that all defendants tortiously interfered with its existing or prospective contractual relationship with Gary's in violation of state law. BCI sought treble damages and attorneys fees under its federal law claims. It also sought punitive damages from each defendant in connection with its state law claim.

D. Economic Evidence

1. Impact on Gary's

[30]** BCI argued at trial that Gary's ability to operate profitably depended on the business of U.S. Healthcare subscribers. As evidence, BCI pointed to the parties' stipulation that, as of December 1993, when Wolfson told Gary Wolf that U.S. Healthcare likes to do business with people "who do business with us," 9,178 U.S. Healthcare subscribers had designated Gary's as their provider pharmacy, and that in 1993, Gary's subscribers purchased $ 1.66 million of prescription drugs. BCI's expert Dr. Calvin Knowlton, who is an associate professor and Chair of the Department of Pharmacy Practice and Pharmacy Administration at the Philadelphia College of Pharmacy and Science, and the President of the American Pharmaceutical Association, testified that, based on the stipulated information and Gary's Sales Reports, in 1993, U.S. Healthcare members accounted for between 3-15% of Gary's prescription drug sales, and, by 1995, for 20% of prescription drug sales in Gary's Montgomery County stores.

If Gary's operated as an unapproved pharmacy, any U.S. Healthcare subscriber who wanted to fill his or her prescription at Gary's would have to pay full price, instead of a small co-payment. Additionally, **[**31]** Gary's head pharmacist testified that prescription drug purchasers are valuable consumers because they typically purchase other items in addition to their prescription drugs. BCI also presented evidence that the prescription drug business of pharmacies is a low-margin business that depends on high volume in order to operate profitably. In order to maximize their sales, pharmacies typically become members of as many prescription drug plans as possible. Out of approximately 1300 participating pharmacies in southeastern Pennsylvania and southern New Jersey, only four pharmacies left the U.S. Healthcare pharmacy network in the period **[*509]** from January 1, 1993 to October 1, 1995 for reasons other than going out of business.

2. Knowlton's Survey

At trial, BCI presented a telephone survey of the market areas surrounding several of Gary's pharmacies, performed by Dr. Knowlton, which was admitted over objection. In this survey, pharmacy students telephoned six to eight pharmacies in the vicinity of three arbitrarily selected Gary's store locations and asked them a series of questions. Knowlton drew conclusions regarding U.S. Healthcare's market power based only on the responses **[**32]** of those stores that listed U.S. Healthcare as their primary HMO customer. He testified that based on this survey U.S. Healthcare's market share of prescription drug sales for the market areas served by the two largest Gary's pharmacies and the new Abington pharmacy was approximately 25%. Knowlton further testified that other sources of information indicated that his survey conclusions as to market share would apply generally in Montgomery County.

3. Interaction Between U.S. Healthcare and Other Pharmacy Operations

The jury also heard evidence of the interaction between U.S. Healthcare and Rite-Aid, Shop-Rite, Food Circus, Walmart, Phar-mor and Weis Markets. With respect to the pharmacy operation in each of these chains, U.S. Healthcare conditioned participation in the provider network upon their making U.S. Healthcare insurance available to their employees. Despite initial resistance, Rite-Aid, Phar-Mor and Weis Markets ultimately agreed to offer their employees U.S. Healthcare insurance products. There was, however, an absence of supporting evidence on the point, and it is not clear that these large companies made U.S. Healthcare a part of their benefits package in response **[**33]** to economic pressure rather than for legitimate business reasons.

Shop-Rite and Food Circus responded by filing complaints with the New Jersey Department of Insurance. [4] After the Department of Insurance took action, U.S. Healthcare agreed to accept the stores into its provider network notwithstanding their refusal to offer U.S. Healthcare coverage. The Walmart stores also resisted U.S. Healthcare's policy, choosing instead to forgo membership in the provider network. U.S. Healthcare did approve the Walmart stores in Massachusetts, where an Any Willing Provider statute was in force. Defendants' experts testified that linkage of network membership and purchase of TPA services was normal business behavior and was not anti-competitive.

[34]** *4. The Setting of Reimbursement Prices*

BCI also presented evidence of how U.S. Healthcare exercised its market power to set reimbursement prices. In January 1996, it effected a drastic reduction in the reimbursements it paid to participating pharmacies for prescription drugs dispensed to U.S. Healthcare subscribers. Dr. Knowlton testified that this reduction, when considered with the fact that U.S. Healthcare does not pay pharmacies a dispensing fee, made U.S. Healthcare's overall compensation to pharmacies the lowest of any third-party payor in the southeastern Pennsylvania region. Yet, notwithstanding the major reimbursement price reduction, only two pharmacies out of approximately 8000 in 12 or 13 states discontinued their participation in the U.S. Healthcare provider network.

Dr. Knowlton testified that, based on this evidence, and the evidence of U.S. Healthcare's successful dominance of other pharmacies, exclusion from the U.S. Healthcare provider network could threaten Gary's survival. As a result, he testified that Gary's had no choice but to accept U.S. Healthcare's arrangement.

E. The Jury Verdict

After 17 days of trial, the case was submitted to the jury on **[**35]** special interrogatories. The jury returned a verdict for BCI on all **[*510]** counts and awarded BCI $ 200,000 in compensatory damages. [5] The jury also awarded BCI $ 1,000,000 in punitive damages in connection with its tortious interference claim. That award was apportioned as follows: $ 400,000 against U.S. Healthcare, $ 200,000 against CHA, $ 100,000 against HMO PA, $ 200,000 against Wolfson, $ 75,000 against Murphy, and $ 25,000 against Brownstein.

[36]** At the close of BCI's case, and again at the close of all evidence, the defendants moved, pursuant to *Fed. R. Civ. P. 50(a)*, for judgment as a matter of law. These motions were denied. Following the verdict, defendants renewed their motion for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(b)*. Concurrently, defendants filed an alternative motion for a new trial pursuant to *Fed. R. Civ. P. 59*. The district court denied these motions in all respects. On appeal, defendants challenge the denial of these motions. The majority of the issues before us arise from the district court's denial of defendants' renewed motion for judgment as a matter of law, and, as to these issues, our review is plenary. *See Stelwagon Mfg. Co. v. Tarmac Roofing, 63 F.3d 1267, 1270-71 (3d Cir. 1995)* ("***HN3***[] The legal foundation for the jury's verdict is reviewed de novo while the factual findings are reviewed to determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict."). Where a different standard of review is implicated, **[**37]** it will be noted in the text.

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[4] The record does not develop the extent to which these complaints may have been facilitated by New Jersey's enactment, in July 1994, of an Any Willing Provider statute which provides that a pharmacy cannot be excluded from an HMO if it "accepts the terms" of the HMO. *N.J. Stat. Ann. § 26:2J-4.7(a)(2)* (West 1996).

[5] The district court's initial order of judgment made it unclear whether BCI was to receive $ 200,000 in total compensatory damages, or to recover that amount separately on each of its three legal theories (thus allowing a total recovery of $ 600,000 in compensatory damages). In response to defendants' motion, pursuant to *Fed. R. Civ. P. Rule 59(e)*, to alter or amend the order of judgment, the district court subsequently amended its order to make clear that BCI may recover only once the $ 200,000 in compensatory damages that it was awarded. BCI does not dispute this point on appeal.

III. THE ANTITRUST ISSUES

A. Introduction -- Characterization of BCI's Claim

BCI's antitrust claim arises from U.S. Healthcare's decision to use the leverage acquired by virtue of its ability to provide Gary's access to thousands of potential pharmacy customers to pressure Gary's into selection of its subsidiary, CHA, as its TPA. BCI claims that this arrangement was an illegal tie in violation *§ 1* of the Sherman Act, ***HN4***[] *15 U.S.C. § 1*, which generally outlaws "every contract . . . in restraint of [interstate or international] trade or commerce." Defendants submit that their conduct was simply hard bargaining that is well within the mainstream of business conduct and does not form the basis of a cognizable antitrust claim.

At trial, BCI's theory of the case prevailed. The jury found that U.S. Healthcare's practices were illegal under both *per se* and rule of reason theories of antitrust liability. On appeal, defendants challenge the characterization of the arrangement at issue as a tying arrangement. They contend that the arrangement **[**38]** was one of reciprocal dealing and not tying, and that as a result the *per se* test for antitrust liability is inapplicable. Before turning to a review of the jury verdict, which the defendants challenge, we will consider the characterization question.

HN5[] Tying exists where a seller conditions the sale of one good (the tying product) on the buyer also purchasing another, separate good (the tied product). *See Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 475 (3d Cir. 1992)* (in banc). The antitrust concern over tying arrangements arises when the seller can exploit its market power in the tying market to force buyers to purchase the tied product which they otherwise would not, thereby restraining competition in the tied product market. [6] *See Allen-Myland, Inc. v. International* ***[*511]*** *Bus. Mach. Corp., 33 F.3d 194, 200 (3d Cir. 1994)*; *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*.

[39]** Unlike tying -- where one party is only a seller and the other only a buyer -- ***HN6***[] reciprocal dealing exists where "two parties face each other as both buyer and seller. One party offers to buy the other party's goods, but only if the second party buys other goods from the first party." *Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 424 (5th Cir. 1978)*. More colloquially, reciprocal dealing exists when one party tells the other: "I'll buy from you, if you buy from me." Again, like tying, not all reciprocal dealing arrangements are anti-competitive. ***HN7***[] The Sherman Act is concerned with what has been termed "coercive" reciprocal dealing, where a party uses its economic power as a purchaser in one market in order to restrict competition in another market where it is a seller. *See Betaseed, Inc. v. U & I, Inc., 681 F.2d 1203, 1216 (9th Cir. 1982)*. [7]

[40]** BCI argued, and the jury found, that U.S. Healthcare and CHA *tied* the purchase of CHA's TPA services to the right to continued participation in the U.S. Healthcare pharmacy network. In order to characterize this arrangement as a tie, U.S. Healthcare must be deemed to have "sold" Gary's the ability to participate in its pharmacy network, but only if Gary's also purchased CHA's TPA services. Defendants contend that BCI's characterization is not correct since U.S. Healthcare did not "sell" Gary's the ability to participate in the pharmacy network as participation in that network is free. In fact, the ultimate result of the contract was that money flowed in the opposite direction -- from U.S. Healthcare to Gary's in exchange for prescription drugs purchased by U.S.

[6] Of course, not all tying arrangements have anti-competitive effects in violation of the Sherman Act. The Supreme Court has twice made use of the following as an example of a tie that is not a concern of the antitrust laws: "If one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition if its competitors were ready and able to sell flour by itself." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (quoting *Northern Pac. R. Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958))*. Indeed package sales such as those noted in the foregoing example may be used by a seller as a means of competing, and may be desired by buyers. The Sherman Act is not designed to preclude such arrangements. *See id*.

[7] This is distinguished from "mutual" reciprocal dealing which occurs "when both parties stand on equal footing with respect to purchasing power, yet they agree to purchase from one another." *Betaseed, 681 F.2d at 1216*.

Healthcare members that designated one of Gary's stores as their network pharmacy. Thus, defendants argue, the arrangement is more accurately labeled as reciprocal dealing where U.S. Healthcare conditioned its agreement to purchase prescription drugs from Gary's on Gary's agreement to purchase TPA services from CHA.

We agree that the arrangement is not tying. While there is force to defendants' broader argument, we do **[**41]** not believe that the relationship between Gary's and U.S. Healthcare can be neatly squeezed into the purchase/sale paradigm. As a result, we are hesitant to conclude that the arrangement was reciprocal dealing, but instead believe that the true character of the arrangement lies somewhere between the two practices. Fortunately, resolution of the antitrust issue presented in this appeal does not require us to wedge the facts into either doctrinal box, for we conclude that there was insufficient evidence to support liability under the Sherman Act regardless of the label placed on the challenged arrangement.

The law is well developed as to when tying arrangements should give rise to liability under the Sherman Act. ***HN8***[] Such arrangements can be deemed illegal *per se* or be found to violate the rule of reason. *Per se* liability exists where the defendant is found to have appreciable market power in the tying market. In such cases, the ability to leverage this power to restrain trade in the tied market is presumed and no inquiry need be made into the actual prevailing market conditions in that **[**42]** market. *See* *Jefferson Parish, 466 U.S. at 15-18* & n. 25; *Town Sound, 959 F.2d at 477*. Where appreciable tying market power cannot be shown, inquiry into the tied product market cannot be avoided, and the plaintiff therefore has the more difficult burden of showing that the arrangement violated the rule of reason because it unreasonably restrained competition in the tied product market. *See* *Jefferson Parish, 466 U.S. at 29*.

In contrast to tying arrangements, reciprocal dealing has not been the subject of extensive **[*512]** case law development. Indeed, this Court has yet to set forth a test for determining when a reciprocal dealing arrangement runs afoul of the Sherman Act. [8] **[**44]** Defendants seek to persuade us to fill this vacuum by holding that reciprocal dealing arrangements cannot be found illegal *per se*, but instead should be judged only under the less rigorous rule of reason test. [9] This position has not been adopted by any of our sister circuits. All those that have

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[8] Defendants suggest that we set forth a rule for judging reciprocal dealing arrangements in *W. L. Gore & Assocs., Inc. v. Carlisle Corp., 529 F.2d 614, 624 (3d Cir. 1976)* where we stated that:

> The use of substantial purchasing power in one product market to coerce a supplier into a reciprocating purchase in another market may be an illegal restraint of trade if the user's purchasing power is sufficiently substantial and its use results in substantial foreclosure of competition in the other weaker product market.

In *Gore*, the owner of two patents brought an action for infringement. The defendant's answer denied the validity of the patents, asserted that one of the patents was unenforceable because of fraud in its procurement, and counterclaimed for damages alleging a violation of the Sherman Act. After trial, the district court entered a judgment holding one of the patents valid and infringed and the other patent invalid, granting the plaintiff an injunction restraining the defendant from infringing the valid patent, and determining that plaintiff had violated the Sherman Act. Both parties appealed from the judgment. In determining that we had jurisdiction to review the injunction, we expressly stated that we had no jurisdiction in an interlocutory appeal over the antitrust counterclaim of the defendant. *See* *id. at 618*. Thus, the statement in *Gore* regarding reciprocal dealing was dicta, and does not establish a rule.

[9] In support of this view, defendants primarily rely on Phillip E. Areeda et al., ***Antitrust Law***, a leading treatise. Areeda argues that "forced reciprocal exchanges are . . . legally distinct from ties and need not receive the same antitrust treatment." X Areeda, ***Antitrust Law*** P 1750c, at 268 (1996). He believes that reciprocal trading should not be illegal *per se*, and that such a claim should instead be judged solely under the rule of reason test. *See* *Id*. P 1778, at 460-61. Professor Areeda's view may be colored by his belief that tying arrangements also should not be illegal *per se*, a view that is contrary to current law. *See* IX Areeda, ***Antitrust Law*** P 1730, at 406 14 (1991).

examined the relationship between tying and reciprocal dealing have determined that each practice should be evaluated under both the *per se* and rule of **[**43]** reason tests. [10]

[45]** This position is logical since both practices implicate the same antitrust concern -- the unlawful extension of economic power in one market to another market. However, we decline to resolve this conflict here since the amorphous and idiosyncratic nature of this case does not provide an appropriate framework in which to fully flesh out the need for a separate test for reciprocal dealing arrangements. Further, we need not reach this issue in order to resolve the present appeal since we find that BCI failed to set forth either a valid *per se* or rule of reason antitrust claim -- a finding fatal to both a tying claim and a reciprocal dealing claim under any test we might devise.

B. Per se Liability

Since our jurisprudence regarding both *per se* and rule of reason liability has developed in the context of tying cases, we will use the terms "tying" product market and "tied" product market to describe the two markets at issue despite our belief that the arrangement in this case lies somewhere between tying and reciprocal dealing. ***HN9***[] The *per se* test is used in cases where exploitation **[**46]** of leverage in the market for the tying product is "probable". *See* *Jefferson Parish, 466 U.S. at 15*; *Town Sound, 959 F.2d at 476-77*. The elements of a *per se* claim are (1) the defendant seller must sell two distinct products; (2) the seller must possess market power in the tying **[*513]** product market; and (3) a substantial amount of interstate commerce must be affected. *See* *id. at 477*. Where such elements are shown, the defendant's tying practices are condemned without further proof of anti-competitive effect. *See id*. Principally at issue in this appeal is whether BCI met its burden of proving the second element of this test: that U.S. Healthcare exercised market power in the tying market. [11]

The jury determined **[**47]** that U.S. Healthcare exercised sufficient market power in the tying market to constitute a *per se* violation of the Sherman Act. The viability of that finding, however, depends on the correctness of the market definition sent to the jury. Defendants maintain that the definition was incorrect as a matter of law, and that U.S. Healthcare could not exercise sufficient power in a properly defined tying market to sustain a *per se* claim.

1. Defining the Relevant Market

Before we can evaluate the extent to which U.S. Healthcare exercises power in the tying market, that market must be properly defined. A market has two components, product and geographic. *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 325-28, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. The burden is on the plaintiff to define both components of the relevant market. *See* *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*; *Pastore v. Bell Telephone Co., 24 F.3d 508, 512 (3d Cir. 1994)*; *Tunis Bros Co., Inc. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991)*. The tying market definition asserted by BCI and adopted by **[**48]** the jury was: "U.S. Healthcare members with prescription drug benefits in the areas surrounding . . . Gary's pharmacies in suburban Philadelphia." Defendants contend that this definition contains both a flawed product market -- U.S. Healthcare members with prescription drug benefits -- and a flawed geographic market -- the areas surrounding Gary's pharmacies in suburban Philadelphia. They submit instead that the relevant tying market consists of "all purchasers of prescription drugs in the greater Philadelphia area."

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[10] *See, e.g.*, *Betaseed, Inc. v. U&I, Inc., 681 F.2d 1203, 1221 (9th Cir. 1982)* ("The similarity between coercive reciprocity and tying arrangements, both in form and in anti-competitive consequences, leads to the conclusion that the two practices should be judged by similar standards."); *Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 425 (5th Cir. 1978)* (holding that label of tying and reciprocal dealing was immaterial, and that the *per se* standard should be applied in both); *E.T. Barwick Indus. v. Walter E. Heller & Co., 692 F. Supp. 1331 (N.D. Ga. 1987)* (same legal standards apply to reciprocal dealing as tying), *aff'd 891 F.2d 906 (11th Cir. 1989)*. *See also* II Earl W. Kintner, *Federal* ***Antitrust Law*** § 10.67, at 264-65 (1980) ("The very presence of the element of coercion indicates that such reciprocal dealings are only anti-competitive in effect. It is widely agreed that coercive reciprocality, like tying arrangements, should be considered a *per se* violation of *Section 1* of the Sherman Act.").

[11] The other issues have not been briefed by the parties. The third element is plainly not disputed. While arguably there is an implicit challenge to the first element, it would involve the characterization question, and we need not reach it.

We agree that BCI failed to meet its burden of presenting sufficient evidence to support the product and geographic markets adopted by the jury. However, while the evidence enables us to determine that the proper product market consists of all purchasers of prescription drugs, it is more difficult to determine the relevant geographic market on the basis of the record. Fortunately, as will be shown, delineation of the exact contours of the geographic market is not necessary to an evaluation of the merit of plaintiff's *per se* claim. We turn first to the product market issue.

a. The Product Market

BCI has posited a single brand market consisting solely of U.S. **[**49]** Healthcare members with prescription drug benefits. Should we accept this market definition our inquiry would be at an end, for U.S. Healthcare must, by definition, control 100% of this product market regardless of the geographic market. BCI seeks to support this product market by arguing that no products are "reasonably interchangeable" with U.S. Healthcare members, and that it is compelled by the Supreme Court's decision in *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*. Examining each of these contentions in turn, we conclude that this narrow market definition cannot stand as a matter of law.

The outer boundaries of a product market are determined by evaluating which products would be reasonably interchangeable by consumers for the same purpose. *See Allen-Myland, 33 F.3d at 201 n.8*; *Town Sound, 959 F.2d at 480*. "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively." *Allen-Myland, 33 F.3d at 206*. **[**50]** One measure of interchangeability is "cross elasticity of demand between the product itself and substitutes for it." *Queen City* **[*514]** *Pizza, 124 F.3d at 437* (quoting *Brown Shoe Co. v. U.S., 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*.

When there is cross-elasticity of demand between products in a market, "the rise in the price of a good within [the] relevant market would tend to create a greater demand for other like goods in that market." *Tunis Brothers*, 952 F.2d at 722.

Thus the issue is which products, if any, Gary's, the consumer, would find to be reasonably interchangeable with, or substitutable for, U.S. Healthcare members who purchase prescription drugs. Defendants argue that no evidence in the record contradicts the logical assumption that Gary's considers members of other prescription plans, or uninsured persons, completely interchangeable with U.S. Healthcare members. We agree.

The only evidence to which BCI directs us to support its argument that there are no products reasonably interchangeable with U.S. Healthcare customers is that when U.S. Healthcare lowered the prices it would pay to pharmacies **[**51]** for the purchase of prescription drugs by U.S. Healthcare members, none of the pharmacies dropped out of the U.S. Healthcare network. BCI asserts that this shows that there is no cross-elasticity of demand between U.S. Healthcare members and other purchasers of prescription drugs since, if there were, then the lowering of prices would have caused pharmacies to stop doing business with U.S. Healthcare customers in favor of other customers who paid more.

This evidence does not support BCI's market definition. The fact that participating pharmacies do not drop out of the U.S. Healthcare network when it lowers its payment schedule does not prove that U.S. Healthcare's action failed to increase the pharmacies demand for customers who are not members of U.S. Healthcare. Even though pharmacies undoubtedly desire higher profit customers, it would not be necessary for them to drop out of the U.S. Healthcare network in order to pursue, or acquire, these customers. Nor would it be economically rational to do so since pharmacies, like most businesses, seek as many customers as they can find. [12]

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[12] We assume that membership in the U.S. Healthcare network remained profitable after U.S. Healthcare lowered its payment schedule. To the extent that BCI is arguing that pharmacies stayed in the U.S. Healthcare network despite the fact that it became unprofitable to do so, this argument renders their overall claim a non sequitur. U.S. Healthcare cannot exercise control over pharmacies via access to its network where membership in that network causes pharmacies to lose money.

[52]** Moreover, to the extent that BCI is arguing that U.S. Healthcare customers are not interchangeable with other customers because the market for prescription customers is so competitive that U.S. Healthcare members are difficult to replace, this argument also does not support its product market definition. Product market definition turns on the existence of close substitutes for a particular product, not on the ability of any particular consumer to switch effortlessly to such substitutes. It is true that when Gary's loses a supply of customers it must compete for other customers to make up lost sales; however, this does not mean that those new customers, when found, would not be interchangeable with U.S. Healthcare members from Gary's standpoint.

BCI also seeks to support its single brand market by reference to the Supreme Court's opinion in *Kodak*. That case, however, is inapposite. In *Kodak*, independent service organizations brought suit alleging that Kodak had tied replacement parts for its copiers to Kodak repair service. *See* *504 U.S. at 459*. Although Kodak exercised complete control over the market for the tying product -- replacement parts for its copiers **[**53]** -- since they were unique, *see* *id. at 456-57*, it argued that it could not, as a matter of law, have sufficient market power in that derivative aftermarket to restrain trade because the primary market for new copiers was competitive. According to Kodak, any attempt to exercise market power in the derivative market for copier parts would raise the "life cycle" cost of owning a Kodak copier, and customers would buy fewer Kodak copiers, making the attempt unprofitable. *See* *id. at 470*.

[*515] The Supreme Court declined to let Kodak's economic theory prevail on summary judgment, holding that, under certain circumstances, the buyer of a Kodak copier could be "locked in" to the Kodak parts market by virtue of the high "switching costs" of purchasing a new copier from another manufacturer. *See* *id. at 476*. In such a situation, Kodak copier owners would be forced to purchase copier parts from Kodak since there were no reasonable substitutes for such parts. Thus, *Kodak* establishes that a single brand market may be considered the relevant market where a legitimate class of consumers is locked in to purchasing a non-interchangeable tying **[**54]** product in a derivative market due to high switching costs in the primary market. *See* *Queen City Pizza, 124 F.3d at 439-40*.

BCI directs us to no evidence introduced at trial to support a conclusion that *Kodak* is applicable to this case. On appeal, they argue that *U.S. Healthcare members* are "locked in" to U.S. Healthcare and, by extension, to the pharmacies in its provider network. We doubt that this argument is factually correct, for we find no evidence suggesting that U.S. Healthcare members who wish to switch HMOs face switching costs significant enough to constitute a lock in. But even if it is, the argument is misplaced since *Kodak* is concerned with the situation where the victims of the alleged tie -- in that case, the purchasers of Kodak copiers -- are faced with high switching costs and thus are "locked in" to the market for the tying product. Under BCI's theory of the case, Gary's is the purchaser of the tying product which is U.S. Healthcare members who purchase prescription drugs. Thus in order to fall within *Kodak*'s concept of lock in, BCI needed to, at a minimum, provide evidence that Gary's -- not U.S. Healthcare members -- was locked **[**55]** into the U.S. Healthcare network. That it did not do.

b. The Geographic Market

BCI proposed a non-contiguous, gerrymandered geographic market consisting solely of the areas surrounding Gary's pharmacies in suburban Philadelphia. To meet its burden of proving the relevant geographic market, *see Tunis Brothers Co.*, 952 F.2d at 726, BCI was required to show that the geographic market it proposed was "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *See id*. (quoting *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa., 745 F.2d 248, 260 (3d Cir. 1984))*.

The only evidence that BCI offered to support its geographic market was testimony from Dr. Knowlton that the area from which Gary's stores, or any pharmacies, draw their customers is made up of primary and secondary trading areas surroundings its stores. Knowlton defines a primary trading area is the geographic area surrounding a pharmacy from which it draws 50% of its clientele, and a secondary trading area as the geographic area from which it draws 90% of its clientele.

We believe that Knowlton is undoubtedly correct to the extent that **[**56]** the jury could reasonably find that pharmacy customers generally use pharmacies near their home. Thus we reject defendants' argument that the relevant geographic market should be the greater Philadelphia area. [13] However, mere invocation of the common-sense precept that customers use pharmacies near their homes does not satisfy BCI's burden of showing that the *particular* geographic market chosen fairly represents "the area in which a potential buyer may rationally look for the goods or services he or she seeks." In this case, where BCI introduced no evidence to support such a conclusion, an amorphous and gerrymandered geographic market cannot stand as a matter of law. *See* 952 F.2d at 727 ("The mere delineation of a geographical area, without reference to a market as perceived by consumers and suppliers, fails to **[*516]** meet the legal standard necessary for the relevant geographic market.").

[57]** *2. U.S. Healthcare's Power in the Tying Market*

Having determined that the market definition adopted by the jury was erroneous as a matter of law, we are now faced with the task of assessing U.S. Healthcare's market power in a properly defined market on the basis of the trial record. Our task is made more difficult by the fact that the record does not contain sufficient evidence to enable us to clearly define the relevant geographic market. In most instances, the proper course in the face of such circumstances would be to remand the case for a new trial; however, our review of the record indicates that it is simply not possible for U.S. Healthcare to have exercised sufficient market power in the properly defined product market to constitute a *per se* violation in any plausible geographic market.

HN10[] In order to impose *per se* antitrust liability, it must be shown that the defendant had "*appreciable* economic power in the tying market." *Kodak, 504 U.S. at 464* (emphasis added). "Market power is defined as the ability 'to raise prices or to require purchasers to **[**58]** accept burdensome terms that could not be exacted in a completely competitive market.' " *Allen-Myland, 33 F.3d at 200* (quoting *United States Steel Corp. v. Fortner Enters., Inc. (Fortner II), 429 U.S. 610, 620, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977))*. Since "the existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market," *Kodak, 504 U.S. at 464* (citations omitted), we turn first to an inquiry into U.S. Healthcare's share of the market for drug prescription customers. In so doing, we are mindful of the fact that "market share, of course, is only one type of evidence that may prove the defendant has sufficient market power to impose *per se* antitrust liability." *Allen-Myland, 33 F.3d at 209*.

a. Evidence of Market Share

At trial, BCI's sole evidence of market share derived from a survey conducted by Dr. Knowlton. His survey concluded that U.S. Healthcare members purchased twenty to twenty-five percent of the prescriptions at the surveyed pharmacies. Defendants argue that this market share is insufficient as a matter of law to serve as the basis for a finding **[**59]** of a *per se* violation. We agree. [14] The highest estimate of U.S. Healthcare's **[*517]**

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[13] Defendants rely primarily on evidence that Gary's advertised in the greater Philadelphia area to support their expansive conception of the geographic market. This reliance is misplaced since "the geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product." *Tunis Bros., 952 F.2d at 726*.

[14] Defendants also argue that the district court abused its discretion in admitting the survey. We also agree with this contention; however, since we conclude that even if the survey were admitted, it would not help BCI, we address the methodological errors that should have barred its admission only briefly.

HN11[] Survey results offered as proof of the matter asserted are hearsay, and thus the results of a survey, and any testimony based on those results, cannot be admitted into evidence unless the survey falls into a recognized class exception to the hearsay rule or into the residual exception contained in *Fed. R. Evid. 803(24)*. *See* *Pittsburgh Press Club v. United States, 579 F.2d 751, 755-58 (3d Cir. 1978)*. In this case none of the class exceptions are present, so we examine whether the survey contains the "circumstantial guarantees of trustworthiness" required for admissibility under *Rule 803(24)*.

In *Pittsburgh Press*, we stated that "***HN12***[] the circumstantial guarantees of trustworthiness are for the most part satisfied if the poll is conducted in accordance with generally accepted survey principles." *Id. at 758*. We then discussed several factors which must be examined in determining whether a poll meets generally accepted survey principles market share resulting from Knowlton's survey -- which, in addition to the methodological errors set out in note 14, used the improper geographic market discussed at pp. 32-33, *supra* -- was twenty five percent. Even were we to accept this percentage as accurate, it is insufficient in itself to impose *per se* antitrust liability. *See* Jefferson Parish, 466 U.S. at 27 (defendant hospital's 30 percent share of market showed that it lacked the "kind of dominant market position that obviates the need for further inquiry into competitive conditions."); *see also* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 612-13, 97 L. Ed. 1277, 73 S. Ct. 872 (1953) (defendants share of 33-40 percent of advertising market insufficient to invoke *per se* rule). In fact, since *Jefferson Parish* no court has inferred substantial market power from a market share below 30 percent. *See*, *e.g.* Town Sound, 959 F.2d at 481 (affirming summary judgment for defendant with control of 10-12% of tying product market); Marts v. Xerox, 77 F.3d 1109, 1113 n.6 (8th Cir. 1996) **[**60]** (18% share of one portion of photocopier market too small for unlawful tying); *Continental Trend* Resources, Inc. v. OXY USA, Inc., 44 F.3d 1465, 1482 (10th Cir. 1995) (affirming grant of summary judgment for defendants where defendants controlled less than 10% of relevant market, since "plaintiffs failed to establish defendants had sufficient strength in the relevant market."), *vacated on other grounds and remanded*, *116 S. Ct. 1843 (1996)*; Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc, 21 F.3d 83, 87-88 (5th Cir. 1994) (17.5 percent share of relevant market for tying product "is not normally sufficient to satisfy the requirements of the *per se* rule.").

[61]**

Because U.S. Healthcare's true market share in a properly defined geographic area could be no higher than 25 percent, plaintiff's cannot rely solely on market share to establish a *per se* antitrust violation. [15]

> A proper universe must be examined and a representative sample must be chosen; the persons conducting the survey must be experts; the data must be properly gathered and accurately reported. It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques.

Id.

The proponent of the evidence has the burden of establishing these elements of admissibility. *See id*. In this case, we find that this burden was not met and that the methodology of the survey was so flawed that the district court's decision to admit it was not consistent with the exercise of sound discretion.

Knowlton's survey was designed to determine U.S. Healthcare's market share in the region close to three of Gary's six pharmacy locations. To determine market share, he had pharmacy students call six to eight to pharmacies within varying distances of each of the three pharmacies (resulting in a total universe of twenty pharmacies). The pharmacists at these pharmacies were then asked to name the HMO with which they did the majority of their business, and to report the percentage of their prescription business for which that HMO was responsible.

This methodology is flawed in several respects. We identify two particularly significant errors. First, the survey questions used were not objective. For example, pharmacists were asked:

> You provide services for people with prescription cards, like PCS and Paid, et cetera. You also provide services for people on specific HMO plans like Keystone, U.S. Healthcare, et cetera. What's the name of the HMO with which you did the most prescription business . . .?

This question improperly slants the response by highlighting respondent to U.S. Healthcare's market presence. People responding to a survey tend to react to the framing of a question. *See*, *e.g.* J.R. Eiser, *Social Psychology* 219-20 (1986). In addition, this question specifically excluded large institutional, non-HMO purchasers of prescription drugs such as PCS and PAID. As a result, it narrowed the product market from "purchasers of prescription drugs" to "HMO purchasers of prescription drugs".

Second, while Knowlton surveyed 20 pharmacies, he only used the data obtained from 14 of those pharmacies in tabulating his results. This decision resulted from the fact that only fourteen of the twenty pharmacies surveyed named U.S. Healthcare as their largest HMO customer. Knowlton simply ignored the other six pharmacies whose data presumably stated a lower estimate of U.S. Healthcare's market share. This type of selective analysis violates the requirement that, in order for survey results to be admissible, the "data must be properly gathered and accurately reported".

We conclude that the cumulative effect of these, and other, methodological errors render it impossible to say that this survey was "conducted in accordance with generally accepted survey principles," and thus it should not have been admitted.

b. Other Factors Bearing on Market Power

Factors other than market share can establish that U.S. Healthcare exercised appreciable power in the market for pharmaceutical customers. *See Allen-Myland, 33 F.3d at 209*. BCI contends that in this case market power can be inferred from the numerosity of the ties imposed by the defendants, and by "market realities" which indicate that the figures for prescription drug **[**62]** sales understate the importance of U.S. Healthcare members to a pharmacy's bottom line.

HN13[] In order to demonstrate tying market power through evidence of the widespread acceptance of a tie, the plaintiff must **[*518]** show that the tie was accepted by an appreciable number of buyers within that market, and that there is an "absence of other explanations for their willingness . . . to purchase the package." *See Fortner II, 429 U.S. 610, 618 n.10, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)*; *see also Grappone, Inc v. Subaru of New England, Inc., 858 F.2d 792, 797-98 (1st Cir. 1988)* (widespread acceptance of tie not evidence of market power where there are plausible business reasons for accepting tie). In this case, BCI has failed to meet its burden.

At trial, the only evidence offered by BCI concerning other ties by defendants was that, with respect to six large chains -- Rite-Aid, Shop-Rite, Food Circus, Walmart, Phar-mor and Weis Markets -- defendants attempted to tie approval of additional pharmacies for participation in the U.S. Healthcare network to each **[**63]** chain agreeing to offer CHA and/or U.S. Healthcare to its employees. Of these purported tying attempts, only three -- those involving Rite-Aid, Phar-Mor and Weis Markets -- were deemed "successful" by the plaintiff. However, as we have already observed, BCI failed to demonstrate that these large companies did not base their decision to make U.S. Healthcare a part of their benefits package on plausible business reasons, *see supra* at *1998 U.S. App. LEXIS 6591* at *31-31. Without some such showing, the evidence of other tie-ins is insufficient to constitute proof of appreciable market power. [16]

BCI also argues that market power can be inferred from the fact that exclusion from the **[**64]** U.S. Healthcare pharmacy network would have a major adverse impact on a pharmacy, to the point of threatening that pharmacy's survival. BCI submits that since the prescription drug business is a low-margin business that depends on high volume, large purchasers such as U.S. Healthcare exert considerable market power. As an example of this market power, BCI again directs us to the evidence that U.S. Healthcare was able to lower its payment schedule to pharmacies without loss of pharmacy participation in its network. [17]

This argument has two flaws. In the first instance, it proves too much. The evidence at trial showed that Gary's was a member of forty or more networks that provided access to pharmaceutical customers. There is no evidence, and no reason to believe, that the customers that U.S. Healthcare delivers are any more desirable than those delivered by other networks. Thus, if we accept the logic of BCI's argument, each of these networks **[**65]** exercises sufficient market power to violate the *per se* rule of antitrust liability. Yet, it would pervert the antitrust notion of market power to find that each of over forty organizations, delivering the same product, has sufficient market power over a pharmacy such as Gary's to generate a *per se* violation of the antitrust laws.

BCI's argument also runs counter to the purpose of the antitrust laws. "The purpose of the Sherman Act 'is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.' " *Queen City Pizza, 124 F.3d at 441* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993))*; *see also Town Sound, 959 F.2d at 494* (it is "no concern of the antitrust laws" that a practice

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[15] We note that evidence produced at trial showed that 16% of the residents of the greater Philadelphia area belong to a U.S. Healthcare plan. We assume, therefore, that U.S. Healthcare's market share in the relevant geographic market lies somewhere between 16%, its share in an impermissibly broad geographic market, and 25%, its share in an impermissibly narrow one.

[16] We further note that while it is apparent that Rite-Aid, Phar-Mor and Weis Markets are large chains, pharmacies are only a part of their business and BCI has offered no specific evidence that the number of pharmacies affected by the alleged tie-ins constituted "an *appreciable* number of buyers within the market."

[17] *See supra* at *1998 U.S. App. LEXIS 6591* at *31-32.

may consign even an entire "class of competitors . . . to competitive oblivion," unless "consumers are also hurt because of diminished competition."); *United States v. Syufy Enterprises, 903 F.2d 659, 668 (9th Cir. 1990)* ("it can't be said often enough that the antitrust laws protect competition, not competitors."). If we were **[**66]** to accept BCI's argument that a showing of appreciable market power can be based solely on a pharmacy's "need" for customers, we would in effect outlaw the agglomeration of pharmacy customers -- a result that provides benefits to individual consumers -- in order to protect pharmacies. This result would stand antitrust jurisprudence on its head, and establish a precedent whereby the antitrust laws **[*519]** would protect competitors rather than competition and consumers.

C. The Rule of Reason Claim

The jury also found that defendants were liable under the rule of reason standard for antitrust violations. Unlike a *per se* case where a showing that the defendant had market power in the tying market leads to a presumption that it is using that power to expand into the tied market, ***HN14***[] to succeed on a rule of reason claim the plaintiff must prove that the alleged tie "unreasonably restrained competition." *Jefferson Parish, 466 U.S. at 29*; *see also Town Sound, 959 F.2d at 495* (in order to support a rule of reason claim, plaintiff must prove that the tie **[**67]** in question caused an "injury to competition"). This burden "necessarily involves an inquiry into the actual effect of the [challenged conduct] on competition [in the tied market]." *466 U.S. at 29*. [18]

[68]** ***HN16***[] Before we can determine whether there was harm to competition in the tied market, that market must be defined. BCI had the burden of defining the tied market, but made no attempt to do so at trial. On appeal, BCI contends that the tied market consists of the market for the provision of health insurance and benefits -- a market that includes HMOs and personal choice plans in addition to TPAs. We find no support for this broad market definition. Instead, we believe, on the basis of the record, that the proper tied market consists solely of the market for TPA services. BCI is a TPA provider and the harm alleged to have occurred as result of the tying arrangement took place in the market for TPA services.

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[18] BCI contends that by failing to specifically challenge the sufficiency of the evidence of anti-competitive effects in the tied market in their pre-verdict motions for judgment as a matter of law made pursuant to *Fed. R. Civ. P. 50(a)*, defendants waived their right to raise that specific argument in their post-trial *Rule 50* motions, or thereafter. In their pre-trial motions, made both at the conclusion of plaintiff's case and at the conclusion of all evidence, the defendants' challenge to the sufficiency of the evidence on the rule of reason claim read:

> The evidence is insufficient to support a finding or sustain a verdict that U.S. Healthcare's practices constituted an unreasonable restraint of trade in light of all the circumstances of the case. Plaintiff has offered no such evidence.

HN15[] Under *Rule 50(a)*, a pre-verdict motion for judgment as a matter of law "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Further, a post-trial motion for judgment as a matter of law made pursuant to *Rule 50(b)* "must be preceded by a *Rule 50(a)* motion sufficiently specific to afford the party against whom the motion is directed with an opportunity to cure possible defects in proof which otherwise might make its case legally insufficient." *Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1173 (3d Cir. 1993)* (quoting *Acosta v. Honda Motor Co., 717 F.2d 828, 831-32 (3d Cir. 1983))*; *see also Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 183-84 (3d Cir. 1992)* (compliance with *Rule 50(a)* "ensures that the party bearing the burden of proof will have an opportunity to buttress its case before it goes to the jury and the moving party will not gain unfair advantage through surprise.").

While the text of the *Rule 50(a)* motion quoted above is far from a model of completeness or clarity, we do not measure its sufficiency by the text alone, but against the background, as reflected in the record, of what the party now claiming waiver understood as to the tenor of the *Rule 50* movant's position and theory. *See Acosta, 717 F.2d at 832* ("The communicative content, 'specificity' and notice giving function of an assertion [in a *rule 50(a)* motion] should be judged in context.") In *Fineman*, for example, we held that a general motion for a directed verdict contesting the sufficiency of the evidence with respect to "coercion" preserved defendant's challenge to the sufficiency of the evidence with respect to the tortious interference claim, because "plaintiffs' counsel was clearly on notice of the legal rubric under which [defendants] planned to proceed." *980 F.2d at 184*. We think that is the case here, and hence find no waiver.

In that market, the only evidence of harm to competition was that BCI failed to renew one contract, its contract with Gary's. That showing is insufficient as a matter of law since it fails to show competitive harm to the tied market as a whole. *See* *Town Sound, 959 F.2d at 493* (requiring foreclosure of a "substantial portion" of the tied market to hurt competition.); **[**69]** *see also* *Virtual Maintenance, Inc. v. Prime Computer, Inc., 957 F.2d 1318, 1330* (6th Cir.) ("the foreclosure of 400 computer systems out of the thousands of systems [in the tied market] is insignificant as a matter of law"), *vacated*, *506 U.S. 910* ***[*520]*** *(1992)*, *reinstated in pertinent part*, *11 F.3d 660, 663-64 (6th Cir. 1993)*.

Moreover, even if we accepted the broad market which BCI proposed, it still failed to provide sufficient evidence of competitive harm. The only evidence offered to show that competition was adversely affected in this broad market consisted of the previously mentioned studies of several large pharmacy chains which faced pressure to offer their employees membership in the U.S. Healthcare HMO. These studies do not provide *any* evidence of market foreclosure or harm to competition since those pharmacies that were "forced" to offer their employees U.S. Healthcare coverage did so *in addition to*, rather than instead of, other health insurance plans. Further, even if this evidence did show harm to competition, BCI has introduced no evidence in which to evaluate the extent to which such foreclosure harmed **[**70]** competition in the broad market for health insurance services generally.

D. Conclusion

Since the record before us does not support a finding that U.S. Healthcare exercised appreciable market power in a properly defined tying market or that the arrangement at issue harmed competition in the tied market, the antitrust jury verdicts on both the *per se* and the rule of reason claims must be set aside. [19]

IV. CIVIL RICO

A. Introduction

The jury found that U.S. Healthcare's business practices constituted a pattern of racketeering activity in violation of *18 U.S.C. §§ 1962(c)* and *(d)*. ***HN17***[] *Section 1962(c)* prohibits any person employed by or associated with an enterprise from conducting or participating in the conduct of that enterprise's affairs through **[**71]** a pattern of racketeering activity. A pattern of racketeering activity "requires at least two acts of racketeering activity", *18 U.S.C. § 1961(5)*. Racketeering activity is defined as an act or threat chargeable as one of a variety of state felonies or any act which is "indictable" under specifically listed federal criminal statutes, *see* *18 U.S.C. § 1961(A)-(B)*. *Section 1962(d)* outlaws any conspiracy to violate the other subsections of *§ 1962*, including, as is relevant to this case, *§ 1962(c)*.

U.S. Healthcare challenges the jury verdict on two primary grounds, asserting that (1) BCI failed to establish its standing to recover for any offenses allegedly committed against Gary's; and (2) BCI failed to present a sustainable case that the defendants committed any of the alleged predicate acts. We address each argument in turn.

B. RICO Standing

The section of RICO allowing private parties such as BCI to pursue a civil action provides that:

> ***HN18***[] any person injured in his business by reason of a violation of *section 1962* of this chapter **[**72]** may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

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[19] Since we find that the jury verdict must be set aside, we need not address defendants challenge to the rule of reason jury instructions.

18 U.S.C. § 1964(c)

The Supreme Court examined the standing requirement of this statutory provision in *Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)*. The Court noted that Congress modeled § 1964(c) on the Clayton Act, and found that **HN19**[] a plaintiff's right to sue under RICO, as under the federal antitrust laws, requires a showing that the alleged violation was the proximate cause of the plaintiff's injury. *See id. at 267-68*. The Court looked to the common law for guidance in defining the proximate cause requirement. In so doing, it focused primarily on one element of proximate cause: the directness of the relationship "between the injury asserted and the injurious conduct alleged." *Id. at 268*. This requirement of a direct relation was held to generally preclude recovery **[**73]** **[*521]** by "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Id. at 268-69*.

On the facts presented in *Holmes*, the Court held that the plaintiff, Securities and Investor Protection Corporation ("SIPC"), had not met the proximate cause requirement and thus had no standing to bring suit under RICO . SIPC is a private nonprofit corporation, created pursuant to the Securities Investors Act, which most broker-dealers are required by law to join and which has a statutory duty to advance funds to reimburse the customers of member broker-dealers that are unable to meet their obligations. *See id. at 261*. SIPC brought a civil RICO action alleging that Holmes, and other former members of a brokerage firm, conspired in a stock manipulation scheme that prevented two broker-dealers from meeting their obligations, thereby requiring SIPC to advance nearly $ 13 million to cover claims by the customers of the affected broker-dealers. SIPC sought standing under § 1964(c) by arguing, *inter alia*, that it was subrogated to the rights of those customers of the broker-dealers who did not **[**74]** purchase the manipulated securities but incurred loses when the broker-dealers failed and could no longer meet their obligations. *See id. at 270*.

The Court assumed, for the sake of argument, that SIPC was entitled to stand in the shoes of the non-purchasing customers, but held that the defendants' conduct was not the proximate cause of those customers' injuries. The Court held that "the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker dealers . . . the broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the non-purchasing customers and general creditors." *Id. at 271*.

Defendants' argue that, under *Holmes*, BCI lacks standing in this case. They assert that since BCI is alleging that Gary's has been a victim of the RICO predicate acts, BCI exemplifies the "plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person." *Id. at 268*. We disagree. The injury proved by BCI, the loss of its TPA contract with Gary's, is not **[**75]** *derivative* of any losses suffered by Gary's. Unlike the injuries suffered by the non-purchasing customers in *Holmes*, BCI's injury was not contingent upon any injury to Gary's, nor is it more appropriately attributable to an intervening cause that was not a predicate act under RICO. Here, BCI's TPA relationship with Gary's was a direct target of the alleged scheme -- indeed, interference with that relationship may well be deemed the linchpin of the scheme's success. Accordingly, we conclude that BCI had standing to pursue its civil RICO claim. [20]

C. Predicate Acts of BCI's RICO Claim

In its special verdict form, the jury found that each defendant **[**76]** had committed one or more types of the predicate acts of: (1) extortion under the Hobbs Act, *18 U.S.C. § 1951*; (2) violation of Pennsylvania's commercial bribery statute, *18 Pa. Cons. Stat. § 4108(b)*; (3) mail fraud, *18 U.S.C. § 1341*; (4) wire fraud, *18 U.S.C. § 1343*; and (5) violation of the Travel Act, *18 U.S.C. § 1952*. Defendants challenge the verdict on the ground that BCI has failed to prove that defendants' conduct violated any of these laws. Defendants contend that this failure to prove any

[20] We note, however, that BCI's RICO standing is limited to injuries arising from its competition with U.S. Healthcare for Gary's TPA business. BCI does not have RICO standing to recover for any injuries suffered by other pharmacies as a result of their relations with U.S. Healthcare since there is no evidence that these relations directly injured BCI.

predicate acts, and *a fortiori* to show a pattern of racketeering activity, entitles them to judgment as a matter of law on the RICO claims. In their submission, the conduct underlying each of the alleged predicate acts was at its bottom no more than aggressive business bargaining and, just as BCI cannot convert aggressive business tactics into antitrust violations, it cannot shoehorn such tactics into the definitions of the predicate acts at issue here. We shall devote **[*522]** the bulk of our time to the important and difficult issue of whether the defendants' conduct amounted to Hobbs **[**77]** Act extortion. The others alleged predicate acts are disposed of easily.

1. Extortion under the Hobbs Act

HN20[] The Hobbs Act imposes criminal penalties on "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so." *18 U.S.C. § 1951*. "Extortion" is defined in the Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *18 U.S.C. § 1951(b)(2)*. The term "fear" includes the fear of economic loss. *See United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1972)*; *United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987)* (in banc).

BCI alleges that the defendants extorted Gary's health benefits business by conditioning access to the U.S. Healthcare provider network on Gary's agreement to switch to CHA as its TPA. According to BCI, this conduct amounts to extortion through the **[**78]** wrongful use of the fear of economic loss. Defendants respond that the use of economic leverage in this manner cannot be made to fit within the statutory framework of Hobbs Act extortion. They reason that any fear of economic loss felt by Gary's was the result of the give and take of bargaining between U.S. Healthcare and Gary's in a business setting in which both parties offered and received something of value. They contend that the use of this economic fear to extract concessions from Gary's was not wrongful, as required by the Hobbs Act, but is instead part and parcel of normal business negotiations.

As will appear, we conclude that plaintiff's theory, which is quite ingenious, does not state a viable claim of extortion because the defendants' use of the fear of economic loss in the context of hard business bargaining was not (legally) wrongful. While this decision may seem compelled by common sense, it is not easily derived from our precedent. This Court has not had prior occasion to address the line separating the legitimate use of economic fear to acquire property in a business setting (i.e., hard bargaining) from the wrongful use of such fear (i.e., extortion). Accordingly, **[**79]** we turn for guidance to the decisions of those few courts that have previously faced the issue. Because it looms so large on the Hobbs Act landscape, we must first, however, consider the Supreme Court's decision in *United States v. Enmons, 410 U.S. 396, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973)*, which construes the meaning of the term "wrongful" under the Act.

a. The Definition of "wrongful".

In *Enmons*, the Court faced the question whether the use of violence in a labor strike to obtain higher wages and other benefits was extortion within the meaning of the Hobbs Act. The Court reviewed the wording of the Act and its legislative history and determined that such conduct was not extortion. In reaching its decision, the Court interpreted the word wrongful, which is not defined in the Act, as follows:

> The term "wrongful," which on the face of the statute modifies the use of each of the enumerated means of obtaining property -- actual or threatened force, violence, or fear -- would be superfluous if it only served to describe the means used. For it would be redundant to speak of "wrongful violence" or "wrongful force" since, as the government acknowledges, **[**80]** any violence or force to obtain property is "wrongful." *Rather, "wrongful" has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be "wrongful" because the alleged extortionist has no lawful claim to that property*.

Id. at 399-400 (emphasis added).

HN21[] The ability to defend against an extortion charge based on a lawful claim to the property obtained has been dubbed the "claim of right" defense to extortion. *See United States v. Agnes, 753 F.2d 293, 298 (3d Cir. 1985)*. Since *Enmons* dealt with the use of force to obtain property, and concluded that it was *not* extortion, read broadly, *Enmons* could stand for the principle that in *all* extortion **[*523]** cases, even "inherently" wrongful actions such as the use or threatened use of force or violence, do not constitute extortion where the defendant has a lawful claim to the property obtained. This broad application of *Enmons*, i.e., outside of the labor context, has, however, been uniformly rejected by the **[**81]** courts of appeals out of a fear that it would "effectively repeal the Hobbs Act." *See* United States v. Cerilli, 603 F.2d 415, 419 (3d Cir. 1979).

The effort to limit the potential impact of *Enmons* has led to a line of cases wherein this Court and others have refused to extend the claim of right defense to defendants accused of using actual or threatened *force* or *violence* to obtain property outside of the labor context. For example, in United States v. Agnes, supra, the defendant was convicted of extortion for using threats of force and actual violence in seeking property which was arguably his under state law. On appeal, he argued that the district court erred in refusing to allow him to assert a claim of right defense and in failing to properly instruct the jury that it is not wrongful to obtain property to which one has a legal right. *See* 753 F.2d at 297. We noted that defendant's contentions were predicated on *Enmons* and held that, contrary to defendant's suggestion, *Enmons* did not create a general claim of right defense in all cases involving the threatened or actual use of force or violence. Instead we **[**82]** interpreted *Enmons* to "create a claim of right defense only in . . . situations [such as those present in *Enmons*] *in which the use of force* is expressly identified by Congress as being outside the purview of the Hobbs Act." Id. at 299 (emphasis added). Other cases, noted in the margin, have similarly limited the reach of the claim of right defense in cases involving the threatened or actual use of force or violence. [21]

[83]** The present case does not fall within this line of cases limiting *Enmons* since it solely involves the accusation of the wrongful use of the fear of economic loss. Unlike the use or threatened use of force or violence, ***HN22***[] the use of economic fear in business negotiations between private parties is not "inherently" wrongful. *See* Sturm, 870 F.2d at 773 (citation omitted); United States v. Clemente, 640 F.2d 1069 at 1077; Hall Am. Ctr. Assoc. Ltd. Partnership v. Dick, 726 F. Supp. 1083, 1095 (E.D. Mich. 1989). Indeed, the fear of economic loss is a driving force of our economy that plays an important role in many legitimate business transactions. This economic reality leads us to conclude that ***HN23***[] the reach of the Hobbs Act is limited in cases, such as this one, which involve the use of economic fear in a transaction between two private parties. The limitation we apply is that set forth in *Enmons*: that a defendant is not guilty of extortion if he **[**84]** has a lawful claim to the property obtained.

We find support for our conclusion in the law of other circuits. The Second Circuit recognized the issues and concerns affecting this case in United States v. Capo, 791 F.2d 1054, 1062 (2d Cir. 1986), *vacated in part*, *on other grounds*, 817 F.2d 947 (2d Cir. 1987) (in banc), when it stated that:

> We recognize, of course, that fear of economic loss plays a role in many business transactions that are entirely legitimate; awareness of that fear and use of it as leverage in bargaining, in which each side offers the other property, services, or rights it legitimately owns or controls, is not made unlawful by the Hobbs Act. *What the Act reaches is not mere hard bargaining but the exploitation of the fear of* **[*524]** *economic loss in order to obtain property to which the exploiter is not entitled*.
>
> (emphasis added).

See also United States v. Clemente, 640 F.2d at 1076-78 (***HN24***[] use of fear of economic loss is wrongful when employed to achieve the wrongful purpose of obtaining **[**85]** property to which one is not entitled).

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[21] *See* United States v. Zappola, 677 F.2d 264, 269, 270 (2d Cir. 1982) (*Enmons* inapplicable where businessmen beat and threatened victim to coerce payment of alleged debt); United States v. Porcaro, 648 F.2d 753, 759-60 (1st. Cir. 1981) (claim of right to property irrelevant where force or threats are used in resolution of contractual dispute); United States v. Kattar, 840 F.2d 118, 123 n.2 (1st Cir. 1988) ("Except in certain labor contexts . . . using threats of violence to induce the payment of money is unlawful, regardless of the extortionist's possible legal right to the funds at issue."); United States v. Sturm, 870 F.2d 769, 772-73 (1st Cir. 1989) (defendants "claim of right" to property obtained from victim is proper defense outside of labor context only if defendant did not use "inherently wrongful" means such as force or violence to obtain the property); United States v. Warledo, 557 F.2d 721, 729-30 (10th Cir. 1977) (*Enmons* inapplicable to Indian tribe's threats and violence to pursue allegedly valid claim against railroad); United States v. Cohen, 738 F.2d 287, 289 (8th Cir. 1984).

The First Circuit has explicitly extended the claim of right defense to cases involving solely the fear of economic harm. *See* Sturm, 870 F.2d at 773 ("For purposes of the Hobbs Act, the use of legitimate economic threats to obtain property is wrongful only if the defendant has no claim of right to that property."). The position of the First and Second Circuits is mirrored in the federal pattern jury instructions for the Hobbs Act. In those instructions "wrongful" is defined as "meaning that the defendant had no lawful claim or right to the money or the property (he)(she) sought or attempted to obtain", and district courts are directed that this definition "should be given only in cases involving a fear of economic loss or in trials concerning the use of violence by union leadership to secure higher wages for the membership as opposed to securing money for themselves." E. Devitt et al., Federal Jury Practice and Instructions, Criminal, § 45.08 & notes (4th ed. 1990). We believe that the position of the First and Second Circuits is sensible, and adopt it here.

b. Lawful Versus Unlawful Claims to Property

Our conclusion **[**86]** that the defendants are not guilty of extortion if they had a lawful claim to the property obtained from Gary's, while focusing our inquiry, does not resolve the issue before us since the line separating lawful from unlawful claims to property obtained in business negotiations is by no means self evident. Once again, we start with *Enmons* which, although addressing extortion through force or violence, provides direction as to the distinction between lawful and unlawful claims to property.

The Court in *Enmons*, having held that a Hobbs Act conviction could not be predicated on violence related to union activity that was aimed at obtaining property to which the alleged extortionist had a lawful claim, found that the defendants, union members and officials, had a lawful claim to the property -- in the form of wages and other employment benefits -- that they obtained from the employer. The Court found that where violence is employed "to achieve legitimate union objectives, such as higher wages, in return for genuine services which the employer seeks . . . there has been no 'wrongful' taking of the employer's property; he has paid for the services bargained for, and the workers receive **[**87]** the wages to which they are entitled in compensation for their services." *410 U.S. at 400*. This scenario was distinguished from cases where "union officials threatened force or violence against an employer in order to obtain personal payoffs, and where unions used the proscribed means to exact 'wage' payments in return for 'imposed, unwanted, superfluous and fictitious services' of workers." *Id.* In such cases, the union officials would not have a lawful claim to the property obtained, and thus the conduct would fall within the reach of the Hobbs Act.

We find particularly illuminating the application of *Enmons*' basic teaching by the District Court for the Southern District of New York in *Viacom Int'l v. Icahn, 747 F. Supp. 205 (S.D.N.Y. 1990)*, *aff'd on other grounds*, *946 F.2d 998 (2d Cir. 1991)*, a case involving the allegation of extortion through the wrongful use of the fear of economic loss. In *Viacom*, the defendants were accused of purchasing substantial stock in the plaintiff company (Viacom) and then coercing the plaintiff to buy its stock back for cash, stock warrants, and free advertising -- all allegedly under a threat **[**88]** of a corporate takeover. In return for the requested "greenmail," the defendants agreed not to buy the plaintiff's stock (or otherwise seek control of the plaintiff) for a period of eleven years. *See id. at 207-09*. Following this transaction, the plaintiff brought a civil RICO suit alleging, *inter alia*, that defendants had violated the Hobbs Act by obtaining above-market consideration for their shares from plaintiff with plaintiff's consent, with such consent induced through the wrongful use of economic fear. *See id. at 210*. On defendants' motion for **[*525]** summary judgment, the court dismissed as a matter of law the allegation that the challenged practice constituted extortion. *See id. at 213*.

The court recognized that it was faced with a case in which the alleged extortion victim received something of value -- an eleven-year standstill covenant, 3,498,200 shares of common stock, and, thereby, relief from the threat of a corporate takeover. It then surveyed existing case law in which the victim received something of value in exchange for his property, and found that in these circumstances "some acts constitute extortion **[**89]** and others are found to be 'hard bargaining.' " *Id. at 212-13*. The court drew the following distinction between the two:

> ***HN25***[] In a "hard bargaining" scenario the alleged victim has no pre-existing right to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant, but

> in an extortion scenario the alleged victim has a pre-existing entitlement to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant.

Id. at 213.

Applying this framework, the court used as examples of extortion, the "personal payoff cases" addressed in *Enmons*. In those cases the defendants "had no lawful claim to the property they received from the victims in exchange for providing the victims with influence and goodwill which quelled the victims fears of harm to their economic interests." *Id.* While the victim received something of value in return for this payment, "the victim [was] entitled by law to be free of the **[**90]** fear he [was] quelling by giving property to the defendant . . . [and thus] the 'something of value' the victim received [was], as a matter of law, as 'imposed, unwanted, superfluous and fictitious' as the hiring of a second worker to do the job that another worker is already doing." *Id.* (citations omitted).

The court then focused on those cases in which the victim receives something of value yet the conduct is found to be hard bargaining. It drew examples of this conduct from the Second Circuit's opinion in *United States v. Capo, 791 F.2d at 1062-63*, which stated that:

> although a job applicant who has long been out of work may have a fear of not obtaining employment that would constitute a fear of economic loss within the meaning of the Act, the Act would not ordinarily reach, for example, the efforts of a prospective employer to bargain down the level of compensation to be paid the applicant. Nor would it reach the normal activities of an employment agency in dealing with the applicant even if, for example the agency required payment from its applicants of some sort of filing fee, service charge, or contingent fee.

In these cases, the defendant **[**91]** is legally entitled to the property obtained from the victim since he has provided real value in exchange for that property, and the victim has no preexisting right to be free of the fear he is quelling in return for his payment to the defendant.

A further example of hard bargaining was provided by the facts of *Viacom* itself. Since the plaintiff had received something of value in return for the property transferred to the defendants, the court looked to whether the law entitled "Viacom to a right to pursue its business interests free of the problems and fears caused by the threat of a takeover by defendants." *747 F. Supp. at 213*. The court found that the law granted no such entitlement and thus that

> ***HN26***[] any intentional exploitation of fear by defendants was only part of "hard bargaining" in a deal which resulted in plaintiff receiving a benefit to which it was not otherwise entitled by law. Accordingly, defendants did not obtain property from plaintiff to which they had no lawful claim and therefore did not commit extortion.

Id. at 213-14. **[**92]**

In the present case, the property that U.S. Healthcare obtained from Gary's was the payments made by Gary's to CHA pursuant to its TPA contract. In return for this property, U.S. Healthcare gave Gary's access to its provider network -- something that is of considerable value to Gary's. Thus, like the court in *Viacom*, we deal with a very narrow subset of the potential universe of **[*526]** extortion cases: one involving solely the accusation of the wrongful use of economic fear where two private parties have engaged in a mutually beneficial exchange of property. While we believe that the fact-bound nature of this type of case will not supply a generalized precept, we are convinced by the logic of *Viacom* that BCI's extortion claim can only survive if Gary's had a right to pursue its business interests free of the fear that it would be excluded from the provider network. Albeit with misgivings, we find that it had no such right.

The chief obstacle to BCI's claim is the fact that Pennsylvania, unlike many other states, has not adopted an "Any Willing Provider" law which compels HMOs to allow *all* interested and minimally qualified providers into their networks. If such a **[**93]** law were in force, then Gary's would have had a legal entitlement to be a member of the provider network and thus to be free of the fear that it would be excluded from that network if it did not switch TPA providers. [22] **[**94]** However, in the absence of such a law, Gary's has no right of access to the U.S. Healthcare network and thus U.S. Healthcare could have denied Gary's access to its network for any reason, or for no reason at all. Under these conditions, U.S. Healthcare had the right to exchange the valuable consideration of inclusion in its network in return for consideration from Gary's in the form of its TPA contract. We thus conclude that this case provides an example of hard bargaining rather than extortion. [23]

BCI raises several arguments in opposition to this conclusion. First, BCI submits that even if Gary's had no right to membership in the provider network per se, it did have a right to compete for membership in that network free from coercion. BCI attempts to ground this right in our holding in *Addonizio, supra.* In that case, we considered extortion charges based on public corruption in which government officials demanded kickbacks from contractors, suppliers and engineers engaged in public works projects for the city of Newark, New Jersey. In upholding defendants' extortion convictions, we determined that, while the contractors have no right to obtain a contract with the city, they "have a right to **[**95]** expect that when they incur time and expense to bid on *public* projects, they will be awarded contracts when their bids are lowest . . . . The City of Newark had systematically destroyed this right." *451 F.2d at 73* (emphasis added).

Our holding in *Addonizio* is distinguishable since it is based on the right of private citizens to compete for government contracts on a level playing field. Such a right is solidly embedded in public policy. *See also United States v. Collins, 78 F.3d 1021, 1030* (6th Cir.), *cert. denied*, *U.S. , 117 S. Ct. 189 (1996)* (upholding Hobbs Act conviction of husband of Kentucky Governor charged with soliciting political contributions in exchange for right to contend for state contracts since "[payors] acted out of fear that without payments they could lose the opportunity to compete for government contracts on a level playing field, an opportunity to which they were legally entitled."). In this case, involving solely private parties, and in the absence of an Any Willing Provider Law, Gary's had no such right to a level playing field.

c. Evidence of Other Unlawful Objectives

BCI also **[**96]** argues that even if U.S. Healthcare did not have the unlawful objective of obtaining property to which it had no lawful claim, it had three other unlawful objectives **[*527]** that convert the economic coercion at issue here into extortion. [24] **[**97]** They are (1) violation of Pennsylvania's insurance fraud statute; (2) violation of New Jersey's Any Willing Provider law; and (3) violation of U.S. Healthcare's own internal procedures. Of these three objectives, the jury was only instructed as to BCI's theory that the defendants use of economic fear was wrongful because it had the unlawful objective of violating the Pennsylvania Insurance Fraud statute, and thus we address only that theory in the text. [25] The other two theories, on which the jury was not instructed, are rejected summarily in the margin. [26]

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[22] Indeed, if Pennsylvania had such a law not only might the outcome of this suit, at least as it pertains to the RICO counts, be different, but it is likely that the underlying facts would never have occurred. Those facts, which demonstrate how heavy-handed tactics can be effectively applied by a large corporation (U.S. Healthcare) against a small firm (Gary's) in this context, might suggest to the Pennsylvania General Assembly that it is time to enact an Any Willing Provider law in Pennsylvania.

[23] This is also not a case where U.S. Healthcare exerted monopoly power in the market for pharmaceutical customers. Under such circumstances, the antitrust laws might well confer on Gary's the legal right to be free of the economic coercion arising from U.S. Healthcare's monopoly. However, we are not presented with such a case and thus do not opine on the potential success of such a theory.

[24] Since we conclude that each of these allegations of wrongful objectives lacks support, we need not decide whether proof that defendants' possessed one of these objectives would be sufficient to convert U.S. Healthcare's use of the fear of economic loss into extortion where U.S. Healthcare had a lawful right to the property obtained.

[25] The district court also instructed the jury that one such unlawful objective would be "a violation of the Federal antitrust laws." In light of the fact that we vacate the antitrust verdict, this instruction alone might compel us to vacate the jury finding with respect to extortion and, indeed, to the whole of the RICO count. However, since we find that both claims fall of their own weight, we need not rely on this flawed jury instruction as grounds for reversal, and thus do not address BCI's contention that U.S. Healthcare waived any objection to the instruction.

[98]** ***HN27***[] The Pennsylvania insurance fraud statute provides that:

> a health care provider may not compensate or give anything of value to a person to recommend or secure the provider's service to or employment by a patient or as a reward for having made a recommendation resulting in the provider's service to or employment by a patient.

18 Pa. Cons. Stat. Ann. § 4117(b)(2) (Purdon 1997). We disagree with BCI that the jury could reasonably have concluded that U.S. Healthcare's conduct violated this statute. By its terms the statute forbids providers from buying recommendations or referrals of patients, and is thus properly characterized as an "anti-kickback" statute directed at providers rather than insurers, such as HMOs. Even if we ignored the statute's clear focus, BCI's contention that U.S. Healthcare violated the statute by referring patients to pharmacies that agreed to give them a benefit fails for two reasons. First, the record does not support an inference that U.S. Healthcare recommended that its members patronize any particular pharmacy in the network. Second, health care **[**99]** providers generally give HMOs something of value (at least in the form of lower prices) in exchange for admission into a network. Thus, if the allegations in this case violated the statute, HMOs might be rendered illegal in Pennsylvania. The Pennsylvania General Assembly could not have so intended.

2. Commercial Bribery

HN28[] The Pennsylvania commercial bribery statute states that a "person who holds himself out to the public as being in the business of making disinterested selection, appraisal, or criticism of commodities or services" violates the law "if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism." *18 Pa. Cons. Stat. Ann. § 4108(b)* (Purdon 1983). Thus, in order for the conduct in this case to constitute commercial bribery, BCI would have to prove (1) that U.S. Healthcare held itself out as being in the business of making *disinterested* selection, appraisal or criticism of health care providers; and (2) that it solicited, accepted, or agreed to accept a **[*528]** benefit to influence that selection, appraisal or criticism.

[100]** BCI argues that the jury had sufficient evidence before it from which to conclude that the defendants held themselves out to the public as selecting providers disinterestedly, based solely on the quality of the provider. BCI points to the testimony of defendant Wolfson to the effect that U.S. Healthcare holds itself out as having quality assurance procedures, and to a snippet from U.S. Healthcare's annual report which boasts of U.S. Healthcare's performance monitoring and quality assessment systems for the health care providers in its networks, and which states that the quality assessments systems "begin with the certification of providers before they can become eligible to care for our members."

U.S. Healthcare responds convincingly that this evidence merely documents the reality that provider quality was a necessary, but not always sufficient, criterion for inclusion in its network. The "bottom line" is that U.S. Healthcare is not a disinterested appraiser of health care providers; it is an HMO. An HMO is designed to provide access to low-cost, good quality health care, at a profit for the HMO. Thus, while U.S. Healthcare is required by law to allow only qualified providers into **[**101]** its network, [27] and chooses its providers from the set of qualified providers, it alone decides whom within that set to admit largely on the basis of a provider's willingness to furnish care at managed

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[26] BCI's claim that U.S. Healthcare had the unlawful objective of violating the New Jersey Any Willing Provider Law, *see N.J.S. 26:2J-4.7(a)(2)*, fails because BCI has RICO standing only to recover for the loss of its TPA contract with Gary's, all of whose pharmacies are located in Pennsylvania.

BCI's argument that U.S. Healthcare had the unlawful objective of violating its own internal regulations is founded on BCI's assertion that U.S. Healthcare's internal regulations required it to admit into its network all pharmacies whose applications met U.S. Healthcare's admission criteria. BCI's brief, however, does not clearly specify the exact regulation(s) in which such a requirement is contained, and it is not at all clear that such regulations exist. At all events, BCI's claim must fail since, even if U.S. Healthcare's regulations did contain such a requirement, we see no reason why violation of an internal regulation regarding provider admission would be unlawful.

[27] *See* 28 Pa. Code. § 9.71 (1997).

care rates. There is nothing disinterested about this process, and we find no evidence to support a finding that U.S. Healthcare represented to the public that the process was, in fact, disinterested.

Finally, we note that the essence of BCI's claim is that U.S. Healthcare used its quality assurance machinery not just to assure quality, but also to coerce Gary's into giving CHA its TPA business. The commercial bribery statute, however, is not concerned with the motive underlying U.S. Healthcare's use of its quality assurance procedures, so long as U.S. Healthcare did not hold itself out as a disinterested appraiser of pharmacies. Thus, while evidence of such coercion provides fodder for BCI's tortious interference claim, *see infra*, it is misplaced in the context of **[**102]** an argument regarding the carefully circumscribed crime of commercial bribery. In sum, since BCI failed to produce evidence to support a finding that U.S. Healthcare held itself out as a disinterested appraiser of pharmacies, we must set aside the jury's finding that some of the defendants committed commercial bribery.

3. Mail and Wire Fraud

HN29[] The federal mail and wire fraud statutes, *18 U.S.C. § 1341* and *18 U.S.C. § 1343*, prohibit the use of the mails or interstate wires for the purpose of carrying out any scheme or artifice to defraud. *See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1413 (3d Cir. 1991)*. "A scheme or artifice to defraud need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *Id. at 1415* (internal quotations omitted).

BCI contends that there was ample evidence for the jury reasonably to have found that the defendants engaged in a scheme to defraud **[**103]** Gary's concerning the nature and purpose of the quality assurance audit and freeze of the Eagleville store, and the reason for the refusal to process the Abington store application. BCI submits that, whereas the defendants led Gary's to believe that legitimate quality assurance concerns motivated their actions, U.S. Healthcare really intended to use the audit as a means to pressure Gary's into switching to CHA as its TPA. Assuming that BCI is correct regarding U.S. Healthcare's true motivation (and the record supports their view), the failure to disclose this motivation does not create a cognizable "scheme to defraud" in the absence of any evidence that this omission was "reasonably calculated to deceive" Gary's.

Here, such a conclusion is not supported by the record evidence, which instead supports the conclusion that Gary's was well aware of the fact that the audits were motivated either by a desire to retaliate against it **[*529]** for canceling the contract with U.S. Healthcare and switching to a self-insurance program, or by a desire to encourage it to choose CHA as its TPA. Indeed, the thrust of plaintiff's case is that Gary's was so acutely aware of this fact that it felt **[**104]** that it had no choice but to switch TPA providers. Moreover, if U.S. Healthcare's intention was to use the audits as a means of coercing Gary's to switch TPA providers, it would make little sense to conceal this underlying motivation from Gary's. [28]

As was the case with BCI's commercial bribery claim, the evidence of defendants' heavy-handed business tactics **[**105]** and, specifically, of their misuse of the quality assurance machinery, while relevant to a tortious interference claim, cannot be made to fit within the statutory and doctrinal constraints of the mail and wire fraud statutes.

4. The Travel Act

HN30[] To make out a violation of the Travel Act, *18 U.S.C. § 1952*, BCI is required to prove interstate travel or use of an interstate facility with the intent to promote unlawful activity. *See United States v. Zolicoffer, 869 F.2d 771, 774 (3d Cir. 1989)*. "Unlawful activity" is "extortion, bribery, or arson in violation of the laws of the State in which

[28] Further, to the extent that BCI contends that U.S. Healthcare's proffered justification for the audit -- Gary's excessive use of brand name drugs -- was an overt misrepresentation, we disagree. The record shows that Gary's employees conceded that the stated reason was accurate, and that the audit revealed that Gary's was using generic drugs far less than the network average and inadequately documenting decisions not to use them. Our conclusion does not diminish BCI's claim that the audit was intended to coerce Gary's choice of TPA providers since even a "legitimate" audit may, based on timing and other circumstances, have a coercive purpose and effect.

committed or of the United States." 18 U.S.C. § 1952(b)(2). Thus, BCI's Travel Act claim hinges on the success of its Hobbs Act and commercial bribery claims. Since we have determined that the jury's findings of these predicate acts must be set aside, so too must be the finding of a Travel Act violation.

D. Conclusion

Having found that the BCI did not present a sustainable case that defendants committed any of the alleged predicate **[**106]** acts, we must set aside the verdict that defendants violated 18 U.S.C. § 1962(c) and that they conspired to violate that section as prohibited by 18 U.S.C. § 1962(d). [29]

V. TORTIOUS INTERFERENCE

In addition to finding for BCI on its federal law claims, the jury also awarded BCI damages on the theory that defendants unlawfully and improperly interfered with BCI's existing and prospective contractual relations with Gary's. Defendants challenge this **[**107]** verdict on the ground that, as competitors for Gary's TPA business, they had a privilege to interfere with BCI's terminable at will contract with Gary's so long as they did not employ "wrongful means". *See* Restatement (Second) of Torts § 768(1)(b) (1979). Defendants contend that BCI made no legally sufficient showing of wrongfulness, and thus that the "competitors' privilege" compels entry of judgment in their favor on BCI's tortious interference claim. In the alternative, defendants argue that even if BCI presented a jury question on tortious interference, a new trial is required because of an error in the jury charge.

HN31[] Pennsylvania recognizes both interference with existing contractual relations and interference with prospective contractual relations as branches of the tort of interference with contract. *See* U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 925 (3d Cir. 1990). While the two branches of tortious interference are distinct, they share essentially the same elements. **[*530]** ***HN32***[] **[**108]** In order to prevail on a claim for intentional interference with contractual or prospective contractual relations, a plaintiff must prove:

(1) the existence of a contractual, or prospective contractual relation between itself and a third party;

(2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent the prospective relation from occurring;

(3) The absence of a privilege or justification on the part of the defendant;

(4) the occasioning of actual legal damage as a result of the defendants' conduct; and

(5) for prospective contracts, a reasonable likelihood that the relationship would have occurred but for the interference of the defendant

Pelagatti v. Cohen, 370 Pa. Super. 422, 536 A.2d 1337, 1343 (Pa. Super. 1988); *see also* Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 471 (Pa. 1979); Birl v. Philadelphia Elec. Co., 402 Pa. 297, 167 A.2d 472, 474 (Pa. 1960).

The defendants assert that BCI failed to present sufficient evidence to satisfy the third element of its claim, which is the absence of privilege or justification **[**109]** on the part of the defendants. In support of this contention the defendants direct us to § 768 of the Restatement (Second) of Torts which sets forth the competitors' privilege. That section provides:

§ 768. Competition as Proper or Improper Interference.

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[29] Defendants have also argued that the aiding and abetting liability imposed on the three U.S. Healthcare executives cannot survive because the statutory analysis applied to securities cases by the Supreme Court in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994), if applied to the RICO statute, would eliminate RICO aiding and abetting liability. In view of the dismissal of the RICO claims, that argument need not be reached.

(1) ***HN33***[] One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

(c) his action does not create or continue an unlawful restraint of trade and

(d) his purpose is at least in part to advance his interest in competing with the other.

(2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

[110]** *Section 768* has been recognized by Pennsylvania courts, *see Gilbert v. Otterson, 379 Pa. Super. 481, 550 A.2d 550, 554 (Pa. Super. Ct. 1988)*; *Franklin Music Co. v. American Broadcasting Co., 616 F.2d 528, 543-44 (3d Cir. 1980)*, which are guided by the Restatement of Torts in the area of tortious interference, *see Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (Pa. 1978)*.

As a threshold matter, the parties dispute whether BCI's contract with Gary's was prospective or existing, and thus whether defendants can even seek the protection of *§ 768*. BCI contends that, since it had an existing contract with Gary's at the time of defendants' alleged interference, defendants' status as competitors could not make the interference proper. *See § 768(2)*. In response, defendants argue that BCI's contract with Gary's was terminable at will, and thus that the Restatement would characterize it as prospective, *see Restatement (Second) of Torts § 766 cmt. g*. ("an interference with [a contract terminable at will] is closely analogous to interference with prospective contractual relations."), thereby bringing **[**111]** defendants' behavior within the ambit of *§ 768(1)*. While the proper classification of at will contracts in tortious interference case law has been the subject of some controversy, we need not enter this debate here since *§ 768(1)*, by its terms, applies to alleged interference with *either* prospective contractual relations or existing contracts terminable at will. There is no question that BCI's contract with Gary's was terminable at will. [30]

Turning to the four elements set forth in *§ 768(1)*, the parties do not contest that elements **[*531]** (a) and (d) are satisfied. BCI and CHA were competitors for Gary's TPA contract, and defendants had the purpose, at least in part, of advancing their interests through their competition with BCI. We also conclude that **[**112]** to the extent that BCI is arguing that defendants' conduct constituted an unlawful restraint of trade within the meaning of *§ 768(1)(c)*, this contention is foreclosed by our reversal of BCI's antitrust claim and BCI's failure to show how defendants conduct violated any other federal or state statutory or common law anti-competitive prohibition. Thus, the question is whether defendants' actions were privileged business competition, which turns on whether they employed "wrongful means" of inducement in their efforts to secure Gary's TPA contract. *See § 768(1)(b)*.

The Pennsylvania Supreme Court has yet to provide a definition of "wrongful means", and thus we turn to the Restatement for guidance. In defining what kind of means are wrongful, *comment e to § 768* provides, in part, that:

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[30] BCI's contract with Gary's provided that "either party may terminate this Agreement for any reason or no reason at any time upon thirty (30) days written notice." This language clearly marks the contract as terminable at will upon proper notice.

> If the actor employs wrongful means, he is not justified under the rule stated in this Section. The predatory means discussed in § 767, Comment c, physical violence, fraud, civil suits and criminal prosecutions, are all wrongful in the situation covered by this Section.

Other courts, relying partly on this language, have interpreted the wrongful means element of *§ 768* to require independently **[**113]** actionable conduct on the part of the defendant. *See*, *e.g.* *DP-Tek, Inc. v. AT&T Global Information Solutions Co., 100 F.3d 828, 833-35 (10th Cir. 1997)*.

Under this standard, wrongful means are those that are themselves capable of forming the basis of liability for the defendant. *Id. at 834* (citing *Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483 (8th Cir. 1992))*. The defendants contend that the Pennsylvania Supreme Court would adopt this construction of wrongful means, and that we must therefore set aside the tortious interference verdict as a matter of law since BCI has failed to identify any basis on which the defendants' conduct could be independently actionable other than the antitrust and RICO theories which we have found to be legally untenable.

The disposition of BCI's claim, however, does not require us to determine whether Pennsylvania would limit wrongful means to those that are independently actionable because the allegations of wrongful means in this case differ in one crucial aspect from those in cases such as *DP-Tek*. Whereas in *DP-Tek* the defendant was accused of using wrongful means in the market in which **[**114]** it and the plaintiff competed, here BCI has alleged that the defendants employed economic pressure in what we have deemed the market for pharmacy customers (where BCI was not a competitor) in order to force Gary's hand in the TPA market (where BCI and CHA competed). This form of "competition" is specifically deemed wrongful by the portion of comment e which directly follows that quoted above. It reads:

> ***HN34***[] The rule stated in this Section rests on the belief that competition is a necessary or desirable incident of free enterprise. Superiority of power in the matters relating to competition is believed to flow from superiority in efficiency and service. If the actor succeeds in diverting business from his competitor by virtue of superiority in matters relating to their competition, he serves the purposes for which competition is encouraged. *If, however, he diverts the competitor's business by exerting a superior power in affairs unrelated to their competition there is no reason to suppose that his success is either due to or will result in superior efficiency or service and thus promote* **[**115]** *the interest that is the reason for encouraging competition. For this reason economic pressure on the third person in matters unrelated to the business in which the actor and the other compete is treated as an improper interference*.

§ 768, cmt. e. (emphasis added)

Based on the this section of comment e, we believe that even if the Pennsylvania Supreme Court were to require independently actionable means, it would not apply that requirement in cases, such as this one, where the defendant exerted "economic pressure" or "a superior power" in a market unrelated **[*532]** to the competitive market. *Cf.* *DP-Tek, 100 F.3d at 835 n.8* (citing comment e and noting that an exception to the independently actionable conduct requirement may exist "where a plaintiff proffers evidence that the defendant exerted 'a superior power in affairs unrelated' to the business in which they compete."). The defendants contend that Pennsylvania, while it has adopted *§ 768*, would ignore this portion of comment e. We disagree, since we see no reason why Pennsylvania would subscribe to the requirements of *§ 768*, but only to selective portions of the comments explaining that section.

[116]** BCI proffered ample evidence from which a jury could conclude that U.S. Healthcare attempted to acquire Gary's TPA business by threatening Gary's with withdrawal of its membership in the U.S. Healthcare provider network. BCI also adduced evidence of heavy-handed tactics by U.S. Healthcare in the market for pharmacy customers. As was discussed in the RICO section, a reasonable jury could have found that U.S. Healthcare used its quality assurance machinery not only to assure quality, but also to generate economic pressure on Gary's to switch TPA providers. While we found that this coercive misuse of the quality assurance apparatus was not cognizable as commercial bribery or mail/wire fraud, *see supra*, it is sufficient, based on comment e, to constitute wrongful means under Pennsylvania tortious interference law.

Defendants seek to avoid the clear application of comment e to their actions by arguing that since both comment e and federal tying/coercive reciprocal dealing jurisprudence are concerned with the extension of economic power from one market to another, the two bodies of law should be read in tandem, and thus that BCI's failure to show that the defendants possessed sufficient **[**117]** market power to violate the Sherman Act should preclude BCI, as a matter of law, from recovering on its tortious interference claim. Put differently, defendants assert that they could not apply "economic pressure" on Gary's in the market for pharmaceutical customers since they did not have appreciable market power, under federal law, in that market. We disagree both with the defendants' reading of comment e and with the premise that state tortious interference law and federal ***antitrust law*** should be read in *pari materia*.

Defendants' argument that the federal market power requirement must be grafted onto comment e is predicated on their suggestion that without such a requirement, comment e would render all reciprocal dealing/tying arrangements tortious -- even those that are pro-competitive. (Our reference to pro-competitive tying arrangements is to those that do not violate the Sherman Act.) Defendants submit that such a result would be contrary to the public policy of Pennsylvania as evidenced by the Commonwealth's failure to pass an Any Willing Provider law. According to the defendants, this failure indicates that Pennsylvania favors selective contracting between HMOs and providers, **[**118]** and thereby approves of the conduct at issue here.

We decline to read an affirmative policy statement into a legislature's failure to pass a law; to do so would be wholly speculative. But even if defendants are correct that Pennsylvania has a policy of allowing HMOs to decide whom to admit into their networks, it would stretch this policy beyond its logical constraints to find in it tacit approval of the use of threatened exclusion from a pharmacy network to foreclose competition on the merits in an unrelated market.

Furthermore, we do not agree with defendants' reading of comment e. Rather, ***HN35***[] we read the language requiring the plaintiff to show that the defendant employed "economic pressure" and "a superior power" in the unrelated market as requiring evidence that the defendant used its economic power in that market to coerce the third party's decision in the competitive market. In order to show coercive pressure, the plaintiff must prove that the defendant exercised *some* market power in the unrelated market -- lest the third party simply ignore its demands. However, we see no reason **[**119]** why economic coercion cannot be generated by market power that, while not sufficient to violate the **[*533]** Sherman Act, is nonetheless not insignificant, which is the case here. [31]

[120]** Viewing the preceding discussion in a broader context, defendants' contention that comment e should be read to include a federal market power requirement ignores the different purposes and scopes of inquiry of the two bodies of law. In particular, it fails to recognize both the gatekeeping role that the market power requirement plays in federal tying jurisprudence and the quite different policies of state tort law. Federal ***antitrust law*** is directed at protecting competition rather than individual competitors, and outlaws only those tying/reciprocal dealing arrangements that substantially foreclose competition in the tied product market. The market power requirement of the *per se* antitrust jurisprudence serves this goal since it is presumed that where the defendant exercises appreciable market power in the tying product market it can leverage that power to substantially foreclose competition in the tied product market.

The use of the federal market power screen is, however, inapposite to state tortious interference law which does not predicate liability on a showing that the defendant's conduct had broad anti-competitive effects. ***HN36***[] **[**121]**

[31] We reject defendants' argument that they are entitled to judgment as a matter of law since the only *direct* evidence that Gary's was coerced consists of hearsay testimony from three BCI employees to whom Gary's Robin Risler indicated that she was forced to fire BCI, and testimony from Sandra Chen that Gary Wolf had indicated to her that he was under pressure to entertain a bid for U.S. Healthcare's TPA service. The district court properly admitted these statements pursuant to *Fed. R. Evid. 803(3)*, the "state of mind" exception to the hearsay rule, with the limiting instruction that the jury should not view the testimony as proof of the truth of the underlying facts asserted. Defendants contend that despite this instruction, the jury must have improperly used the testimony as substantive evidence of coercion, because there was no other evidence of coercion. We disagree with this conclusion and with the defendants' view of the evidence, since we believe that there is ample *circumstantial* evidence from which a jury could have reasonably inferred that Gary's was coerced. Defendants are, of course, free to argue their view of the evidence on remand.

Unlike federal ***antitrust law***, state tortious interference law is designed to protect competitors not competition. In this regard, it bases liability for competitors, in part, on the means of competition employed and their effect on a single competitive interaction. This inquiry neither requires, nor is served by, a showing that the defendant exercised appreciable market power.

In the end, we take a fundamentally different view of BCI's tortious interference claim from that espoused by the defendants. As we noted earlier in this opinion, the crux of defendants' argument is that BCI should not be able to repackage a failed antitrust claim as tortious interference. In our view, BCI has attempted just the opposite. That is, it has taken conduct that constituted tortious interference with contractual relations and attempted to turn it into violations of federal antitrust and racketeering laws. While these attempts have been derailed on this appeal, that result does not foreclose BCI's state tort law claim.

Despite our determination that BCI adduced sufficient evidence at trial to allow a reasonable jury to find that defendants employed wrongful means and thus acted outside the scope of **[**122]** the competitors' privilege, we must reverse the judgment and remand the case for a new trial because of errors in the relevant jury charge. The district court instructed the jury on "wrongful means" as follows:

> It is -- wrongful means to take business away from a competitor by using economic power in matters that are unrelated to the business in which the competitors compete. Thus taking away a competitor's business by applying economic pressure in an area that is unrelated to the field in which the parties compete constitutes wrongful means.
>
> Wrongful means also include any unlawful conduct in violation of specific statutory provisions or of established public policy.
>
> To determine whether a defendant's interference was wrongful, you should consider the following factors: first, the nature of the actor's conduct; second, the actor's motive; third, the interests of the other with which the actor's conduct interferes; **[*534]** fourth, the interests sought to be advanced by the actor; fifth, the social interests in protecting the freedom of action of the actor and the contractual interests of the other; sixth, the proximity or remoteness of the actor's conduct to the interference **[**123]** and, seventh, the relations between the parties.

As set out in the proceeding discussion, the first paragraph of this instruction, which is derived from *comment e to § 768*, provides a proper basis on which the jury could have determined that the defendants' conduct was wrongful. However, the second paragraph, while an accurate statement of the law, necessitates a retrial because it invited the jury to import the errors in the antitrust and RICO analysis, as set out *supra*, into the tortious interference analysis. Indeed, based on the prominent position that BCI's antitrust claim occupied at trial, such infection almost certainly occurred. Faced with this circumstance, the proper course is for us to remand for a new trial rather than attempt to divine the basis of the jury's verdict. *See* *Wilburn v. Maritrans GP, Inc., 139 F.3d 350, 1998 U.S. App. LEXIS 4134, 1998 WL 100551*, *9 (3d Cir. 1998) ("***HN37***[] Where a jury has returned a general verdict and one theory of liability is not sustained by the evidence or legally sound, the verdict cannot stand because the court cannot **[**124]** determine whether the jury based its verdict on an improper ground."); *Avins v. White, 627 F.2d 637, 646 (3d Cir. 1980)* (" 'Where . . . a general verdict may rest on either of two claims -- one supported by the evidence and the other not -- a judgment thereon must be reversed.' ") (quoting *Albergo v. Reading Co., 372 F.2d 83, 86 (3d Cir. 1967))*; *see also* *McKenna v. Pacific Rail Service, 32 F.3d 820, 831-32 (3d Cir. 1994)*. [32]

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[32] We do not believe that any doubt is cast on the applicability of this general rule by the fact that this case was submitted to the jury on special interrogatories and thus, unlike the cases cited, the jury did not render a general verdict. Our reading of the verdict sheet submitted to the jury in this case indicates that, at least as to the tortious interference count, the verdict rendered by the jury was the functional equivalent of a general verdict. The sole question relating to tortious interference liability posed to the jury was

> Do you find that the plaintiff has proven by a preponderance of the evidence that the following defendants intentionally interfered with the plaintiff's existing or prospective contractual relations.

[125]** BCI argues that remand is not required since defendants' waived any objection to the jury charge. Their argument has two bases. The first is ***HN38***[] *Fed. R. Civ. P. 51* which requires any objections to the jury charge to be made at the close of the charge. As BCI correctly notes, no such objection was lodged in this case. Despite this failure, we do not find waiver since we see no basis on which defendants could have objected to this portion of the instruction. As noted, the problem with the court's instruction was not that it misstated the law, but rather that, in correctly stating the law, it created the possibility that errors in the RICO and antitrust verdicts would contaminate the tortious interference verdict. Thus, it was not until our decision on appeal that the tortious interference instructions became erroneous. In such a situation, it would be unfair to visit the harsh consequence of waiver on the defendants. This conclusion is buttressed by the fact that defendants did object at trial to the jury instructions regarding the alleged antitrust violation.

BCI also contends that since the **[**126]** case was submitted to the jury on special interrogatories, defendants' failure to proffer any interrogatories requiring the jury to specify the basis on which they found defendants conduct to be wrongful resulted in a waiver by defendants of any right they had to a new trial on that basis. This contention is based on *Fed. R. Civ. P. 49(a)*, which governs the use of special verdicts in the federal courts. Specifically, plaintiff relies on that part of ***HN39***[] *Rule 49(a)* which provides that if, when submitting special interrogatories to the jury, "the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires he **[*535]** demands its submission to the jury." *Fed. R. Civ. P. 49(a)*. [33]

[127]** While, under *Rule 49(a)*, a court may be deemed to have made a factual finding on an element of an offense that is necessary to sustain a judgment even though the jury did not specifically answer an interrogatory concerning that element, *see* *Watkins v. Fibreboard Corp., 994 F.2d 253, 257-58 (5th Cir. 1993)*, we do not read this rule, by its terms, as applying to the situation where, as here, the defendants' objection is not based on the fact that the wrongfulness issue was not submitted to the jury, but rather that the court gave a definition of wrongful that has been rendered erroneous by our decision on this appeal.

Nor would such an application be in keeping with the purpose of that section of *Rule 49(a)* that allows the trial court to "fill in the gaps" of a special verdict. As noted in *Watkins*, this ability

> is imperative if a special verdict . . . rather than a general verdict is to continue to be employed.
> Otherwise there would always be the danger that the special verdict would be set aside because the jury had failed to make a particular finding whereas a general verdict could not be challenged on this ground.

994 F.2d at 258 **[**128]** (citing 5A *Moore's Federal Practice* P 49.03(4) (1993); 9a Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2507 (1971)). In this case, even had the jury rendered a general verdict, we would be constrained to remand for a new trial based on errors in the charge. Thus, the need to preserve symmetry between the treatment of general and special verdicts would not be served, and would indeed be denigrated, by a finding of waiver predicated on *Rule 49(a)*.

As this interrogatory in no way facilitates our inquiry into the basis for the jury verdict, we find that the general rule requiring remand stated in *Wilburn* and *Avins* governs.

[33] ***HN40***[] *Rule 49(a)* provides:

> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

VI. CONCLUSION

For the foregoing reasons, the judgment of the district court will be reversed and the case remanded with instructions to grant judgment for the defendants' on BCI's antitrust and civil RICO claim, and to conduct a new trial on BCI's claim for tortious interference with contractual relations. [34]

[129]** The parties shall bear their own costs.

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[34] On retrial, the jury will have to consider anew whether defendants' behavior was outrageous enough to warrant an award of punitive damages under Pennsylvania law. *See* *Takes v. Metropolitan Edison Co., 440 Pa. Super. 101, 655 A.2d 138, 146 (Pa. Super. 1995)* ***HN41***[] ("Punitive damages will lie only in cases of outrageous behavior, where defendant's egregious conduct shows either an evil motive or reckless indifference to the rights of others.") While the original jury found malice on the part of U.S. Healthcare and its executives, such a finding may not be inevitable at retrial where the jury will not be under the mistaken impression that defendants' conduct violated the Sherman Act, civil RICO, and the statutes underlying the predicate acts of the RICO count. We, of course, intimate no view on that subject.

J. Allen Ramey, M.D., Inc. v. Pacific Found. for Med. Care

United States District Court for the Southern District of California

April 6, 1998, Decided ; April 6, 1998, Filed

CASE NO. Civ. 96-1738-B (RBB)

Reporter
999 F. Supp. 1355 *; 1998 U.S. Dist. LEXIS 4706 **; 1998-1 Trade Cas. (CCH) P72,146; 98 Daily Journal DAR 10329

J. ALLEN RAMEY, M.D., INC., Plaintiff, vs. PACIFIC FOUNDATION FOR MEDICAL CARE, Defendant.

Disposition: [1]** Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment granted as to all claims.

Core Terms

antitrust, prices, price-fixing, patients, competitor, summary judgment, maximum price, conspiracy, anti trust law, horizontal, consumers, vertical, preferred provider, injuries, alleges, cause of action, Sherman Act, maximum-price, membership, schedules, payors, Clayton Act, third-party, innovation, maximum, medical services, non-predatory, reimbursement, violations, anticompetitive

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Entitlement as Matter of Law, Appropriateness**

On a motion for summary judgment pursuant to *Fed. R. Civ. P. 56*, the moving party must first establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment must be granted if the party responding to the motion fails to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[ ] **Entitlement as Matter of Law, Appropriateness**

Although the moving party has the initial burden of demonstrating that summary judgment is proper, that burden may be discharged by pointing out to the court an absence of facts to support the nonmoving party's case. The burden then shifts to the nonmoving party to show that summary judgment is not appropriate. To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. When considering whether summary judgment is appropriate, the court should draw all reasonable factual inferences in favor of the nonmoving party. If the court finds that judgment may be entered as a matter of law or that no reasonable factfinder could find in favor of a party, summary judgment is warranted.

Antitrust & Trade Law > Sherman Act > Defenses

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Employer & Physician Covenants

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN3[ ] **Sherman Act, Defenses**

Agreements by competitors to fix prices are unlawful per se under the Sherman Act, and no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

HN4[] **Remedies, Damages**

The Sherman Act does not authorize private causes of action. The available remedies for private plaintiffs are found in the Clayton Act, which authorizes certain antitrust suits for monetary relief (*15 U.S.C.S. § 4*) and injunctive relief (*15 U.S.C.S. § 16*). *15 U.S.C.S. §§ 15*, *26*. A private plaintiff may not recover damages under *§ 4* of the Clayton Act merely by showing injury causally linked to an illegal presence in the market. To proceed under the Clayton Act, a private plaintiff must show that he suffered an "antitrust injury" by showing that his injury resulted directly from the defendant's anticompetitive acts, that the harm was of the type that the antitrust laws are intended to prevent, and that the injuries reflect the anticompetitive effect of the violation. The antitrust injury requirement applies to plaintiffs even when they are alleging per se antitrust violations.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Bare allegations of threatened predatory pricing are inadequate to establish antitrust injury; the circumstances must be such as to make such an allegation credible. Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

A competitor may not complain of conspiracies that set minimum prices at any level. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

Counsel: For Plaintiff: Donald Merkin, San Diego, CA.

For Defendant: Rick C. Zimmerman, San Francisco, CA.

Judges: Rudi M. Brewster, UNITED STATES DISTRICT JUDGE.

Opinion by: Rudi M. Brewster

Opinion

[*1356] ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Case Type and Jurisdiction

Plaintiff is suing Defendant under the Clayton Act for treble damages and injunctive relief for alleged violations of *§ 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*. The Court has federal question jurisdiction over this action pursuant to *15 U.S.C. §§ 15*, *26* and *28 U.S.C. § 1337*. The parties have **[*1357]** submitted cross-motions for summary judgment.

On January 22, 1998, the Court requested that the parties submit additional briefing on the following question: "Has the Plaintiff suffered an 'antitrust injury' cognizable under *§ 4* and *§ 16* of the Clayton Act? See *15 U.S.C. §§ 15*, *26*; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; *Atlantic Richfield Co. v. USA Petroleum, 495 U.S. 328, 109* ***[**2]*** *L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*."

II. Background

Plaintiff J. Allen Ramey, M.D., Inc. ("Plaintiff") is a corporation owned by Dr. Ramey that offers ear, nose, and throat ("ENT") medical services in San Diego County. [1] Defendant Pacific Foundation for Medical Care ("Defendant" or "PFMC") is a non-profit, preferred provider organization (PPO) headquartered in Santa Rosa, California, that facilitates business between health care providers (i.e., doctors, hospitals) and third-party payors (i.e., insurance companies, health care service plans). Doctors may apply to Defendant to become preferred providers. Defendant selects preferred providers based upon their willingness to agree to provide medical services within certain reimbursement rate schedules and to abide by certain cost-containment quality of care and utilization controls.

[3]** Defendant's reimbursement rate schedule is established each year by an at least nominally independent actuary, Mr. Robert Shirrell. The actuarial process reviews industry data to establish a schedule of conversion factors that weigh the relative value of different types of services. These conversion factors are multiplied by prices for specific medical procedures, as established in the 1974 California Relative Value Studies, to determine the maximum price that will be reimbursed to preferred providers for services rendered to PFMC-affiliated patients. [2] Health care providers and third-party payors are permitted, and sometimes do, lobby Mr. Shirrell to adjust the schedule. Defendant's board of trustees does not vote on the schedule, and the schedule is not submitted to doctor-members for group approval. The schedules must be accepted or rejected on a yearly basis by each individual provider when they decide whether to renew their association with Defendant.

[4]** The quality of care and utilization control standards are established by Defendant's liaison committees for each of some thirty specialties. The otolaryngology liaison committee is composed of eleven to fifteen ENT specialists from practice locations throughout the country. These standards prescribe guidelines for testing, surgery, use of alternate techniques, etc. These standards are used to determine the appropriate billing codes to be charged to a patient, and are designed to protect payors from unnecessary and excessive procedures and overbilling.

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[1] Dr. Ramey personally is not a party to this case. In fact, on November 10, 1997, California revoked Dr. Ramey's medical license for gross negligence in his treatment of a patient, although revocation was stayed and Ramey was placed on probation for a term of two years. At the same time, the report noted that Dr. Ramey had practiced for twenty-six years without any disciplinary action having been taken against him, and that he was a competent and caring physician. Because Plaintiff's counsel has continued to prosecute this lawsuit, the Court infers that Dr. Ramey's practice continues to operate, and that it will allegedly suffer antitrust injuries from Defendant's practices. However, Dr. Ramey's declaration, filed on October 24, 1997, states that he recently sold his practice and that he is currently taking a sabbatical, but that he later intends to return to work as an independent contractor at his former practice. Were the Court not granting summary judgment to Defendant, it would need to consider whether these facts would affect this lawsuit.

[2] These patients are sometimes referred to as "PFMC-affiliated patients" in this Order. However, it is important to note that the patients do not have a direct relationship with Defendant, nor are their health care choices controlled by Defendant. Their relationship with Defendant is based upon the contract between their insurer and Defendant.

A five-person membership committee reviews membership applications from the San Diego area in accordance with specified procedures. Fifty-six ENT specialists are listed in Defendant's 1997 San Diego County preferred provider directory. These doctor-members are free to join other PPO organizations. Several other PPOs operate in the San Diego area, and there is no evidence that Defendant is a dominant market actor in this area.

[*1358] Defendant contracts with third-party payors to make available its "panel" of preferred providers in accordance with its cost-containing advantages. Patients who are affiliated with these third-party payors through **[**5]** their insurance coverage or employee health benefit plans are then permitted to obtain services from preferred providers under whatever payment arrangements are established by the agreements between patients and their insurers. Typically, patients pay less money out of pocket when they visit a preferred provider, but they are not prohibited from seeking services from any doctor. In any case, the actual payments made by patients and by their insurers are governed by patients' insurance agreements, and not by Defendant. [3]

Defendant serves to bring together doctors on one side, and patients and their third-party payors on the other, by developing arguably mutually beneficial cost-containment strategies, including maximum fees for certain services. This system, a common framework among PPOs, enables insurance companies to permit their customers greater freedom to choose **[**6]** their doctor while reducing the companies' exposed risk to overbilling and providing greater assurance to patients that they will be reimbursed on a relatively more familiar and simple system than an *ad hoc* reimbursement plan.

Dr. Ramey [4] was a doctor-member of PFMC until 1989, when he claims that he quit due to conflicts about his billing practices. On June 6, 1995, Ramey reapplied for membership. His application included an explicit acceptance of Defendant's reimbursement policies, including the maximum price schedules. On August 29, 1995, Ramey was informed that his application had been denied on the grounds that his "practice patterns have been found to be inconsistent with peer review norms adopted by the Foundation or that which is generally accepted in the community." Further letters to Ramey's counsel on February 16 and April 9, 1996, explain that the membership committee believed that Ramey had a history of billing for unnecessary tests and for "unbundling" extra charges that should have been included in a global fee (e.g., charging separately for office visit or supplies that should have been included in the fee charged for a performed procedure). Ramey declined invitations **[**7]** to appear for an interview or to appeal. On October 11, 1996, Plaintiff filed this antitrust action. Plaintiff seeks the following relief: (1) a declaration that Defendant has engaged in unlawful activities, (2) $ 2,000,000 in compensatory damages, to be trebled for violation of the antitrust laws, (3) a permanent injunction preventing Defendant from enforcing its maximum fee schedule on doctors, and (4) costs and attorney's fees.

On February 4, 1997, the Court denied Defendant's motion to dismiss the suit. Both Plaintiff and Defendant have now submitted motions for summary judgment.

III. Plaintiff's Claims

Plaintiff's first cause of action alleges that Defendant's refusal to accept Dr. Ramey as a member was an illegal group boycott that limits Plaintiff's access to PFMC-affiliated patients and handicaps its ability to compete in the market **[**8]** for ENT medical services. Plaintiff argues that the boycott (1) suppresses competition in ENT services, (2) prevents Plaintiff from competing for PFMC-affiliated patients, (3) shrinks Plaintiff's clientele, and (4) discourages Plaintiff from attempting new and innovative treatment techniques.

Plaintiff's second cause of action alleges that PFMC fixes prices for medical care by imposing maximum prices to be charged by its preferred providers. Plaintiff alleges that the price-fixing scheme stifles competition and innovation

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[3] In some cases, the contracts between Defendant and third-party payors provide that Defendant will process and collect payments for the payors.

[4] Dr. Ramey, and not the Plaintiff, J. Allen Ramey, M.D., Inc., was a member of PFMC. Plaintiff itself did not apply for membership. See footnote 1 of this Order.

by rewarding the *status quo* and discouraging state-of-the-art medical care. Plaintiff further alleges that the scheme hinders its ability to compete for PFMC-affiliated patients and forces Dr. Ramey to accept the same compensation as less experienced doctors.

Plaintiff's third cause of action alleges that Defendant's rejection of Dr. Ramey's membership application was illegal because it was **[*1359]** done in furtherance of its price-fixing scheme.

IV. Discussion

A. Standard of Law

HN1[] On a motion for summary judgment pursuant to *Federal Rule of Civil Procedure 56*, the moving party must first establish that there is "no genuine issue of material fact and **[**9]** that the moving party is entitled to judgment as a matter of law." *British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978)*. Summary judgment must be granted if the party responding to the motion fails "to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. ***HN2***[] Although the moving party has the initial burden of demonstrating that summary judgment is proper, that burden may be discharged by pointing out to the court an absence of facts to support the nonmoving party's case. *Id. at 325*.

The burden then shifts to the nonmoving party to show that summary judgment is not appropriate. *Celotex, 477 U.S. at 324*. To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. Id. When considering whether summary judgment is appropriate, the Court should draw all reasonable factual inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. If the Court **[**10]** finds that judgment may be entered as a matter of law or that no reasonable factfinder could find in favor of a party, summary judgment is warranted. *Id. at 249-52*.

B. Price-Fixing

Although Plaintiff's complaint alleges three separate causes of action, the heart of this suit is the allegation, found in the second cause of action, that Defendant's member-doctors conspired to fix a maximum price for ENT medical services in the San Diego market. ***HN3***[] Agreements by competitors to fix prices are "unlawful per se under the Sherman Act, and . . . no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. In 1982, the Supreme Court applied this standard to horizontal maximum-price fixing conspiracies in the medical arena in *Arizona v. Maricopa County Medical Society, et al., 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*.

In Maricopa, the State of Arizona brought suit against two large medical societies and their respective "foundations for medical care." The defendants commanded **[**11]** the membership of large percentages of the practicing doctors in Maricopa and Pima Counties of Arizona. [5] The foundations adopted schedules establishing maximum prices for a variety of medical services. Their boards of trustees calculated "relative values" and "conversion factors" used to compute fees, and these schedules were submitted to the entire doctor-membership for approval by majority vote. Member-doctors agreed to charge no more than the maximum fee to any patient insured by a foundation-endorsed plan. Insurance policies typically permitted their insureds to visit any doctor but required them to pay any excess amount charged by the non-member physician. The Supreme Court held that, as a horizontal

[5] The Maricopa Foundation represented 70% of the practitioners in Maricopa County. *Maricopa, 457 U.S. at 339*. The Supreme Court was unable to determine precisely the membership of the Pima Foundation, noting that a 1975 publication reported 80% membership, while an affidavit filed in 1978 as part of the case reported 30%. *Id. at 340 n. 8*.

price-fixing agreement, the foundations' fee schedules constituted per se violations of *§ 1* of the Sherman Act. It was essential to Maricopa's determination of per se illegal horizontal price restraints that prices were fixed by doctors themselves. *Maricopa, 457 U.S. at 352-355*.

[12]** Defendant argues, and the Court finds at least plausible, that the instant case is distinguishable from Maricopa because doctors did not themselves establish the price schedules, and because each doctor acted individually. This argument could be construed as an attempt to characterize the price-fixing as vertical (vertical maximum prices are no longer per se illegal, *State Oil Co. v. Khan, et al., 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)*, and maximum medical prices vertically imposed by insurance companies in another case were found not to violate the antitrust laws, *Barry v. Blue Cross of California, 805 F.2d 866 (9th Cir. 1986))*. In the alternative, Defendant may be arguing that, even if it cannot be said to have a vertical relationship with its doctor-members, Maricopa still does not apply because the doctors themselves did not fix prices, but instead only made individual decisions to accept or reject fee schedules established by the actuary.

While Defendant's arguments may have merit, Plaintiff has at the least stated a case that bears a strong resemblance to Maricopa. It therefore is appropriate at this stage to determine whether, viewing the complete record **[**13]** before the Court, Plaintiff is entitled to bring a private cause of action pursuant to the Clayton Act. Therefore, the Court will first assume, *arguendo*, that Defendant's practices are congruous with those found to be per se violations in Maricopa.

C. Antitrust Injury

1. Standard of Law

HN4[] The Sherman Act does not authorize private causes of action. The available remedies for private plaintiffs are found in the Clayton Act, which authorizes certain antitrust suits for monetary relief (*§ 4*) and injunctive relief (*§ 16*). *15 U.S.C. §§ 15*, *26*. "A private plaintiff may not recover damages under *§ 4* of the Clayton Act merely by showing 'injury causally linked to an illegal presence in the market.'" *Atlantic Richfield Co. (ARCO) v. USA Petroleum, 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. To proceed under the Clayton Act, a private plaintiff must show that he suffered an "antitrust injury" by showing that his injury resulted directly from the defendant's anticompetitive acts, that the harm was of the type that the antitrust laws **[**14]** are intended to prevent, and that the injuries reflect the anticompetitive effect of the violation. *Brunswick, 429 U.S. at 488-489*. The activities of a monopolist or cartel may indeed injure a competitor through increased competition, but such harm does not create a private right of action. The antitrust injury requirement is purposed on the maxim that antitrust laws were enacted for the "protection of competition, not competitors." *Id. at 488* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*. The requirement is not derived from constitutional standing, but instead from prudential concerns about potential misappropriation of ***antitrust law*** for unintended purposes.

The antitrust injury requirement applies to plaintiffs even when they are alleging per se antitrust violations. See *ARCO, 495 U.S. at 341-346*. ARCO involved allegations of vertical, maximum price fixing. At the time ARCO was decided, vertical maximum price-fixing was illegal per se, as established in *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)* (Albrecht was overruled in *State Oil Co. v. Khan, et* ***[*1360]*** *al., 139* ***[**15]*** *L. Ed. 2d 199, 118 S. Ct. 275 (1997))*. In ARCO, the Supreme Court rejected the plaintiff's argument that antitrust injury can be inferred by the existence of per se violations. The Court determined that the purpose of the antitrust injury requirement was unrelated to the factors that guide per se versus rule-of-reason analysis, and that "proof of a per se violation and of antitrust injury are distinct matters that must be shown independently." *ARCO, 495 U.S. at 344* (quoting 2 AREEDA & HOVENKAMP, ***ANTITRUST LAW***, P 334.2c, p. 380 (1989 Supp.).

The Court must be particularly sensitive to the antitrust injury requirement in this case because Plaintiff is a competitor, not a consumer. As the Seventh Circuit has noted, "competitors' theories of injury under *section 4* deserve particularly intense scrutiny. … Whenever the plaintiff and consumers have divergent rather than congruent interests, there is a potential problem in finding 'antitrust injury.' If, as in Brunswick, itself, the plaintiff and defendant are competitors, the plaintiff gains from higher prices and loses from lower prices--just the opposite of the consumers' interest. When the plaintiff is a poor champion of **[**16]** consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust." *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1419 **[*1361]** (7th Cir. 1989)* (citations omitted). See also 2 AREEDA & HOVENKAMP, ***ANTITRUST LAW***, P 373a, p. 275 (1995 ed.) ("Because a competitor opposes efficient, aggressive, and legitimate competition by his rivals, he has an incentive to . . . use an antitrust suit to delay their operations or induce them to moderate their competition. For that reason, the courts should be skeptical of a plaintiff's claims that his rivals have violated the antitrust laws and caused . . . antitrust injury.")

While the precise legal standards are stated elsewhere in this Order, it cannot be said too often that the only injuries that qualify as antitrust injuries are injuries of the type that Congress intended to protect when they adopted the antitrust laws. The definition does not include other injuries directly caused by acts clearly prohibited by the antitrust laws. Nor does the definition include injuries to an individual business' competitiveness (i.e., being forced out of business) that are ultimately caused by **[**17]** fair market forces, even in the presence of clear antitrust violations.

The Court must therefore examine the nature of Plaintiff's alleged injuries. To review possible bases for antitrust injury caused by a maximum price scheme, the Court will focus its evaluation on two cases: (1) ARCO, in which the Supreme Court considered whether a competitor could establish antitrust injury from a vertical maximum-price fixing conspiracy; and (2) because ARCO involved vertical price-fixing, the Court will evaluate potential theories of antitrust injury unique to a horizontal price-fixing scheme as contemplated in Maricopa.

2. ARCO

While ARCO involved vertical price-fixing, its analysis of competitor antitrust injury allegations is highly instructive. The plaintiff, USA Petroleum Company (USA), was an independent retail marketer of gasoline that purchased gasoline from major petroleum companies for resale under its own brand name. The defendant, Atlantic Richfield Co. (ARCO), was an integrated oil company that sold its gasoline to consumers directly through its own stations and indirectly through ARCO-brand dealers. In the early 1980s, ARCO developed a marketing strategy **[**18]** to compete with independent, discount gasoline retailers. The strategy included the elimination of credit card sales and the provision of short-term discounts to retailers to enable them to match retail prices offered by independents. USA sued, alleging that ARCO conspired to fix maximum prices at artificially low levels in violation of *§ 1* of the Sherman Act.

The district court granted summary judgment for ARCO on the *§ 1* claim, finding that "even assuming that [USA] can establish a vertical conspiracy to maintain low prices, [USA] cannot satisfy the 'antitrust injury' requirement of Clayton Act *§ 4*, without showing such prices to be predatory." *ARCO, 495 U.S. at 333* (internal quotations omitted). A divided panel of the Ninth Circuit reversed, but the Supreme Court granted *certiorari* and reversed.

The Supreme Court wrote that an injury, "although causally related to an antitrust violation, nevertheless will not qualify as antitrust injury unless it is attributable to an anti-competitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition." *ARCO, 495 U.S. at 334* (internal **[**19]** punctuation and citations omitted). The Court rejected the notion that the antitrust injury requirement can be satisfied by a showing that the long-term effect of the allegedly violative conduct would ultimately reduce competition. *Id. at 337 n.7*. "Rivals cannot be excluded in the long run by a nonpredatory maximum-price scheme unless they are relatively inefficient." Id. (citations omitted).

Plaintiff has not alleged that Defendant's prices are predatory. Even if it had, it appears highly unlikely that such a claim could be supported. [6] Therefore, ARCO suggests **[*1362]** that Plaintiff has not suffered an antitrust injury in this case.

[20]** Plaintiff's supplemental brief does not attempt to distinguish ARCO; therefore, it must be relying on additional theories of antitrust injury based upon Maricopa. [7] However, before proceeding to those theories, the Court will first consider whether ARCO is dispositive.

[21]** A pre-ARCO Supreme Court case lends support for the proposition that the logic of ARCO applies in horizontal price-fixing schemes. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp, et al., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. In Matsushita, American television manufacturers sued twenty-one Japanese or Japanese-controlled corporations that manufactured and/or sold television sets in the United States, alleging that the Japanese companies, as horizontal competitors, had conspired to eliminate American producers by maintaining artificially low prices for their products in the United States. As horizontal price-fixing, the conspiracy would have been illegal per se under *§ 1* of the Sherman Act. The district court granted summary judgment for the defendants, finding that the plaintiffs had not presented sufficient evidence of a conspiracy to establish a triable issue of fact. The Third Circuit reversed, but the Supreme Court reversed the circuit.

The evidentiary issues upon which Matsushita turned are not relevant to this case. However, the opinion provides guidance regarding antitrust injury in horizontal price-fixing cases. The Court found **[**22]** that a plaintiff must "show that the conspiracy caused them an injury for which the antitrust laws provide relief," *citing* *Brunswick, 429 U.S. at 488-489*, and that such a showing required proof that "petitioners conspired to price *predatorily* in the American market, since the other conduct in the alleged conspiracy cannot have caused such an injury." *Matsushita, 475 U.S. at 584 n. 7* (emphasis added). In addition to dispelling any doubt that the antitrust injury requirement applies to suits alleging horizontal price-fixing, the language suggests that a *non-predatory* horizontal price-fixing conspiracy could not cause an antitrust injury.

Such an inference is not remarkable, given the Supreme Court's finding four years later in ARCO that a vertical maximum-price scheme could not cause antitrust injury unless it was predatory. From a competitor's vantage point, the exercise of a non-predatory, maximum-price scheme by another competitor or competitors should have the same or similar effects regardless of whether the price is established, for example, vertically by a competitor's franchisor or horizontally by a consortium of competing franchisees. In both cases, **[**23]** the uninvolved competitor is free from any constraints of the scheme, and is able to offer superior services if the maximum price is too low and to collect windfall profits if the price is too high. Regardless of who establishes prices, a competitor

[6] A defendant's behavior may fairly be characterized as predatory when the defendant is "attempting to exclude rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)* (citations omitted). ***HN5***[] Bare allegations of threatened predatory pricing are inadequate to establish antitrust injury; the circumstances must be such as to make such an allegation credible. "Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme." *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 120 n. 15, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*. In this case, the record is void of any indication that Defendant possesses sufficient market power to pose a credible threat of predatory pricing.

[7] Plaintiff's supplemental pleadings do not materially address ARCO. Instead, Plaintiff continues to repeat Maricopa's explanation of why the alleged acts were illegal per se. As this Order has explained, the applicability of the per se test is an entirely separate matter from antitrust injury. *ARCO, 495 U.S. at 344*. Antitrust injury was not part of the appeal before the Supreme Court in Maricopa, so its opinion does not address the issue. The Maricopa plaintiff, the state of Arizona, should have been required to establish antitrust injury; only the United States is authorized to sue directly under the Sherman Act. At the time Maricopa was decided, some courts were less concerned with antitrust injury in injunctive relief suits, at least for a state government. It is irrelevant for the purposes of this motion why Maricopa does not address antitrust injury; the law is clear that a private individual plaintiff must establish antitrust injury as a prerequisite for both legal and injunctive relief. However, the Court notes that Arizona could have alleged antitrust injuries from suppression of medical competition that would increase its public aid burden, or argued that it was suing on behalf of its consumers (the availability of the latter argument is debatable). These arguments are not available to Plaintiff in this case.

cannot be excluded from the market by a non-predatory maximum price scheme unless the competitor is relatively inefficient. *ARCO, 495 U.S. at 337 n. 7*. Therefore, it appears that Plaintiff cannot establish an antitrust injury based upon Defendant's pricing policies.

[*1363] 3. Potential Antitrust Injuries Contemplated by Maricopa

While it appears to be irrelevant to a determination of antitrust injury whether maximum prices are established vertically or horizontally, the Court will still evaluate any additional potential theories of antitrust injury unique to a medical, horizontal price-fixing scheme. Maricopa describes three potential types of injuries: (1) "a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases;" (2) "a restraint also may discourage **[**24]** entry into the market [8] and may deter experimentation and new developments by individual entrepreneurs;" and (3) a maximum price scheme "may be a masquerade for an agreement to fix uniform [i.e., maximum] prices, or it may in the future take on that character." *Maricopa, 457 U.S. at 348*. Plaintiff in this case has failed to establish an antitrust injury under any of these three categories.

a. Same Economic Rewards to All Practitioners

Maricopa expressed concern that a maximum price-fixing scheme would "provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases." However, such injury only could be suffered by doctors who participated in the price-fixing arrangement. They would be the ones who would receive the same compensation **[**25]** regardless of their skill. [9] Plaintiff is not a member of PFMC, so it can charge whatever it likes and will be paid according to skill (as established by the market).

Plaintiff alleges that Defendant's maximum prices force it to lower its prices lest it price itself out of the market. Plaintiff's arguments imply that its services are worth more than the PFMC maximum. If patients do in fact so value Plaintiff's services, then Plaintiff should be able to attract customers, including PFMC-affiliated patients, regardless of Dr. Ramey's non-member status. PFMC-affiliated patients are permitted to patronize nonmember providers; they are merely required to pay a deductible or some additional amount as prescribed by their agreement with a third-party payor. The additional cost could represent the premium value of a non-member provider's superior services. Patients who **[**26]** are unwilling to pay more for such services do not value it as such, and it is hardly unreasonable for these patients' third-party payors to seek to avoid paying for services not valued by their insureds. If Plaintiff is losing business to Defendant's preferred providers, it is because of their lower net prices offered to patients, and not because of any conspiracy to suppress competition. [10]

[27] b. Experimentation and Innovation**

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[8] Plaintiff has already entered the market. Therefore, it cannot suffer an antitrust injury related to barriers to market entry.

[9] A court might reject a member-doctor's allegation of antitrust injury on the grounds that the doctor voluntarily agreed to the maximum-price policy.

[10] The Court recognizes that many PFMC-affiliated patients will never even be aware of Plaintiff's availability. However, Defendant has no duty to advertise Plaintiff's services and is not prohibited from encouraging patients to patronize preferred providers. The Ninth Circuit noted in a similar, but vertical, case involving maximum medical prices established by an insurance company, "We agree that paying lower benefits for treatment by nonparticipating physicians greatly discourages patients from using such physicians. This, however, is simply a consequence of every commercial contract . . . . The contract does not mean that the parties have agreed to an unlawful concerted refusal to deal. Under the Plan, the consumer still enjoys complete freedom to seek treatment from a nonparticipating physician. ... Ordinary competitive market forces--lower prices--have simply reduced the demand for the nonparticipating physician's services. *Barry v. Blue Cross of California, 805 F.2d 866, 872 (9th Cir. 1986)*.

Maricopa's next concern was that a horizontal price-fixing conspiracy could deter experimentation and innovation. Plaintiff argues that Defendant's maximum prices may force it to abandon expensive laser techniques and other advanced services. [11]

[*1364] To the contrary, Defendant's prices should not deter *competitive* experimentation or innovation by non-member competitors. Plaintiff is free to charge whatever prices he can command. If the market values a service that is too expensive to be offered by member-doctors within the rules of Defendant's maximum-price policy, then the price-fixing scheme would actually *help* Plaintiff because it would enable it to offer valued services effectively closed to PFMC-affiliated **[**28]** doctors. However, if consumers are not willing to pay for more costly services, they would not patronize those services regardless of the prices for alternative services. The antitrust laws do not require the market to subsidize underappreciated products to ensure their "competitiveness."

Maricopa's real concern was not for non-participating doctors such as Dr. Ramey, nor the participating doctors who voluntarily agreed to limits. The Court's concern was that if too many doctors were participating in the conspiracy, advanced techniques could become unavailable to consumers who would otherwise be willing to pay for them. A patient who needs and could pay for a complicated $ 300,000 heart transplant operation would be injured if doctors refused to perform the additional services because they could not charge more than $ 200,000. Consumers, not doctors, are the victims of this type of antitrust violation.

c. Disguised Minimum Prices

Maricopa's third concern was that a maximum-price scheme can be a masquerade for a more harmful minimum price scheme. *Maricopa, 457 U.S. at 347-348*. However, as a competitor, Plaintiff could only benefit from artificially high prices. ***HN6***[] **[**29]** "A competitor 'may not complain of conspiracies that . . . set minimum prices at *any* level.'" *ARCO, 495 U.S. at 337* (quoting *Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574, 585 n. 8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (emphasis original)). "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." *ARCO, 495 U.S. at 340*. The ARCO Court added that "rivals cannot be excluded in the long run by a non-predatory maximum-price scheme unless they are relatively inefficient," *Id. at 337 n.7*, and that a "firm complaining about the harm it suffers from nonpredatory price competition is really claiming that it is unable to raise prices." *Id. at 337-338*. As noted above, Plaintiff has not alleged that Defendant's prices are predatory. Therefore, no basis for antitrust injury exists under this theory.

4. Plaintiff Has Not Suffered An Antitrust Injury

Plaintiff has not established any potential antitrust injuries contemplated by ARCO or Maricopa. Therefore, Plaintiff is injured, if **[**30]** at all, not by price fixing but by the increased efficiency that results from Defendant's cost-containing operation.

Although Defendant has no apparent market power to produce such results, suppose that Plaintiff's injuries did force it out of business. While conduct that eliminates rivals reduces competition, reduction of competition does not invoke the Sherman Act until it harms consumer welfare. *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*. Courts have repeatedly found that Congress designed the Sherman Act as a "consumer welfare prescription." Id. (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978)). Consumer welfare is maximized when economic resources are allocated to their best use and when consumers are assured competitive price and quality. Id. (citations omitted). Plaintiff has failed to demonstrate an injury to consumer welfare.

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[11] Defendant notes that its pricing policies contemplate and provide for the use of advanced services, including lasers, when such services are warranted under Defendant's practice standards. It also appears that a review process exists to consider atypical cases.

Therefore, even if Plaintiff is correct that Defendant's practices constitute a per se illegal restraint of trade, absent a showing of antitrust injury as defined in Brunswick, that claim is not Plaintiff's to make. Plaintiff has failed to establish that it can demonstrate antitrust injury **[**31]** at trial. Therefore, Defendant's motion for summary judgment must be granted as to Plaintiff's second cause of action.

D. Rejection of Dr. Ramey as a Preferred Provider

Plaintiff's first cause of action alleges that Defendant's refusal to accept Dr. Ramey as a **[*1365]** member is an illegal group boycott because it limits Plaintiff's access to PFMC-affiliated patients and handicaps its ability to compete in the market for ENT medical services. Plaintiff's third cause of action alleges that Defendant's rejection of Dr. Ramey's application for membership was illegal because it was done in furtherance of its price-fixing scheme.

The only plaintiff in this case is J. Allen Ramey, M.D., Inc. Dr. Ramey himself is not a plaintiff. The medical corporation of a solo practitioner does not have standing to contest a hospital's rejection of privileges for the individual doctor. See *Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1441 n. 1 (11th Cir. 1991)*. Therefore, Defendant must be granted summary judgment as to Plaintiff's first and third causes of action.

Even if Dr. Ramey himself were a plaintiff, he would still be required to establish antitrust injury, which, as discussed above, **[**32]** the corporation has failed to do. In any case, antitrust injury would be difficult to establish. If Defendant was not engaging in anticompetitive activities, then it had the right as a private enterprise to reject Dr. Ramey's application. Numerous courts have rejected *§ 1* claims based upon the rejection of privileges or membership in the medical arena. See *BCB Anesthesia Care v. Passavant Mem. Area Hosp., 36 F.3d 664, 667-668 (7th Cir. 1994)* ("Hundreds, perhaps thousands of pages in West publications are devoted to [such questions] . . . [and they] almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of *section 1* of the Sherman Act."). [12] If, on the other hand, Defendant's pricing polices represent an illegal, profitable price-fixing conspiracy, Dr. Ramey could not establish antitrust injury by arguing that he was prevented from participating in the illegal conspiracy. Dr. Ramey's application expressly stated his acceptance of Defendant's pricing policies. Participation in an illegal, anticompetitive conspiracy is not representative of the type of behavior the antitrust laws were designed to protect, and therefore a denial **[**33]** of such does not give rise to antitrust injury under Brunswick. See *Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197, 1201-1204 (7th Cir. 1986)* (distributor allegedly terminated for underselling a price-maintenance scheme did not suffer antitrust injury; right to receive supercompetitive profits achieved by participation in price-fixing conspiracy is not protected by Sherman Act).

Therefore, summary judgment against Plaintiff on these claims may be fairly based on more than the technicality (albeit an important one) that the complaint fails to name Dr. Ramey as a plaintiff.

V. Conclusion

The Court denies Plaintiff's motion for summary judgment. The Court grants **[**34]** Defendant's motion for summary judgment as to all claims.

IT IS SO ORDERED.

DATED: APR 6 1998

Rudi M. Brewster

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[12] In many cases, these determinations are made on their merits, reviewed under the rule of reason, rather than as a question of antitrust injury. However, the Court need not make such a determination since Dr. Ramey is not a party. The citations are provided to illustrate the unlikelihood that this cause of action could be successful.

UNITED STATES DISTRICT JUDGE

Kimberlin v. DOJ

United States Court of Appeals for the District of Columbia Circuit

January 26, 1998, Argued ; April 7, 1998, Decided

No. 96-5250

Reporter

139 F.3d 944 *; 329 U.S. App. D.C. 251 **; 1998 U.S. App. LEXIS 6899 ***

BRETT C. KIMBERLIN, APPELLANT v. DEPARTMENT OF JUSTICE, APPELLEE

Subsequent History: **[***1]** Certiorari Denied October 5, 1998, Reported at: *1998 U.S. LEXIS 5917*.

Prior History: Appeal from the United States District Court for the District of Columbia. (No. 95cv01328).

Disposition: Remanded.

Core Terms

disclosure, Exemption, district court, segregability, withholding, investigated, documents, amicus, press, law enforcement purpose, privacy interest, withheld, personal privacy, misconduct, employees, compiled, unwarranted invasion, categorical, portions

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's grant of summary judgment, applying the same standards that govern the district court's decision.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Law Enforcement Records > Personal Information

Criminal Law & Procedure > ... > Abuse of Public Office > Illegal Political Activity > Penalties

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Law Enforcement Records > General Overview

HN2[] **Law Enforcement Records, Personal Information**

Exemption 7(C) to the Freedom of Information Act, *5 U.S.C.S. § 552(b)(7)(C)* permits an agency to withhold information "compiled for law enforcement purposes" to the extent that such information can reasonably be expected to constitute an unwarranted invasion of personal privacy. *5 U.S.C.S. § 552(b)(7)(C)*. It does not exempt from disclosure, internal agency investigations in which an agency, acting as the employer, simply supervises its own employees. Material compiled in the course of such internal agency monitoring does not come within Exemption 7(C) even though it might reveal evidence that later could give rise to a law enforcement investigation. On the other hand, an agency's investigation of its own employees is for "law enforcement purposes" if it focuses directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which can, if proved, result in civil or criminal sanctions.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN3[] **Governmental Information, Freedom of Information**

The main purpose of the Freedom of Information Act (FOIA) is to open agency action to the light of public scrutiny. Although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the government's activities are opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the government is so disclosed.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN4[] **Governmental Information, Freedom of Information**

In view of the purpose of the Freedom of Information Act, it is ordinarily enough for a court to consider, when balancing the public interest in disclosure against the private interest in exemption, the rank of the public official involved and the seriousness of the misconduct alleged.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Governmental Information > Personal Information > General Overview

HN5[] **Governmental Information, Freedom of Information**

A government official does not, merely by acknowledging an investigation and making a vague reference to its conclusion, waive all his interest in keeping the contents of his personnel file confidential. And although such government official may have a "somewhat diminished" privacy interest, he does not surrender all rights to personal privacy when he accepts a public appointment.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Deletion of Material

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN6[] **Compliance With Disclosure Requests, Deletion of Material**

The Freedom of Information Act, specifically *5 U.S.C.S. § 552(b)* requires that any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. *5 U.S.C.S. § 552(b)*. More specifically, non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.

Administrative Law > Governmental Information > Personal Information > General Overview

Constitutional Law > Substantive Due Process > Privacy > Personal Information

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Law Enforcement Records > General Overview

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Law Enforcement Records > Personal Information

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN7[] **Governmental Information, Personal Information**

In order to withhold an entire file pursuant to Exemption 7(C) to the Freedom of Information Act (FOIA), *5 U.S.C.S. § 552(b)(7)(C)*, the government must show that disclosure of any part of the file can reasonably be expected to constitute an unwarranted invasion of personal privacy. Moreover, the government must make that showing in its Vaughn index and in such affidavits as it may submit therewith. The purpose of a Vaughn index is to permit adequate adversary testing of the agency's claimed right to an exemption, and those who contest denials of FOIA requests--who are, necessarily, at a disadvantage because they have not seen the withheld documents--can generally prevail only by showing that the agency's Vaughn index does not justify withholding information under the exemptions invoked.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Law Enforcement Records > General Overview

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

Administrative Law > Governmental Information > Personal Information > General Overview

HN8[] **Defenses & Exemptions From Public Disclosure, Law Enforcement Records**

The focus in the Freedom of Information Act is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material. The Vaughn index requires agencies to specify in detail, which portions of the document are disclosable and which are allegedly exempt. A submission that does not do that does not even qualify as a Vaughn index.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Administrative Law > Governmental Information > Personal Information > General Overview

HN9[] **Governmental Information, Freedom of Information**

It is error for a district court to simply approve the withholding of an entire document without entering a finding on segregability or the lack thereof.

Counsel: Julia Court, appointed by the court, argued the cause as amicus curiae supporting appellant, with whom Thomas M. Barba was on the briefs. Brett C. Kimberlin, appearing pro se, entered an appearance.

Cynthia A. Schnedar, Assistant U.S. Attorney, argued the cause for appellee, with whom Mary Lou Leary, U.S. Attorney at the time the brief was filed, and R. Craig Lawrence, Assistant U.S. Attorney, were on the brief.

Judges: Before: GINSBURG, HENDERSON, and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge GINSBURG.

Opinion by: GINSBURG

Opinion

[253]** **[*946]** GINSBURG, *Circuit Judge*: Appellant Brett C. Kimberlin sued the Department of Justice seeking disclosure, pursuant to the Freedom of Information Act, *5 U.S.C. § 552*, of documents relating to an investigation of an Assistant United States Attorney by the Department's Office of Professional Responsibility. The district court determined that the Government properly withheld the information pursuant to Exemption 7(C) to the FOIA because the Department had compiled the requested information for "law enforcement purposes." **[***2]** *See* *5 U.S.C. § 552(b)(7)(C)*. We agree that the nature of the withheld information brings it presumptively within Exemption 7(C). Because the district court failed to determine whether any of the information could be segregated and disclosed without compromising the nondisclosable material, however, we remand the case to the district court.

I. BACKGROUND

In 1982 the Drug Enforcement Administration investigated and found baseless certain allegations that then-U.S. Senator Dan Quayle had used cocaine. During the 1992 presidential campaign, renewed speculation in the media about Quayle's alleged cocaine use led AUSA John Thar, of the Southern District of Indiana, to disclose the findings of the 1982 investigation to the *Indianapolis Star* with the following explanation:

> I'm disclosing what I have, with approval, simply because so much has been made out of nothing.... It's all been so misconstrued.... I'm making an honest disclosure of what was found, hoping to put an end to it.

James A. Gillaspy, *Feds Reveal Details of Quayle Drug Probe,* Indianapolis Star, Nov. 13, 1991, at 1. The *Star* described Thar's disclosure as "a rare departure from the Department **[***3]** of Justice policy of withholding comment about any investigation." The Office of Professional Responsibility, which handles allegations of improper conduct by DOJ officials, investigated the disclosure. In response to an inquiry from the press Thar acknowledged that he was disciplined as a result of the OPR investigation at a level of severity somewhere between "you've done **[*947]** **[**254]** something wrong" and "you're fired." Aaron M. Freiwald, *Quayle Accuser Presses Conspiracy Claims,* Legal Times, March 30, 1992 at 1, 20.

In 1994 Kimberlin sought disclosure pursuant to the FOIA of "all papers, documents and things pertaining to the OPR investigation" of Thar. Initially the OPR gave a standard *Glomar* response, refusing either to confirm or to deny that such an investigation had taken place. *Cf.* *Phillippi v. CIA, 178 U.S. App. D.C. 243, 546 F.2d 1009, 1011 (D.C. Cir. 1976)* (CIA refused to confirm or deny existence of information regarding research vessel *Glomar Explorer*). When Kimberlin brought suit in district court to compel disclosure and confronted the OPR with evidence that Thar had acknowledged publicly that the OPR had investigated his disclosure to the *Star,* the OPR withdrew **[***4]** its *Glomar* response and released two press clippings from its file on the investigation. The OPR withheld the balance of the file on the ground that it comes within Exemption 7(C) to the FOIA, which provides that an agency may withhold "records or information compiled for law enforcement purposes" to the extent that the production thereof "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(7)(C)*.

The district court reviewed *in camera* some or all of the OPR file, together with a memorandum from the Government detailing its reasons for withholding the contents of the file. Upon cross-motions for summary judgment, the district court held that "the Government has properly invoked Exemption 7(C) and may continue to withhold such information from public disclosure." *Kimberlin v. Department of Justice, 921 F. Supp. 833, 836 (D.D.C. 1996)*. Kimberlin appealed, and this court appointed an *amicus curiae* to argue in support of Kimberlin.

II. ANALYSIS

The *amicus* argues that the district court erred in three ways: first, by determining that the OPR's investigation was for "law enforcement purposes" and hence potentially **[***5]** within the scope of Exemption 7(C); second, by failing properly to balance the interests for and against disclosure; and third, by failing to order release of any reasonably segregable portion of the OPR file. ***HN1***[] We review *de novo* the district court's grant of summary judgment, applying the same standards that governed the district court's decision. *See* *The Nation Magazine v. United States Customs Serv., 315 U.S. App. D.C. 177, 71 F.3d 885, 889 (D.C. Cir. 1995)*.

A. Does Exemption 7(C) Apply?

HN2[] Exemption 7(C) to the FOIA permits an agency to withhold information "compiled for law enforcement purposes" to the extent that such information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(7)(C)*. It does not exempt from disclosure, as we have previously had occasion to note, "internal agency investigations … in which an agency, acting as the employer, simply supervises its own employees." *Stern v. F.B.I., 237 U.S. App. D.C. 302, 737 F.2d 84, 89 (1984)*. Material compiled in the course of such internal agency monitoring does not come within Exemption 7(C) even though it "might reveal evidence that later could give **[***6]** rise to a law enforcement investigation." *Id.* On the other hand,

> an agency's investigation of its own employees is for "law enforcement purposes" … if it focuses "directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions."

Id. (quoting *Rural Housing Alliance v. U.S. Dept. of Agriculture, 162 U.S. App. D.C. 122, 498 F.2d 73, 81 (D.C. Cir. 1974))*.

The OPR investigation here at issue was conducted in response to and focused upon a specific, potentially illegal release of information by a particular, identified official. The investigation was intended to discover whether John Thar had violated any law by revealing to the press information concerning an investigation of the Vice-President, who was then running for re-election. The investigation was not aiming generally, as was the investigation in *Rural Housing* for example, "to insure that [the agency's] employees are acting in accordance with statutory mandate and the agency's own regulations." *498 F.2d at 81*. **[*948] [**255]** We conclude, therefore, that the Government compiled the information in the OPR file **[***7]** for law enforcement purposes, with the result that the Government may withhold the requested records pursuant to Exemption 7(C) if such disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C. 552(b)(7)(C)*.

B. The Balance of Public and Private Interests

The district court weighed the interests for and against disclosure as follows:

> Public employees have an expectation that information gathered in the course of internal investigations will remain private. *Beck v. Department of Justice, 302 U.S. App. D.C. 287, 997 F.2d 1489, 1494 (D.C. Cir. 1993)*. While the public does have an interest in examining the internal disciplinary processes of the Department of Justice, such public interest cannot be held to be superior to the privacy interests of those employees who may, from time to time, come under the scrutiny of OPR. It would be grossly unfair to release such information and subject dedicated public servants to unnecessary scrutiny for every complaint that has been filed, regardless of the merits.

921 F. Supp. at 836. In stating that "the public does have an interest in examining the internal disciplinary **[***8]** processes of the Department of Justice," the district court followed the teaching of the Supreme Court that ***HN3***[] the main purpose of the FOIA is to open agency action to the light of public scrutiny. As the Supreme Court put the matter:

> Although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.

United States Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 774, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1988) (emphases deleted).

The present parties take the Court's point, of course, but they disagree about how disclosure of the OPR materials concerning the investigation of Thar would serve the "central purpose" of the FOIA. On the one hand, the *amicus* argues that "the OPR records requested could not be more central to FOIA's core purpose ... because by nature such records contain **[***9]** information that examines and documents agency action." On the other, the Government contends that "how the Department of Justice handled one isolated case concerning an alleged leak would not shed enough light on how the Department in general handles any alleged leaks" to warrant disclosure of the requested materials. The Government also asserts that in this case Exemption 7(C) protects the privacy interests not only of Thar but also of "third persons whose identities would be revealed by release of the files."

The *amicus* faults the district court for creating a categorical rule against disclosure of OPR files and argues that OPR investigations

> are not sufficiently uniform in the privacy interests at stake, the subject matter involved, the rank of the public officials involved, the type of misconduct investigated, or a myriad of other factors, to comprise a single category in which the balance would always tip in favor of exemption.

Cf. Reporters Committee, 489 U.S. at 776 ("categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance [of interests for and against disclosure] characteristically **[***10]** tips in one direction"). For its part, the Government does not disagree with the *amicus* that the balancing of interests with regard to OPR files should be done on a case-by-case basis rather than categorically; the Government just reads the district court to have performed such an ad hoc balancing and not to have created a categorical rule.

In view of the parties' agreement, and regardless what the district court may have had in mind, we may assume for purposes of **[*949]** **[**256]** this opinion that the balance of interests relating to the disclosure of material in an OPR file will not so often tip toward withholding that a categorical rule against disclosure is appropriate. The alternative of case-by-case balancing should not be as complicated as implied by the *amicus*'s reference to a "myriad" of relevant factors, however, lest it come to resemble the open-ended " 'kitchen sink' rule of reason" in ***antitrust law***. Charles F. Rule, *Point: As American as Baseball, Apple Pie, or Guidelines,* 4 Antitrust 31, 32 (1989); *cf.* Frank H. Easterbrook, *The Limits of Antitrust,* *63 Texas L. Rev. 1, 12 (1984)* (commenting upon the rule of reason that "when everything is relevant, nothing is dispositive"). ***HN4***[] **[***11]** In view of the purpose of the FOIA, it will ordinarily be enough for the court to consider, when balancing the public interest in disclosure against the private interest in exemption, the rank of the public official involved and the seriousness of the misconduct alleged. *Cf.* *Stern, 737 F.2d at 94* ("There is a decided difference between knowing participation by a high-level officer in such deception and the negligent performance of particular duties by the two other lower-level employees").

Here the OPR has investigated a staff-level government lawyer in connection with the possibly unauthorized and perhaps illegal release of information to the press. Under these circumstances, we have no doubt that disclosure of the OPR investigative file would occasion an invasion of Thar's privacy disproportionate to, and therefore "unwarranted" by, such insight as the public would gain into "what the Government is up to." *Reporters Committee, 489 U.S. at 750*.

The *amicus* urges upon us the particularized claim that Thar "waived any privacy interest of his own when he admitted to the press that he was investigated and disciplined for releasing the Vice President's DEA files." But surely **[***12]** ***HN5***[] Thar did not, merely by acknowledging the investigation and making a vague reference to its conclusion, waive all his interest in keeping the contents of the OPR file confidential. And although government officials, as we have stated before, may have a "somewhat diminished" privacy interest, they "do not surrender all rights to personal privacy when they accept a public appointment." *Quinon v. FBI, 318 U.S. App. D.C. 228, 86 F.3d 1222, 1230 (D.C. Cir. 1996)*.

That said, Thar's statement to the press undoubtedly does diminish his interest in privacy: the public already knows who he is, what he was accused of, and that he received a relatively mild sanction. He still has a privacy interest, however, in avoiding disclosure of the details of the investigation, of his misconduct, and of his punishment--and perhaps, too, an interest in preventing hitherto speculative press reports of his misconduct from receiving authoritative confirmation from an official source. *Cf.* *Bast v. Department of Justice, 214 U.S. App. D.C. 433, 665 F.2d 1251, 1255 (D.C. Cir. 1981)*. We agree with the district court's implication, therefore, that official confirmation of what has been reported in the press **[***13]** and the disclosure of additional details could reasonably be expected to constitute an unwarranted invasion of Thar's personal privacy. Accordingly, the Government properly asserted Exemption 7(C) as a bar to disclosure with respect to Thar. It goes almost without saying, moreover, that individuals other than Thar whose names appear in the file retain a strong privacy interest in not being associated with an investigation involving professional misconduct; hence, the Government correctly asserted Exemption 7(C) with respect to them as well.

C. Segregability

HN6[] The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." *5 U.S.C. § 552(b)*. More specifically, "it has long been the rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Central, Inc. v. United States Dep't of the Air Force, 184 U.S. App. D.C. 350, 566 F.2d 242, 260 (D.C. Cir. 1977)*.

The *amicus* argues that the "OPR's Vaughn index failed to establish that OPR could not segregate and release nonexempt **[***14]** **[*950]** **[**257]** information" and, relatedly, that the district court erred by failing to determine whether there are any non-exempt portions of the requested information sufficiently segregable that the OPR could have released them. Both points are well-taken.

HN7[] In order to withhold an entire file pursuant to Exemption 7(C), the Government must show that disclosure of any part of the file "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Moreover, the Government must make that showing in its *Vaughn* index and in such affidavits as it may submit therewith. *See generally* *Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, 827-28 (D.C. Cir. 1973)* (outlining requirements agency must meet in indexing documents for which it claims exemption from disclosure under FOIA). We recently explained:

> The purpose of a *Vaughn* index is to permit adequate adversary testing of the agency's claimed right to an exemption, and those who contest denials of FOIA requests--who are, necessarily, at a disadvantage because they have not seen the withheld documents--can generally prevail only by showing that the agency's *Vaughn* index does not justify withholding **[***15]** information under the exemptions invoked.

Schiller v. NLRB, 296 U.S. App. D.C. 84, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (citations omitted).

In the *Vaughn* index it submitted in this case, the Government asserts only that entire documents are exempt from disclosure. As the Government should know by now, however, **HN8**[] "the focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Central, 566 F.2d at 260*. In the most egregious instance the Government claims that Exemption 7(C) applies to a 37-page document consisting of a cover letter and 36 pages described only as "material collected by the United States Attorney's Office." As we have pointed out before, "*Vaughn* itself requires agencies to 'specify in detail which portions of the document are disclosable and which are allegedly exempt.' *484 F.2d at 827*. A submission that does not do that does not even qualify as a '*Vaughn* index.' " *Schiller, 964 F.2d at 1210*.

The Government does argue that because "the requested OPR file focuses completely on one government employee," the "release of any **[***16]** of the file, whether redacted or not, would necessarily ... cause AUSA Thar's name to be associated with allegations of misconduct and could cause him 'great personal and professional embarrassment.' " Neither the *amicus* nor the court, however, is obliged to accept that conclusion without more specification of the types of material in the file.

Perhaps because of the manifest inadequacy of the Government's *Vaughn* index, the district court exercised its discretion to perform its own *in camera* inspection of certain documents in the file. The district court does not appear to have considered the segregability issue in the course of its inspection, however; the court made no findings regarding segregability despite our prior guidance that **HN9**[] "it is error for a district court to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof." *Schiller, 964 F.2d at 1210* (quoting *Church of Scientology v. Department of the Army, 611 F.2d 738, 744 (9th Cir. 1979))*. Therefore, we must remand this case to the district court to determine whether any of the withheld documents contains material that can be segregated and disclosed **[***17]** without unwarrantably impinging upon anyone's privacy. *See* *Krikorian v. Department of State, 299 U.S. App. D.C. 331, 984 F.2d 461, 467 (D.C. Cir. 1993)* (remanding "because the district court did not make specific findings of segregability regarding each of the withheld documents").

III. CONCLUSION

The district court correctly concluded that the OPR compiled its file on John Thar's release of information to the *Indianapolis Star* for "law enforcement purposes." The court also correctly determined that some information in the OPR file falls within Exemption 7(C) to the FOIA: Thar was not a high-ranking official in the Department of Justice, and the alleged wrongdoing concerning **[*951]** **[**258]** which he was investigated was not so serious that the public's interest in disclosure warrants the invasion of Thar's privacy that would attend disclosure of the investigative file. The district court erred, however, in failing to make any finding regarding the segregability of such disclosable information as may be in the file. Accordingly, we remand this matter for the district court to establish whether any reasonably segregable portion of the documents in the withheld OPR file can be disclosed.

[*18]** *So ordered.*

Southern Card & Novelty v. Lawson Mardon Label

United States Court of Appeals for the Eleventh Circuit

April 7, 1998, Decided

No. 96-3682.

Reporter
138 F.3d 869 *; 1998 U.S. App. LEXIS 6825 **; 1998-1 Trade Cas. (CCH) P72,104; 11 Fla. L. Weekly Fed. C 1175

SOUTHERN CARD & NOVELTY, INC., Plaintiff-Appellant, v. LAWSON MARDON LABEL, INC. d.b.a. Lawson Mardon Post Card, and Daniel J. Saunders, Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Middle District of Florida. (No. 95-130-CVI-ORL-22), Anne C. Conway, District Judge.

Disposition: AFFIRMED.

Core Terms

Card, postcards, manufacturers, distributor, consumers, purchases, tying arrangement, practices, dealers, rule of reason, anticompetitive, district court, monopolization, products, anti trust law, Sherman Act, competitors, vertical, percent, sales, buy

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Courts > Court Personnel

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

The court reviews the granting of summary judgment de novo, applying the same legal standards that bound the district court. There is no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN2[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "per se." It is clear, however, that not every refusal to sell two products separately can be said to restrain competition. Thus, in a sense the question whether a case involves "tying" is beside the point. The legality of a seller's conduct depends on its competitive consequences, not whether it can be labeled "tying."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN4[] **Vertical Restraints, Nonprice Restraints**

Line forcing, be it full or representative, is a vertical nonprice restraint--an agreement between entities at different levels of distribution that does not purport to affect prices charged for the goods.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Economic analysis supports the view and no precedent opposes it, that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels. This is so because such restraints have the real potential to stimulate interbrand competition, the primary concern of ***antitrust law***.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN6[] **Price Fixing & Restraints of Trade, Vertical Restraints**

"Full-line" or "representative-line" forcing occurs when a manufacturer agrees to license or franchise a dealer to sell its products, but only on condition that the dealer sell a full or representative line of those products.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN7[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Restraints imposed by agreement between competitors are traditionally denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN8[] **Regulated Practices, Trade Practices & Unfair Competition**

Interbrand competition is the competition among the manufacturers of the same generic product. In contrast, intrabrand competition is the competition between the distributors--wholesale or retail--of the product of a particular manufacturer.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the rule of reason, a plaintiff must prove an anticompetitive effect of the defendant's conduct on the relevant market, and that the conduct has no procompetitive benefit or justification.

Counsel: ATTORNEY(S) FOR APPELLANT(S): Hal K. Litchford, Litchford & Christopher, Scott K. Lippman, Orlando, FL.

ATTORNEY(S) FOR APPELLEE(S): James A. Murray, Janine Bloch, Nathan Lane, III., Graham & James, San Francisco, CA. Christopher K. Kay, Michael J. Beaudine,Kay, Panzl & Latham, Orlando, FL.

Judges: Before HATCHETT, Chief Judge, EDMONDSON and COX, Circuit Judges.

Opinion by: HATCHETT

Opinion

[*871] HATCHETT, Chief Judge:

The appellant, Southern Card & Novelty, Inc. (Southern Card), a postcard distributor, challenges the district court's grant of summary judgment for the appellees, Lawson Mardon Label, Inc. (Lawson), a manufacturer of postcards and related products, and Daniel Saunders, the vice-president in charge of Lawson's postcard business, on its federal and state antitrust tying claims. We affirm.

I. FACTS

Lawson manufactures postcards and sells them to distributors throughout North America. [1] Those distributors then sell the postcards to retail outlets, which in turn sell them to consumers. Over a decade ago, Lawson's predecessor-in-interest, **[**2]** H.S. Crocker Company, Inc. (H.S.Crocker), secured a license agreement with the Walt Disney Company (Disney Company) that permits Lawson to manufacture postcards bearing the copyrighted images of Disney characters such as Mickey Mouse. Although the license agreement is "non-exclusive," the Disney Company has not granted similar rights to any other postcard manufacturer. Thus, Lawson is the sole producer of postcards bearing Disney images. Lawson also makes "local view" postcards, *i.e.,* postcards depicting nonlicensed local images. In Florida, these postcards might present, for example, pictures of beaches, palm trees or alligators. Local

[1] Lawson has about an eleven percent market share of the North American postcard business.

view postcards comprise over ninety percent of Lawson's total postcard **[*872]** production and accounted for over sixty percent of its sales in Florida in 1995. The parties do not dispute that at least six other postcard manufacturers produce postcards specific to areas in Florida.

Southern **[**3]** Card, located in Daytona Beach, distributes postcards to retailers--primarily "chain stores"--situated in central and northern Florida. Southern Card purchases its postcards from large commercial printers such as Lawson, and acts as a rack jobber in the stores it services. [2] From 1986--the year Southern Card commenced business dealings with H.S. Crocker--to 1991, Southern Card retained complete control over the quantity and types of postcards that it purchased from the manufacturer. [3] **[**4]** During the late 1980s and early 1990s, Southern Card bought a percentage of its local view postcard stock from Lawson's competitors, finding their products superior in terms of price and quality. [4]

In late 1991, Lawson introduced a "Disney Product Plan" in Florida. In a letter dated December 12, 1991, Saunders put forth the terms of the agreement he hoped to reach with Southern Card pursuant to this plan:

> d) Distributor will purchase Local View and General Florida post cards and allied products from [Lawson] equal to his purchases from [Lawson] of Disney products. [For example,] if distributor purchases $ 100,000 in 1992 of Disney product from [Lawson], distributor agrees to purchase a minimum of $ 100,000 in 1992 of Local View or General Florida product from [Lawson].
>
> e) Failure to meet the minimum requirement agreed to in d) above, may result in [Lawson's] decision to not sell any product to distributor in following year.

Because Southern Card feared losing its lone source of Disney postcards, it began buying Lawson's local view postcards in amounts equal to its purchases of Disney postcards.

In October 1993, Saunders wrote to Nyberg expressing his **[**5]** concern that Southern Card continued to buy a significant quantity of postcards from Lawson's competitors. The next month, Saunders wrote to Nyberg asking that Southern Card commit to having Lawson postcards comprise one hundred percent of Southern Card's business in the Orlando area. Southern Card refused, asserting that Lawson already received about seventy-five to eighty percent of its total business, and that it never committed to purchasing one hundred percent of its requirements from Lawson.

A few months later, in February 1994, Lawson began recruiting Southern Card's competitors to sell Lawson postcards to chain stores. The next month, Lawson limited Southern Card's purchases of Disney postcards to those that Southern Card had bought in 1993. [5] In the meantime, Lawson sold a number of Disney postcards that had **[*873]** been developed in 1994 to those distributors that bought only Lawson local view postcards. The district court found, and Southern Card does not dispute, that as a result of these developments, Southern Card "has faced new competition" in retail stores in the Orlando area.

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[2] Southern Card asserts that "there are approximately eight main line independent postcard distributors in the state of Florida."

[3] It may well be that in the mid-to-late 1980s, Southern Card and Lawson entered into an informal arrangement whereby Southern Card acted as Lawson's exclusive vendor to chain stores in exchange for Lawson's promise not to sell Disney postcards to Southern Card's competitors. On November 22, 1989, John Nyberg, Southern Card's president, wrote to the chairman of the board of H.S. Crocker, detailing the "history of the relationship" between the two companies. Nyberg wrote that he had "wanted exclusivity on all H.S. Crocker postcard products, including all Walt Disney World items within [Southern Card's] territorial area," and that "with the understanding that H.S. Crocker would not manufacture for, or sell to any other distributor in the territory serviced by Southern Card & Novelty, our companies began to do business." Nyberg also acknowledged the existence of this arrangement when deposed on April 18, 1996, stating, "So de facto, I became--Southern Card & Novelty became the exclusive vendor to the chain stores. Although there was never any such agreement made between myself and Lawson Mardon, it had indeed evolved that way." However, in an affidavit dated July 30, 1996, Nyberg averred that while the parties had entered into an exclusivity agreement concerning retailers in Daytona Beach, they "had no territorial exclusive agreement for Orlando." For purposes of this appeal, we accept this assertion as true.

[4] About seventy percent of Southern Card's revenue is attributable to its sale of local view postcards.

[5] Since 1994, Southern Card has continued to purchase these Disney postcards from Lawson but has acquired its entire local view stock from other manufacturers.

[6]** II. PROCEDURAL HISTORY

Southern Card instituted this lawsuit in February 1995, and its amended complaint asserted federal and state claims of (1) illegal tying pursuant to *section 1* of the Sherman Act, *15 U.S.C. § 1*, *section 3* of the Clayton Act, *15 U.S.C. § 14*, and *Florida Statutes section 542.18*; and (2) monopolization and attempted monopolization under *section 2* of the Sherman Act, *15 U.S.C. § 2*, and *Florida Statutes section 542.19*. In outlining its tying claims, Southern Card stated that (1) Disney postcards constituted the "tying" product, and local view postcards were the "tied" product; (2) the "greater Orlando area" constituted the relevant geographic market or sub-market; and (3) the sale of local view postcards to distributors comprised the relevant product market. The crux of the tying claims was that Lawson "illegally compelled and coerced Southern Card and others to agree to purchase [local view postcards] from Lawson … as a condition of obtaining and retaining access to Disney Cards." Southern Card sought treble damages, injunctive relief and attorneys' fees. [6]

[7]** After the parties conducted extensive discovery, Lawson filed a motion for summary judgment that Southern Card vigorously opposed. In November 1996, the district court granted Lawson's motion. As to Southern Card's federal tying claims, the court first considered whether to deem Lawson's practices unlawful *per se* or subject to evaluation under the rule of reason. The court found that Lawson's practices were "unlike traditional tying arrangements" "because Southern Card does not allege that the ultimate consumer must buy the tied product (a local view postcard) to buy the tying product (a Disney postcard)." The court thus considered the challenged conduct to represent " "full' or "representative' line forcing," that is, a vertical nonprice restraint "undeserving of *per se* treatment." Applying the rule of reason, the court held that Southern Card failed to demonstrate that Lawson had unreasonably restrained competition in the local view postcard market.

Notwithstanding its conclusion regarding the applicability of the rule of reason, the district court also went on to hold that even if it "were to use a *per se* analysis, Southern Card's tying claims would fail" because "the **[**8]** alleged "Disney' and non-Disney classifications are not separate products such that there can be a "tie-in' between them…. Rather, all of Lawson Mardon's postcards are sufficiently unitary to be considered a single product." Next, the court rejected Southern Card's federal monopolization and attempted monopolization claims on the grounds that Southern Card "failed to produce any admissible evidence that creates triable issues of fact with respect to the existence of a cognizable market or Lawson Mardon's monopoly power in such a market." Finally, the court turned away Southern Card's state claims, recognizing that "Florida ***antitrust law*** mirrors federal law as applied to the tying, monopolization and attempted monopolization claims in the instant case." On appeal, Southern Card challenges the district court's grant of summary judgment only as to its federal and state tying claims.

III. DISCUSSION

HN1[] We review the granting of summary judgment *de novo,* applying the same legal standards that bound the district court. *Uniforce Temporary Personnel, Inc. v. National Council on Compensation Ins., Inc., 87 F.3d 1296, 1299 (11th Cir.1996)*. "There is no **[*874]** genuine issue for trial unless **[**9]** the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor." *Cohen v. United Am. Bank of Cent. Fla., 83 F.3d 1347, 1349 (11th Cir.1996)*.

A.

"***HN2***[] A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' " *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462, 112 S. Ct. 2072, 2079,*

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[6] Southern Card's expert witness, Dr. Bruce Seaman, subsequently opined that Southern Card had suffered two types of injuries. According to Dr. Seaman, Southern Card "suffered economic damages linked to the overcharge on the tied non-Disney post cards." Also, Lawson's "refusal to allow Southern Card access to a full Disney array of post card products and other types of products has affected and will continue to affect Southern's profits on existing chain store accounts as well as the likelihood that chain store clients will continue to be lost due to the resulting weakening of Southern's relative competitive position."

119 L. Ed. 2d 265 (1992) (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 518-519, 2 L. Ed. 2d 545 (1958)). Such arrangements can run afoul of the Sherman Act's prohibition against agreements "in restraint of trade," 15 U.S.C.A. § 1 (West 1997), and section 3 of the Clayton Act, 15 U.S.C.A. § 14 (West 1997). *See* Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 428 (5th Cir.1978) ("The Clayton Act, passed as a response to what Congress considered grudging constructions of the Sherman Act by the courts, specifically bans tying arrangements."), *cert. denied,* **[**10]** *444 U.S. 831, 100 S. Ct. 59, 62 L. Ed. 2d 39 (1979)*. As our predecessor court made clear, the two statutory theories of liability are substantively synonymous. Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 (5th Cir. Unit A Feb.1981), *cert. denied, 454 U.S. 860, 102 S. Ct. 315, 70 L. Ed. 2d 158 (1981)*; *see also* IX Phillip E. Areeda, ***Antitrust Law*** P 1719b, at 254 (1991) ("Although their words differ, the two statutes apply a single substantive standard."). [7]

> Although the Sherman Act, by its terms, prohibits every agreement "in restraint of trade," this Court has long recognized that Congress intended to outlaw only unreasonable restraints. As a consequence, most antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.
>
> Some types of restraints, however, have such predictable and pernicious anticompetitive effect, **[**11]** and such limited potential for procompetitive benefit, that they are deemed unlawful *per se. Per se* treatment is appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it. Thus, we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.

State Oil Co. v. Khan, __ U.S. __, __, 118 S. Ct. 275, 279, 139 L. Ed. 2d 199 (1997) (internal quotation marks, citations and brackets omitted). *See also* Levine v. Central Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1549 (11th Cir.) ("The presumption in cases brought under section 1 of the Sherman Act is that the rule-of-reason standard applies. We apply the per se rule only when history and analysis have shown that in sufficiently similar circumstances the rule of reason unequivocally results in a finding of liability, *i.e.,* when the conduct involved always or almost always tends to restrict competition and decrease output.") (internal quotation marks, citations and brackets **[**12]** omitted), *cert. denied, __ U.S. __, 117 S. Ct. 75, 136 L. Ed. 2d 34 (1996)*.

"***HN3***[] Certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "per se.' " Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9, 104 S. Ct. 1551, 1556, 80 L. Ed. 2d 2 (1984). "It is clear, however, that not every **[*875]** refusal to sell two products separately can be said to restrain competition." Jefferson Parish, 466 U.S. at 11, 104 S. Ct. at 1557. "Thus, in a sense the question whether this **[**13]** case involves "tying' is beside the point. The legality of [Lawson's] conduct depends on its competitive consequences, not whether it can be labeled "tying.' " Jefferson Parish, 466 U.S. at 21 n. 34, 104 S. Ct. at 1563 n. 34.

We believe that the terms that Lawson imposed on Southern Card pursuant to its "Disney Product Plan"--that Southern Card purchase local view postcards in amounts equal to its purchases of Disney postcards--are indicative of a manufacturer's "line force" upon a distributor. [8] "***HN4***[] Line forcing, be it full or representative, is a vertical nonprice restraint--an agreement between entities at different levels of distribution that does not purport to affect

[7] Because Southern Card does not discuss its state tying claim independently and fails to cite any Florida case law, we assume that federal antitrust doctrine controls that claim as well. *See* Fla. Stat. Ann. § 542.32 (West 1997); *see also* Parts Depot Co. v. Florida Auto Supply, Inc., 669 So. 2d 321, 324 (Fla.App. 4th D.C.A.1996) ("The Legislature has directed courts to rely on comparable federal antitrust statutes in construing [Florida Statutes section 542.18].").

[8] "***HN6***[] Full-line" or "representative-line" forcing occurs when "a manufacturer agrees to license or franchise a dealer to sell its products, but only on condition that the dealer sell a full or representative line of those products." Smith Machinery Co. v. Hesston Corp., 878 F.2d 1290, 1294 (10th Cir.1989), *cert. denied,* ***493 U.S. 1073, 110 S. Ct. 1119, 107 L. Ed. 2d 1026 (1990)***.

prices charged for the goods." Smith Machinery, 878 F.2d 1290 at 1295. [9] As the Supreme Court has made clear, "**HN5**[] economic analysis supports the view, and no precedent opposes it, that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels." Business Electronics, 485 U.S. 717 at 735-36, 108 S. Ct. 1515 at 1525-26, 99 L. Ed. 2d 808. This is so because such restraints have the "real potential to stimulate interbrand competition, "the primary concern of ***antitrust law***.' " Business Electronics, **[**14]** 485 U.S. 717 at 724, 108 S. Ct. 1515 at 1519, 99 L. Ed. 2d 808 (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n. 19, 97 S. Ct. 2549, 2558 n. 19, 53 L. Ed. 2d 568 (1977)). [10]

[15]** As Professor Areeda has written, "requiring dealers to purchase a tied product from the defendant need not impair consumers' purchases from his rivals who sell directly to consumers or who continue to reach them through an ample number of other dealers." IX Areeda, ***Antitrust Law*** P 1725a, at 317. The Tenth Circuit has similarly stated--in a case involving a distributor's claim that a manufacturer tied the sales of its established, popular farm machinery to sales of its new, unestablished tractors--that

> in a line forcing situation, where a dealer is serving as an intermediate link in a distribution chain, if one manufacturer is foreclosed from selling to a dealer because of the arrangement, it is likely going to find another way to take its product to market, providing a profit potential continues to exist. In such a case, there is no ultimate foreclosure to the consumer of a choice of goods. In other more traditional tying arrangements there is an ultimate foreclosure of choice to the ultimate consumer. Thus, a foreclosure of choice to an ultimate consumer appears to be the principal key to a tie that is illegal per se. No such foreclosure occurs or is threatened in **[**16]** a typical line forcing situation such as that at bar.

Smith Machinery, 878 F.2d at 1297 (citing Jefferson Parish, 466 U.S. 2 at 5, 104 S. Ct. 1551 at 1554; United States v. Loew's, Inc., 371 U.S. 38, 40, 83 S. Ct. 97, 99, 9 L. Ed. 2d 11 (1962); Northern Pac. Ry., 356 U.S. at 3, 78 S. Ct. at 517; and International Salt Co. v. United States, 332 U.S. 392, 393, 68 S. Ct. 12, 13, 92 L. Ed. 20 (1947)). *See also* Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379, 1383 (5th Cir.1994) ("Ties that constrain only dealers ... create relatively little danger to competition, provided consumers may purchase the two goods separately.") (footnote omitted), *cert. denied, 513 U.S. 1103, 115 S. Ct. 779, 130 L. Ed. 2d 673 (1995)*; Ransomes Am. Corp. v. Spartan Distribs., Inc., 914 F. Supp. 183, 185 (W.D.Mich.1996) ("Tying arrangements that constrain only dealers are **[*876]** not presumptively illegal because they pose little danger to competition, as long as consumers may purchase the two goods separately."); Paul E. Volpp Tractor Parts, Inc. v. Caterpillar, Inc., 917 F. Supp. 1208, 1229 (W.D.Tenn.1995) ("Because consumers are not hurt by vertical non-price restraints **[**17]** between manufacturers and dealers, the type of line-forcing/exclusive arrangement found in this case should not be subject to the same *per se* treatment as traditional tying arrangements."). Not surprisingly, then, "most courts dealing with the full-line force have not applied the per se rule against tying but have required proof in the particular case of a significant threat to competition." IX Areeda, ***Antitrust Law*** P 1725c, at 323.

Southern Card has made no showing that line-forcing arrangements like the one at issue always or almost always tend to restrict competition and decrease output. This fact, coupled with the strength of the authorities cited above, leads us to conclude that it would be inappropriate to deem Lawson's line-forcing practice unlawful *per se.* Thus, we will review the restraint under rule-of-reason analysis.

For the same reasons, Lawson's (unsuccessful) attempt to compel Southern Card to carry only Lawson-produced local view postcards does not require us to employ a different standard.

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[9] "**HN7**[] Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 1522, 99 L. Ed. 2d 808 (1988).

[10] "**HN8**[] Interbrand competition is the competition among the manufacturers of the same generic product.... In contrast, intrabrand competition is the competition between the distributors--wholesale or retail--of the product of a particular manufacturer." GTE Sylvania, 433 U.S. at 51 n. 19, 97 S. Ct. at 2558.

> The claimed arrangement between [Lawson] and [Southern Card] constituted a vertical nonprice restraint between a manufacturer and a dealer on goods that **[**18]** the dealer offered to customers independently. It was in effect an exclusive-dealing arrangement in which [Lawson] required [Southern Card] to sell [Lawson], and only [Lawson], [local view postcards]. Such an arrangement is not the sort that would always or almost always tend to restrict competition and decrease output. It does not threaten competition to the same extent as tying arrangements that bind ultimate customers. Regardless of whether the restraint also constituted a tying arrangement, subjecting it to per se analysis would ignore our directive from the Court. The measure of legality of relationships between manufacturers and independent distributors must not be allowed to turn on labels.

Taylor Sales, 28 F.3d at 1384-85 (internal quotation marks and footnotes omitted).

B.

HN9[] Under the rule of reason, a plaintiff must prove an anticompetitive effect of the defendant's conduct on the relevant market, and that the conduct has no procompetitive benefit or justification. *Levine, 72 F.3d at 1551*. Southern Card argues that Lawson's behavior generated anticompetitive effects because it (1) foreclosed the market to competitive manufacturers; (2) caused consumers **[**19]** to pay higher prices; and (3) resulted in a dilution in product quality and service. Southern Card thus attempts to prove that Lawson's conduct had an actual detrimental effect on competition. *Levine, 72 F.3d at 1551*. We address Southern Card's contentions in turn.

1.

Southern Card asserts that the "record clearly supports the existence of market preclusion of competitive manufacturers of local view cards in the Orlando area." In support of this contention, Southern Card first argues that Lawson's "specific attack" on the sales base of one of its competitors, John Hinde Curteich & Co. (Hinde), evidences an anticompetitive effect. In making this argument, Southern Card relies primarily on the affidavit of Hinde vice-president Don Moffet.

Moffet's affidavit, however, does little to advance Southern Card's cause. Moffet avers that Lawson's practices caused Hinde to lose "some" of its share of the local view postcard market to Lawson. Moffet also states, however, that as Disney postcards increased in popularity in the late 1980s and early 1990s, Hinde's sales of local view postcards "began to decrease." We agree with Lawson that Moffet's affidavit is woefully deficient, as it fails **[**20]** to (1) state with any degree of specificity just how much business Hinde lost to Lawson; (2) describe any competitive actions Hinde took in response to Lawson's practices; or (3) explain away other potential reasons for Hinde's loss of business.

[*877] Unfortunately for Southern Card, none of the other evidence it proffers is even as probative as Moffet's affidavit. [11] In short, Southern Card has failed to show that Lawson's dealings somehow either precluded other manufacturers from gaining access to the local view postcard market or adversely impacted upon consumer choice. Thus, we have little difficulty in turning away Southern Card's contention here. As the Fifth Circuit has stated, "speculation about anticompetitive effects is not enough." *Taylor Sales, 28 F.3d at 1385*.

2.

Southern Card **[**21]** next asserts that as a result of Lawson's practices, "the average price of local view postcards in the Orlando area was significantly higher than in any other part of [Florida]." In support of this assertion, Southern Card relies on a survey that its expert, Dr. Seaman, conducted. [12] Dr. Seaman avers that "the result of the survey was that the average price of non-Disney local view cards in the Orlando area, as sold in gift shops by Scenic

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[11] We reach this conclusion after carefully reviewing the record citations put forth at pages fourteen and forty-one through forty-four of Southern Card's initial brief, and at pages seven through twelve of its reply brief.

[12] Dr. Seaman surveyed postcard prices at over 200 retail stores located throughout approximately forty different vacation areas in Florida.

Card[] [a distributor that purchased all of its local view postcards from Lawson] is $ .30, which is … higher than the average price of $ .25 charged in retail outlets served by Southern Card [and another distributor]…. The average price of local view post cards in the non-Orlando locations is also approximately $ .25…."

Southern Card's evidence is again lacking. As the district court correctly pointed out, the cited price **[**22]** differential "is of little value" because it may result from "the biased sample of local view postcard purchases from Orlando gift and souvenir shops, rather than from lower-cost retail outlets served by Southern Card," or from Dr. Seaman's failure "to factor in differentials in the cost of living (or cost of a vacation) in the various parts of the state." Moreover, Southern Card has not referenced *any* record evidence that enables this court to assess whether Lawson charged disproportionately higher prices for its local view postcards as compared to other manufacturers. In sum, Dr. Seaman's conclusion, standing alone, would not enable reasonable jurors to conclude that Lawson's practices caused consumers to pay more for local view postcards in the Orlando area. Southern Card's purported proof regarding anticompetitive effects thus remains overly speculative.

3.

Finally, Southern Card argues that Lawson's practices caused a dilution in local view postcard quality and service in the Orlando area. Southern Card, however, fails to present any expert testimony or consumer survey evidence to support this subjective assessment. Instead, Southern Card first refers to a number of internal **[**23]** memoranda from Lawson describing various quality and service difficulties it experienced in its production and delivery of certain postcards. These documents, however, do not address the *relative quality* of Lawson's local view postcards. Southern Card also cites to the deposition testimony of Duncan Page, a president of both a postcard manufacturing company (*i.e.,* a Lawson competitor) and a postcard distribution company, who, not surprisingly, states that he prefers to buy postcards from his own manufacturing company (even though "the pricing is exactly the same as Lawson Mardon") because the "quality of our postcard and our images are better." Southern Card also references the affidavit of Joel Mittelberg, the president of Scenic Florida Distributors, Inc., who states, after noting that he purchases local view postcards from several manufacturers in addition to Lawson, that Lawson's delivery times on new work orders are "generally slower than is standard in the post card industry." The testimony of Page and Mittelberg, without more, certainly does not rise to the level of an anticompetitive effect in the relevant local view postcard market. [13]

[24]** **[*878]** IV. CONCLUSION

For the foregoing reasons, we hold that the district court was correct (1) in evaluating Southern Card's claims under the rule of reason, and (2) in concluding that Southern Card's evidence was insufficient for a reasonable jury to find that Lawson's sales practices generated an anticompetitive effect in the relevant market. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

End of Document

[13] Because we conclude that Southern Card has failed to establish a violation of the antitrust laws, we have no occasion to consider Lawson's challenge to Southern Card's standing to bring this lawsuit. *See* *Levine, 72 F.3d at 1545*.

Tops Mkts., Inc. v. Quality Mkts., Inc.

United States Court of Appeals for the Second Circuit

October 27, 1997, Argued ; April 9, 1998, Decided

Docket Nos. 97-7392, 97-7448

Reporter

142 F.3d 90 *; 1998 U.S. App. LEXIS 7106 **; 1998-1 Trade Cas. (CCH) P72,111

TOPS MARKETS, INC., Plaintiff-Appellant-Cross-Appellee, v. QUALITY MARKETS, INC.; THE PENN TRAFFIC COMPANY; SUNRISE PROPERTIES, INC., Defendants-Appellees, JAMES V. PAIGE, JR., Defendant-Appellee-Cross-Appellant.

Prior History: [1]** Plaintiff Tops Markets appeals from a judgment of the United States District Court for the Western District of New York (Elfvin, J.), entered August 21, 1996, dismissing its antitrust claims under the Sherman Act *§§ 1* & *2*. Defendant James Paige cross-appeals from that same judgment on the ground that the district court improperly dismissed without prejudice Tops Markets' state law claims against him and his state law counterclaims against Tops Markets.

Disposition: Affirmed, in part, vacated, in part, and remanded for further proceedings.

Core Terms

monopoly power, monopolization, market share, supermarket, site, market power, Street, summary judgment, competitors, district court, defendants', adverse effect, parcels, prices, relevant market, state law claim, antitrust, barriers, cause of action, percent, probability, anti trust law, Sherman Act, counterclaims, opening, specific intent, demonstrating, possessed, genuine, factfinder

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] Sherman Act, Claims

The appellate court reviews a district court's grant of summary judgment de novo to ensure that the substantive law was correctly applied. The summary judgment remedy is appropriate only when there is no genuine issue of material fact. In making this determination, an appellate court must consider the evidence in the light most favorable to the non-moving party. Although all reasonable inferences are drawn in the non-movant's favor, in an antitrust case, those inferences must be reasonable in light of competing inferences of acceptable conduct. Where the non-moving party carries the burden of proof at trial, it must go beyond the pleadings to demonstrate the existence of some specific facts that create a genuine issue as to those matters for which it has the burden of proof.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Sherman Act, Claims

Section 1 of the Sherman Act forbids every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. *15 U.S.C.S. § 1*. To establish a *§ 1* violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN3[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason, before a factfinder may consider the harms and benefits of the challenged behavior, a plaintiff initially must show that the challenged action had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. This requirement ensures that otherwise routine disputes between business competitors do not escalate to the status of an antitrust action. The Sherman Act protects competition as a whole in the relevant market, not the individual competitors within that market, so that a plaintiff may succeed only when the loss he asserts derives from activities that have a "competition-reducing" effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Market power, while necessary to show adverse effect indirectly, alone is insufficient. A plaintiff seeking to use market power as a proxy for adverse effect must show market power, plus some other ground for believing that the challenged behavior could harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the interbrand market.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act makes it an offense for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. *15 U.S.C.S. § 2*. Thus, *§ 2* forbids both monopolization and attempted monopolization.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN6[] **Sherman Act, Claims**

To establish a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, for completed monopolization, a plaintiff must produce evidence sufficient to prove the defendant: (1) possessed monopoly power in the relevant market; and (2) willfully acquired or maintained that power. The second element is distinct from business growth or development as a consequence of superior product, business acumen or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power, also referred to as market power, is the power to control prices or exclude competition. It may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN8[] **Financial Institutions, Bank Mergers**

While market share is not the functional equivalent of monopoly power, it nevertheless is highly relevant to the determination of monopoly power. A court may infer monopoly power from a high market share. A court will draw an inference of monopoly power only after full consideration of the relationship between market share and other relevant market characteristics. These characteristics include the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct, and the elasticity of consumer demand.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN9[] Monopolies & Monopolization, Actual Monopolization

A market share of over 70 percent is usually strong evidence of monopoly power. Nonetheless, such evidence does not conclusively establish monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN10[] Monopolies & Monopolization, Actual Monopolization

A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN11[] Monopolies & Monopolization, Attempts to Monopolize

To establish a claim for attempted monopolization, a plaintiff must prove: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

HN12[] Monopolies & Monopolization, Attempts to Monopolize

Critical to deciding the dangerous probability prong of a plaintiff's attempted monopolization claim is the defendant's economic power in the relevant market. Attempted monopolization requires some degree of market power. In considering the likelihood of achieving monopoly power, the appellate courts employ the same concept of market power as that used in a completed monopolization claim, i.e., one which considers the defendant's relevant market share in light of other market characteristics, including barriers to entry. Despite the similar approaches, a lesser degree of market power may establish an attempted monopolization claim than that necessary to establish a completed monopolization claim.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN13[] Monopolies & Monopolization, Attempts to Monopolize

Although the completed offense of monopolization requires only a general intent, a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN14[] **Supporting Materials, Affidavits**

The litigant seeking summary disposition of a case bears the initial burden of demonstrating, through affidavits or otherwise, the absence of genuine factual issues. Although the movant need not support its motion with affidavits or other similar materials negating the opponent's claim, his or her reasons for the motion somehow must be before the district court.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN15[] **Sherman Act, Jurisdiction**

28 U.S.C. § 1367(c)(3) permits a district court, in its discretion, to decline to exercise supplemental jurisdiction over state law claims if it has dismissed all federal claims. Further, when all federal claims are eliminated in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction over remaining state law claims and dismissing them without prejudice.

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DAVID J. SEEGER, Buffalo, New York, for Defendant-Appellee James V. Paige, Jr.

Judges: Before: FEINBERG, CARDAMONE, and WALKER, Circuit Judges.

Opinion by: CARDAMONE

Opinion

[*93] CARDAMONE, *Circuit Judge*:

On this appeal from a dismissal of an antitrust complaint, we affirm all but one **[**2]** of the district court's rulings. We conclude that plaintiff's claim of attempted monopolization presents a genuine issue of material fact and should not have been dismissed. In ruling on this sort of cause of action it is important to distinguish aggressive competition from the kind of predatory conduct that tends to destroy competition. A wise insight suggests that a business that attains monopoly power is a business at the end of its journey. While defendants' pilgrimage was far from complete, a reasonable factfinder could believe that, by their words and actions, defendants here demonstrated a specific intent to create a monopoly with a dangerous probability of success. Were such to be found, it would demonstrate a failure of the market at the expense of the public, something the Sherman Act is designed to prevent.

Tops Markets, Inc. (Tops, plaintiff or appellant) appeals from an August 21, 1996 judgment of the United States District Court for the Western District of New York (Elfvin, J.) that: (1) granted summary judgment in favor of defendants Quality Markets, Inc., the Penn Traffic Company and Sunrise Properties, Inc., and defendant James V. Paige, Jr.; (2) dismissed plaintiff's **[**3]** federal antitrust claims; and, (3) declined to exercise pendent jurisdiction over remaining state law claims and counterclaims, dismissing them all without prejudice. Defendant Paige cross-appeals the dismissal without prejudice of plaintiff's state law claims against him, and the dismissal of his state law counterclaims against plaintiff.

FACTS

The corporate parties to this action include: plaintiff Tops Markets, a New York corporation engaged in the retail supermarket business, operating 53 supermarkets and 87 convenience stores in western New York; defendant Penn Traffic Company (Penn), which owns and operates 267 supermarkets and 15 discount department stores throughout New York, Pennsylvania, Ohio and West Virginia; defendant Quality Markets (Quality), a New York corporation that is a division of Penn and competes with Tops by operating supermarkets in western New York and western Pennsylvania; and defendant Sunrise Properties (Sunrise), a Pennsylvania corporation and wholly-owned subsidiary of Penn that owns and develops commercial real estate for Penn and its divisions. Quality, Penn and Sunrise together comprise the "Quality defendants." The remaining party is defendant James **[**4]** V. Paige, Jr., a Jamestown, New York, real estate developer.

A. *The Relevant Market*

For purposes of reviewing the grant of summary judgment in this antitrust appeal, the relevant geographical market is that to **[*94]** which the parties stipulated: an area in the southeastern portion of Chautauqua County, New York, extending approximately seven to ten miles in all directions from the city of Jamestown. The area includes 17 municipalities and is populated by approximately 75,000 people. The parties also stipulated that the relevant product market consists of the retail sale by "supermarkets" of predominantly food items, together with general household merchandise. A "supermarket" is defined as a retail store with at least 7,500 square feet of retail space that sells a full range of perishable and non-perishable food items and general household merchandise.

The Jamestown market recently has undergone dramatic changes. In 1992 Quality owned five of the nine supermarkets in the geographical market. Of the remaining four supermarkets, "Bells" and "Super Duper" each owned and operated two. In January 1993 Quality acquired and within one year closed both "Bells" stores. In April 1995 it purchased **[**5]** both "Super Duper" stores and immediately shut them both as well. In May 1995 Wegmans, a Quality competitor, successfully opened a large 100,000 square foot supermarket in the Jamestown market area.

B. *The Disputed Act: The Washington Street Site*

Tops owned a supermarket in the Jamestown market until 1984 when it voluntarily terminated operations there. Seven years later, in 1991, it resolved to re-enter the Jamestown market and commissioned studies to evaluate the feasibility and profitability of numerous potential sites for a new store location. These studies determined certain property located on Washington Street in Jamestown (the Washington Street site) was the most suitable spot for a supermarket. The Washington Street site consisted of several parcels of land, four of which were owned by defendant Paige.

Paige agreed to sell his four parcels to Tops. Under the terms of a March 13, 1992 contract, Paige undertook to transfer title to Tops for $ 475,000. The parties set December 15, 1992 as the date for closing, subject to change only by their mutual agreement. The contract also called for Paige to obtain options to purchase the remaining parcels he did not own at the Washington **[**6]** Street site, giving him until March 15, 1992 to comply with this requirement. The contract specified that if Paige failed to acquire these additional parcels, Tops could elect unilaterally to terminate the agreement.

When Quality discovered Tops' intention to re-enter the Jamestown market at the Washington Street site, it expressed an interest in acquiring two of Paige's Washington site parcels. Paige and Sunrise subsequently entered into a "Back-Up" agreement on June 30, 1992 under which Sunrise would acquire for $ 225,000 two non-contiguous parcels lacking any frontage on Washington Street. The contract of sale was made expressly contingent upon the termination of Paige's prior contract with Tops.

Sunrise and Paige restructured their contract on November 4, 1992 to grant Sunrise the option to purchase the same two parcels for a total purchase price (i.e., the sum of the option price and the "strike price") of $ 360,000. This arrangement again was amended on January 27, 1993 to increase the total purchase price to $ 765,000. Also included was a right of repurchase by Paige within one year after the deed to the property was conveyed to Sunrise. Any repurchase however, would be subject **[**7]** to a deed restriction limiting the property to uses other than a supermarket. On the same day that the *second amendment* was prepared, Paige notified Sunrise that his contract with Tops had terminated. Sunrise thereafter exercised its option and did acquire title to the two Washington Street parcels in April 1993. This lawsuit followed.

Plaintiff eventually acquired the entire Washington Street site when the Jamestown Urban Renewal Agency, exercising its power of eminent domain, condemned the property and later sold it to Tops. Tops opened a superstore at the site on April 19, 1997.

C. *Prior Proceedings*

Plaintiff filed the present action in the Western District of New York in April 1993 to recover damages from the Quality defendants and Paige for their alleged violations of **[*95]** *§§ 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1* & *2*. It also asserted state law claims against the Quality defendants for violations of New York state antitrust laws and tortious interference with a contractual relationship. As against Paige, it further alleged breach of contract, breach of fiduciary duty, and fraud. Maintaining no binding contract existed between him and Tops, Paige counterclaimed **[**8]** against Tops on several state law grounds including fraud, tortious interference with a contractual relationship, wrongfully clouding title, and defamation.

Defendants moved for summary judgment with respect to all of plaintiff's causes of action. In its August 21, 1996 judgment, the trial court ruled that Tops failed to establish facts from which a reasonable jury could find that defendants violated either *§ 1* or *§ 2* of the Sherman Act. It determined, with respect to plaintiff's *§ 1* cause of action, that Tops failed to show either an actual adverse effect on competition in the Jamestown market or Quality's possession of market power. With respect to the *§ 2* cause of action, it further ruled that Tops failed to demonstrate Quality had either the requisite market power or potential market power to sustain a monopolization or attempted monopolization claim respectively.

Plaintiff urges on appeal that dismissing its Sherman Act causes of action was error. Paige cross-appeals, arguing the district court should have entertained his state law counterclaims and dismissed Tops' state law claims against him *with* prejudice. We affirm, in part, reverse, in part, and remand this case **[**9]** to the district court for further proceedings.

DISCUSSION

Standard of Review

This appeal comes before us as a result of a grant of summary judgment. Courts use summary judgment "to isolate and dispose of factually unsupported claims," *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*, particularly in the antitrust context. By avoiding wasteful trials and preventing lengthy litigation that may have a chilling effect on pro-competitive market forces, summary judgment serves a vital function in the area of ***antitrust law***. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593-94, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 541 (2d Cir. 1993)*.

HN1[] We review a district court's grant of summary judgment *de novo* to ensure that the substantive ***antitrust law*** was correctly applied. *See* *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1011 (2d Cir. 1989)*. The summary judgment remedy is appropriate only when there is no genuine issue of material fact. *See* *Fed. R. Civ. P. 56(c)*. In making this determination, a court **[**10]** must consider the evidence in the light most favorable to the non-moving party. *See* *Burtnieks v. City of New York, 716 F.2d 982, 985 (2d Cir. 1983)*. Although all reasonable inferences are drawn in the non-movant's favor, in an antitrust case, those inferences must be reasonable in light of competing inferences of acceptable conduct. *See* *Matsushita, 475 U.S. at 588*. Where the non-moving party, in this instance Tops, carries the burden of proof at trial, it must go beyond the pleadings to demonstrate the existence of some specific facts that create a genuine issue as to those matters for which it has the burden of proof. *See* *Celotex, 477 U.S. at 324*.

Sherman Act Claims

I The Sherman Act, *§ 1*

With these standards in mind, we turn to the substance of the district court's rulings on the antitrust causes of action. ***HN2***[] *Section 1* of the Sherman Act forbids "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1 (1994)*. Tops alleges the defendants violated *§ 1* by conspiring to prevent it from opening a store at the Washington Street site and competing in the supermarket business **[**11]** in the Jamestown market. To establish a *§ 1* violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted **[*96]** action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either *per se* or under the rule of reason. *See* *Capital Imaging, 996 F.2d at 542*.

A. *Concerted Action*

Tops avers it produced sufficient evidence to demonstrate that the contract between Paige and Sunrise constituted a concerted action resulting in an unreasonable restraint of trade. Even assuming Tops could establish that an antitrust conspiracy existed among the defendants, it fails to show how defendants' activities comprised an unreasonable restraint of trade. Tops does not contend that defendants' action was illegal *per se*, but instead advances an argument under the rule of reason.

B. *Rule of Reason and the Adverse-Effect Requirement*

HN3[] Under this rule, before a factfinder may consider the harms and benefits of the challenged behavior, a plaintiff initially must show that "the challenged action had an *actual* adverse effect on competition as a whole in the relevant **[**12]** market; to prove it has been harmed as an individual competitor will not suffice." *Capital Imaging, 996 F.2d at 543* (emphasis in original). This requirement ensures that otherwise routine disputes between business competitors do not escalate to the status of an antitrust action. *See* *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 708 (4th Cir. 1991)*. The Sherman Act protects competition as a whole in the relevant market, not the individual competitors within that market, so that a plaintiff may succeed only when the loss he asserts derives from activities that have a "competition-*reducing*" effect. *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342-44, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)* (emphasis in original).

The district court found that Tops failed to produce evidence to sustain this initial burden, despite having two independent means by which to satisfy the adverse-effect requirement. On the one hand, it could have shown an actual adverse effect on competition, such as reduced output. *See F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*; *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., **[**13]** 61 F.3d 123, 128 (2d Cir. 1995)*; *Capital Imaging, 996 F.2d at 546*. Alternatively, if it failed to make such a showing, it could have demonstrated "adverse effect" indirectly by establishing that Quality had sufficient market power to cause an adverse effect on competition. *See K.M.B. Warehouse, 61 F.3d at 128-29*; *Capital Imaging, 996 F.2d at 546*. Market power is but a "surrogate for detrimental effects." *Indiana Fed'n of Dentists, 476 U.S. at 461* (quoting 7 Phillip E. Areeda, ***Antitrust Law*** P 1511, at 429 (1986)).

1. *Actual Adverse Effect*

Plaintiff failed to demonstrate an actual detrimental effect on competition. It relied almost entirely on the affidavit of Robert F. Kennedy (the Kennedy Affidavit), which discussed Quality's high market share and the competitive advantages that could have resulted in *potentially* higher prices, but significantly did not allege that prices were *actually* higher in the Jamestown market. The Kennedy Affidavit further failed to provide sufficient proof that Tops' exclusion from the market had, in fact, resulted in any decrease in the quality of service to Jamestown area shoppers. *See Capital Imaging, 996 F.2d at 546*. **[**14]**

Nor did Tops allege that other supermarkets were excluded from the market. The only clear effect of defendants' alleged conspiracy was to bar plaintiff from opening a store at the Washington Street site. But, the fact that Tops may have been prevented from competing in the Jamestown market does not alone prove an adverse effect on competition as a whole. *See K.M.B. Warehouse, 61 F.3d at 128*. For even if plaintiff were hindered from competing, nothing changed in the relevant product market from the consumer's perspective. *See Balaklaw v. Lovell, 14 F.3d 793, 798-99 (2d Cir. 1994)*.

2. *Market Power*

Tops' showing of Quality's market power was also insufficient to satisfy its burden **[*97]** of demonstrating an adverse effect on the market as a whole. The Kennedy Affidavit asserted that, at all relevant times, Quality's share of the total sales of food items and general household merchandise in the Jamestown area market exceeded 72 percent. Plaintiff asks us to infer that this high market share equates to market power.

Even assuming this market share data implies that Quality possessed market power, Tops still would fail to satisfy its burden under the adverse-effect requirement. ***HN4***[] **[**15]** Market power, while necessary to show adverse effect indirectly, alone is insufficient. *See K.M.B. Warehouse, 61 F.3d at 129*. A plaintiff seeking to use market power as a proxy for adverse effect must show market power, plus some other ground for believing that the challenged behavior could harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the interbrand market. *See id.*; *see also Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1573 (11th Cir. 1983)* (requiring plaintiff to show high market share and that intrabrand competition was impeded, and that "the interbrand market structure was such that intrabrand competition was a critical source of competitive pressure on price, and hence, of consumer welfare").

Yet, plaintiff provided no evidence other than market share to prove that defendants' action had an adverse effect on competition. The Kennedy Affidavit does not cure this deficiency. It declares that the nature of the interbrand market is such that supermarkets compete for geographic location, seeking a site with close proximity to high concentrations of people, convenience, accessibility, **[**16]** visibility and space. But Quality's purchase of the Washington Street site was not shown either directly or indirectly to have any adverse effect on competition. While Tops may not have readily acquired the location it preferred, Quality's one-time purchase of the site did not foreclose other prospective supermarket competitors from entering the market in desirable locations. We find particularly significant Wegmans' subsequent acquisition of land and construction of a 100,000 square foot store on a different site, which demonstrates the absence of geographic barriers preventing competitors from entering the Jamestown area. Within one year after opening, Wegmans captured approximately 26 percent of the Jamestown market.

Hence, despite Quality's presumed market power, Tops still failed to show any adverse effect on competition as a whole. As such, Judge Elfvin properly dismissed its *§ 1* Sherman Act claim.

II The Sherman Act, *§ 2*

HN5[] *Section 2* of the Sherman Act makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2 **[**17]** (1994)*. Thus, *§ 2* forbids both monopolization and attempted monopolization. We address each offense in turn.

A. *Completed Monopolization*

HN6[] To establish a *§ 2* violation for completed monopolization, a plaintiff must produce evidence sufficient to prove the defendant: (1) possessed monopoly power in the relevant market; and (2) willfully acquired or maintained that power. *See* *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990)*. The second element is distinct from business growth or development as a consequence of superior product, business acumen or historic accident. *See* *Grinnell Corp., 384 U.S. at 571*.

The district court granted summary judgment in favor of defendants regarding Tops' claim for completed monopolization. It held, as a matter of law, without even addressing the issue of defendants' conduct, that Quality lacked the requisite monopoly power. We must therefore carefully consider whether the relevant evidence created an issue of fact for the jury regarding monopoly power.

HN7[] Monopoly power, also referred to as market power, **[**18]** *see* *International Distrib. Ctrs., Inc. v. Walsh Trucking, 812 F.2d 786, 791 **[*98]** (2d Cir. 1987)*, is "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. It may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market. *See* *K.M.B. Warehouse, 61 F.3d at 129*. Tops sought to prove Quality's monopoly power by proffering evidence on both points.

With respect to direct evidence, plaintiff produced the Kennedy Affidavit, which explained Quality's potential ability to control prices in the following terms:

> Currently, consumers in general must choose between Wegmans and a Quality store which will almost always be closer to their homes than Wegmans' Ellicott facility. Those Jamestown area residents living in outlying areas will most likely find it less convenient and impracticable (especially for purchases of perishable goods) to shop at Wegmans. This scenario would certainly endow Quality with the power to raise prices and limit both selections of grocery items **[**19]** and services *unless the competitive structure of the industry were to change, i.e., unless another competitor were to open a centrally located store which would give the majority of consumers a meaningful choice as to where to fill their weekly grocery list*.

Kennedy Aff. P 19 (emphasis added). Kennedy's conclusion expressly assumes, without offering any support, that no other competitors would enter the market were Quality to raise its prices. This proposition suggesting Quality's purported monopoly power is too speculative to create an issue of fact for the jury. It neither demonstrates Quality's present ability to raise prices, nor evidences the exclusion of competition from the Jamestown market area.

Tops next presented evidence of Quality's high market share in the Jamestown market to establish indirectly Quality's monopoly power. ***HN8***[] While market share is not the functional equivalent of monopoly power, it nevertheless is highly relevant to the determination of monopoly power. *See* *Consolidated Rail, 902 F.2d at 179*. A court may infer monopoly power from a high market share. *See* *Grinnell, 384 U.S. at 571* ("The existence of [monopoly] power ordinarily may be inferred **[**20]** from the predominant share of the market."); *Broadway Delivery Corp. v. United Parcel Serv. of America, Inc., 651 F.2d 122, 129 (2d Cir. 1981)* ("The higher a market share, the stronger is the inference of monopoly power."); *cf.* *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363, 10*

L. Ed. 2d 915, 83 S. Ct. 1715 (1963) (explaining that where a merger results in one firm controlling a high percentage of the relevant market, it is inherently likely to lessen competition substantially).

A court will draw an inference of monopoly power only after full consideration of the relationship between market share and other relevant market characteristics. *See*, *e.g.*, Walsh Trucking, 812 F.2d at 792 ("Other market characteristics must also be considered in determining whether a given firm has monopoly power . . . ."); Hayden Publ'g Co. v. Cox Broad. Corp., 730 F.2d 64, 68 (2d Cir. 1984) ("[A] number of factors must be considered in determining whether monopoly power exists."); Broadway Delivery, 651 F.2d at 128 ("The true significance of market share data can be determined only after careful analysis of the particular market."). These characteristics include **[**21]** the "strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand." Walsh Trucking, 812 F.2d at 792; *see also* Hayden Publ'g Co., 730 F.2d at 68-69 (discussing some of these factors); Broadway Delivery, 651 F.2d at 128 (same).

In the case at hand, Tops presented evidence that Quality's share of the total sales of food items and general household merchandise by Jamestown area supermarkets always exceeded 72 percent. At the time Quality contracted with Paige in 1992 to purchase the Washington Street property, Quality's market share stood at roughly 73 percent. After its acquisition and closing of the "Bells" and "Super Duper" stores and the **[*99]** opening of the Wegmans store, Quality's share steadied at 74 percent in 1995.

Tops asks us to infer Quality's monopoly power from these statistics. We have held that ***HN9***[] a market share of over 70 percent is usually "strong evidence" of monopoly power. *See* Broadway Delivery, 651 F.2d at 129 ("Sometimes, but not inevitably, it will be useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share **[**22]** between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power."). Nonetheless, such evidence does not conclusively establish Quality's monopoly power. *See* *id. at 128* ("The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence.").

At this juncture, either plaintiff or defendants may introduce evidence regarding these other market factors to determine whether Quality possessed monopoly power. *See* 2A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, P 532a, at 161 (1995) ("The courts generally allow the defendant to rebut inferences of market power by showing easy entry conditions."). The Quality defendants point to several facts in the record suggesting there are no barriers to entry, and Tops failed to produce any further evidence to rebut this assertion. Tops alleges that site availability in the Jamestown market was extremely limited, but offers no proof demonstrating what geographic barriers inhibit a competitor's ability to enter that market. Instead, the record suggests **[**23]** that undeveloped land on which to locate a supermarket has been available at all relevant times throughout the market area. As already noted, Wegmans, a major competitor of Quality, opened a 100,000 square foot store at a different site in 1995 and quickly gained a respectable share of the market. Even Tops' own contemporaneous market studies indicate that Quality did not have such a strong market position as to enable it to exclude competitors. According to these studies, competitors, like Tops and Wegmans, could readily enter the Jamestown market at any number of available sites and successfully compete for supermarket sales.

We agree with Judge Elfvin's conclusion that as a matter of law, despite evidence of Quality's high market share, consideration of other relevant factors does not support a conclusion that Quality did, in fact, possess monopoly power. We cannot be blinded by market share figures and ignore marketplace realities, such as the relative ease of competitive entry. Had Wegmans not gained such a high market share within such a short period, we might recognize at least a *genuine* issue of material fact as to monopoly power, in light of Quality's over-70 percent **[**24]** market share. Wegmans' successful entry, however, itself refutes any inference of the existence of monopoly power that might be drawn from Quality's market share. If Quality were to raise its prices above their competitive level, new competitors could and would enter the market and, by undercutting those prices, quickly erode Quality's market share. *See*, *e.g.*, *Oahu Gas Serv., Inc. v. Pacific Resources Inc., 838 F.2d 360, 366 (9th Cir. 1988)* ***HN10***[] ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.") (citations omitted); *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986)* ("The lower the barriers to entry . . . the less power existing firms have.").

On this record we can draw no reasonable inference other than that Quality lacks monopoly power. Despite its high market share, no other evidence -- such as barriers to entry, the elasticity of demand, or the nature of defendant's conduct -supports the conclusion that Quality can control prices or exclude competition and in **[**25]** fact, Wegmans' quick garnishment of such high market share dispositively refutes such a conclusion. Thus, absent a showing of Quality's monopoly power, Tops' claim for completed monopolization was properly dismissed.

B. *Attempted Monopolization*

HN11[] To establish a claim for attempted monopolization, a plaintiff must prove: "(1) **[*100]** that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*; *see also* *Walsh Trucking, 812 F.2d at 790*. In the discussion that follows we deal first with anticompetitive conduct, second with a dangerous probability of achieving monopoly power and, third, with defendants' intent.

1. *Anticompetitive Conduct*

A factfinder could reasonably find that the Quality defendants' and Paige's conduct was anticompetitive. For purposes of this summary judgment motion, we assume that a valid contract existed between Paige and Tops for the sale of the Washington Street site; the Quality defendants interfered with that contract and induced Paige to breach **[**26]** it; and Paige then sold to Sunrise the land targeted by Tops for its store site. The plain effect of this conduct was to prevent Tops, a Quality competitor, from entering the Jamestown market at the Washington site.

2. *Dangerous Probability of Success*

The district court determined, again as a matter of law, that there was no proof of a dangerous probability that Quality would achieve monopoly power and therefore dismissed the attempted monopolization claim. We think, to the contrary, that a factfinder could reasonably find that Quality was close to achieving monopoly power. ***HN12***[] Critical to deciding the dangerous probability prong of plaintiff's attempted monopolization claim is defendant's economic power in the relevant market. *See* *Spectrum Sports, 506 U.S. at 458-59*. Attempted monopolization requires some degree of market power. *See* *Walsh Trucking, 812 F.2d at 791*. In considering the likelihood of achieving monopoly power, we employ the same concept of market power as that used in a completed monopolization claim, *i.e.*, one which considers the defendant's relevant market share in light of other market characteristics, including barriers to entry. *See* *H.L. Hayden Co., **[**27]** 879 F.2d at 1017*; *Walsh Trucking, 812 F.2d at 791*.

Despite the similar approaches, a lesser degree of market power may establish an attempted monopolization claim than that necessary to establish a completed monopolization claim. *See id*. (noting that the offense of attempted monopolization reaches further than the offense of completed monopolization); *Northeastern Tel., 651 F.2d 76 at 85* (explaining that the offense of attempted monopolization encompasses conduct by firms lacking monopoly power). That Tops failed to demonstrate the monopoly power required to prove the offense of completed monopolization therefore does not, *a fortiori*, lead to the conclusion that it failed to make a sufficient showing with respect to its attempted monopolization cause of action.

In view of the lowered quantum of proof requirement, the minimum threshold of evidence Tops must adduce to survive summary judgment on its attempted monopolization claim is reduced. While concededly, Tops proffered only Quality's market share figures as evidence of a dangerous probability of success, those figures demonstrate that Quality possessed a market share exceeding 72 percent when it purchased the Washington **[**28]** Street parcels. Holding such a large market share percentage at the time when defendants took other anticompetitive actions is sufficient, in our mind, to create a genuine factual issue as to whether there was a dangerous probability that Quality would achieve monopoly power. *See* *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 999 (11th*

Cir. 1993) (finding that a 60 or 65 percent market share is sufficiently large to create a genuine issue of material fact as to whether there was a dangerous probability of success); *see also* H.L. Hayden Co., 879 F.2d at 1017 (holding a dangerous probability of monopoly may exist where a party possesses a significant market share at the time it undertakes the challenged anticompetitive conduct); Walsh Trucking, 812 F.2d at 791 (same); 3A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, P 801a, at 301 (1996) (suggesting it is reasonable to presume substantial market **[*101]** power when defendant's share of relevant market exceeds 70-75 percent for the five years preceding the complaint).

We recognize that the Quality defendants point to the lack of barriers to entry, and that we found such evidence dispositive in our previous discussion **[**29]** of market power regarding a completed monopolization claim. Yet, with respect to an attempted monopolization claim, such evidence is insufficient to support summary judgment in defendants' favor. Because plaintiff's quantum of proof is lower in this context, defendants' evidence serves only to raise questions of fact for trial. Whereas Tops' proof of market share alone -- even when countered with evidence of easy market access -- failed to show as a matter of law that Quality *actually* possessed market power, it could nevertheless support a finding that Quality had a dangerous probability of *achieving* market power. *See* 4 Phillip Areeda & Donald F. Turner, ***Antitrust Law***, P 917a, at 86 (1980) ("Particularly disturbing is a study showing that concentration in food retailing markets, where entry barriers seem to be very low, had large adverse [anticompetitive] price effects."). Plaintiff's attempted monopolization claim therefore survives summary judgment on this point.

Consequently, on remand, the jury should be instructed to consider the impact of other market characteristics, particularly the barriers to entry, on this high market share to determine whether a dangerous **[**30]** probability, in fact, existed. A jury may also properly consider Quality's subsequent decline in market share attributable to the entry and growth of a competitor. *See* 3A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, P 807e1, at 358 (1996).

3. *Specific Intent*

a. *Quality's Intent*. ***HN13***[] Although the completed offense of monopolization requires only a general intent, "a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt." Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1953). An examination of the record would permit a reasonable factfinder to find that the Quality defendants intended to acquire monopoly power.

To begin with, defendants' intent can be derived from their words. Defendants' officials frequently affirmed their stated goal of preventing Tops from entering the Jamestown market. *See* Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., Inc., 845 F.2d 404, 408 (2d Cir. 1988), *aff'd on other grounds*, 492 U.S. 257, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989) (finding sufficient evidence of intent where defendants' officials frequently reaffirmed their **[**31]** goal to drive plaintiffs from the Burlington market and engaged in predatory pricing). For example, John Dixon, then-president of Quality and current President and C.E.O. of Penn, stated that one reason why the Quality defendants purchased the Washington Street parcels was to prevent Tops from competing at that site. Gary Hirsh, Chairman of the Board at Penn, echoed this sentiment. After purchasing the disputed parcels, the Quality defendants announced at a press conference they would not allow the property to be used by a competing supermarket company. In fact, the "*Second Amendment* Agreement" between the Quality defendants and Paige is strong evidence of the Quality defendants' aim of preventing a supermarket from opening at the Washington Street site by requiring, if Paige repurchases the property, that he would preclude the development of a supermarket on the transferred parcels.

Second, a factfinder could also reasonably infer a specific intent to destroy competition from the Quality defendants' conduct. *See* Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 85 (2d Cir. 1981) (explaining that proof of unlawful conduct may imply specific intent). The Quality defendants **[**32]** purchased for above-market value two non-contiguous land parcels with no street frontage, which are, by themselves, essentially undevelopable. [1] A jury could find this conduct was not motivated by a valid business justification. *See Aspen Skiing Co. v. [*102] Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. The Quality defendants obviously could have chosen a more profitable location for a possible convenience store, but were willing to pay a very substantial premium for land on Washington Street in an attempt to exclude Tops from entering the Jamestown market. *Cf*. *Consolidated Rail, 902 F.2d at 178-79* (finding that defendant monopolist's pursuit of non-profit-maximizing market behavior supports a showing of willful acquisition of monopoly power for a completed monopolization claim); *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 291 (2d Cir. 1979)* (finding that a monopolist's use of monopoly power to act in a manner "that a firm would have found substantially less effective, or even counterproductive, if it lacked market control" demonstrates a willful acquisition of monopoly power for a completed monopolization claim).

[33]** b. *Paige's Intent*. Paige also asserts he lacked the requisite intent to attempt to monopolize in violation of *§ 2* of the Act. He now urges that because he was never personally engaged in the supermarket retail business, he had no motive for influencing that industry within the relevant market. According to Paige, he was simply a local real estate developer innocently seeking the best available deal for property he held for sale.

While this argument may or may not ultimately be persuasive, we are unable to consider it now on appeal because it was not raised below. In seeking summary judgment, Paige bore the initial burden of "informing the district court of the basis for [his] motion." *Celotex, 477 U.S. at 323*; *see also Capital Imaging, 996 F.2d at 542* ***HN14***[] ("The litigant seeking summary disposition of a case bears the initial burden of demonstrating, through affidavits or otherwise, the absence of genuine factual issues."). Although the movant need not support its motion with "affidavits or other similar materials *negating* the opponent's claim," *Celotex, 477 U.S. at 323* (emphasis in original), his or her reasons for the motion somehow must be before the district **[**34]** court. Thus, Paige had the burden of demonstrating there was no factual support for the allegation that he possessed the requisite specific intent.

We find neither evidence of nor even any argument pertaining to Paige's allegedly "innocent" intentions in the record. Apart from his answer to Tops' complaint, in which he asserts a general denial of the Sherman Act antitrust allegations, Paige does not address the issue of his intent. To the contrary, his attorney's affidavit, which was attached to Paige's notice of motion for summary judgment, asserted three grounds for his motion:

> 3. The Defendant's motion is made on the following grounds:
>
> a. The Plaintiff never had a valid or enforceable contract with the Defendant;
>
> b. If the Plaintiff had a "Contract" with the Defendant, the Defendant notified the Plaintiff of the approaching closing date and the Plaintiff determined that it did not wish to close, justifying the Defendant in not closing the "Contract";
>
> c. If the Plaintiff had a "Contract" with the Defendant, the Plaintiff committed an anticipatory breach of that "Contract", justifying the Defendant in not closing the "Contract".

Paige expressly limited **[**35]** the basis for his motion to state contract law grounds. Moreover, neither Paige nor his attorney appeared at oral argument to advance any different grounds for urging summary judgment in Paige's favor. Because the district court was not given the opportunity to consider the issue of Paige's intent, summary judgment in his favor may not now be affirmed on this ground.

State Law Claims and Counterclaims

Paige also cross-appeals on the ground that the district court erroneously dismissed without prejudice Tops' state law claims against him and his state law counterclaims against Tops. When Judge Elfvin granted summary judgment dismissing Tops' Sherman Act claims, the only federal claims, he properly declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed them without prejudice. The governing statute, ***HN15***[] *28 U.S.C. [*103] § 1367(c)(3) (1994)*, permits a district court, in its discretion, to decline to

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[1] Quality originally agreed to pay $ 225,000 and then later bought the two parcels for a total price of $ 765,000. Tops had been willing to pay $ 475,000 for all four of Paige's Washington site parcels.

exercise supplemental jurisdiction over state law claims if it has dismissed all federal claims. Further, the Supreme Court, in *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988)*, announced that when all federal **[**36]** claims are eliminated in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction over remaining state law claims and dismissing them *without* prejudice. *See also* *Morse v. University of Vt., 973 F.2d 122, 127-28 (2d Cir. 1992)* (same). Hence, contrary to Paige's assertions, the district court was correct not only in dismissing the state law causes of action, but also in dismissing them without prejudice.

Thereafter, pursuant to a stipulation, the district court ordered, on March 4, 1997, that the parties would be granted leave to re-file their state law claims and counterclaims, if we remanded the federal antitrust claims. Since we are remanding this case on the attempted monopolization cause of action, Tops is free to refile its state law claims and Paige may also reassert his state law counterclaims in federal court. Because the district court did not make a final decision on the merits of these causes, we cannot now review their merits. *See* *28 U.S.C. § 1291 (1994)*.

CONCLUSION

Accordingly, for the foregoing reasons, we affirm the district court's dismissal of the Sherman Act *§ 1* claim and the *§ 2* claim for **[**37]** completed monopolization. We vacate the dismissal of the *§ 2* claim for attempted monopolization, and remand that cause of action to the district court for further proceedings consistent with this opinion.

Affirmed, in part, vacated, in part, and remanded.

End of Document

Campos v. Ticketmaster Corp.

United States Court of Appeals for the Eighth Circuit

February 14, 1997, Submitted ; April 10, 1998, Filed

No. 96-2883

Reporter

140 F.3d 1166 *; 1998 U.S. App. LEXIS 7128 **; 1998-1 Trade Cas. (CCH) P72,112

ALEX CAMPOS; DANIA CAMPOS; ALBERT ALFONSO, Individually and on behalf of all others similarly situated; Plaintiffs/Appellants, v. TICKETMASTER CORPORATION; Defendant/Appellee. STEPHEN HINES; DIRK SCHNABLE; TODD VICSIK; JAMIE SALTZMAN; MIKE ELLIS; BRAD CHESKES; SUZANNE CRAWFORD, on behalf of themselves and on behalf of a class of persons similarly situated; Plaintiffs/Appellants, v. TICKETMASTER CORPORATION; Defendant/Appellee. JOSEPH CROWLEY, Individually and on behalf of all others similarly situated; Plaintiff/Appellant; v. TICKETMASTER CORPORATION; Defendant/Appellee; TONY STEPHENS, Individually and on behalf of all others similarly situated; Plaintiff/Appellant; v. TICKETMASTER CORPORATION; Defendant/Appellee; EBON PETTY; ARLEAN AZZO; JOHN AZZO; SCOTT HENRY BUETTNER; SCOTT J. FREEDLAND; BRIAN HOMER; ROGER HUTTON; GARRETT PFETZING; CHRISTOPHER W. QUINN; THOMAS ROCKOV; JAMES STEWART; HILARY TOMPKINS, on behalf of themselves and others, in a class to be certified; Plaintiffs/Appellants, v. TICKETMASTER CORPORATION; Defendant/Appellee

Subsequent History: [1]** Certiorari Denied January 19, 1999, Reported at: *1999 U.S. LEXIS 570*.

Prior History: Appeals from the United States District Court for the Eastern District of Missouri. 4: *95 MD 1033* SNL. Honorable Stephen Limbaugh.

Disposition: Affirmed the district court's judgment that the plaintiffs lack standing to pursue their claims for damages under § 4 of the Clayton Act. Reversed the district court's ruling that the plaintiffs lack standing to seek injunctive relief under § 16, and vacated and remanded for further proceedings on the issue of proper venue.

Core Terms

purchaser, indirect, venue, ticket, overcharge, monopoly, Clayton Act, subsidiary, concert, damages, injunctive relief, antitrust, antecedent, monopolist, district court, anti trust law, transaction of business, antitrust violation, service fee, monopolized, promoter, cases, exclusive contract, lack standing, courts, buyer, input

LexisNexis® Headnotes

Civil Procedure > Dismissal > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Civil Procedure, Dismissal**

The court may affirm a dismissal on the pleadings only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. The court must assume that the plaintiff can prove the facts alleged in its amended complaint.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > ... > Justiciability > Standing > General Overview

HN2[] **Purchasers, Direct Purchasers**

Indirect purchasers generally lack standing under the antitrust laws and so cannot bring suits for damages.

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

Section 12 of the Clayton Act, *15 U.S.C.S. § 15*, provides in pertinent part that any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > Corporations

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN4[] **Clayton Act, Jurisdiction**

When venue is asserted over a parent corporation on the basis of a subsidiary's business activities, the question is whether the parent exercises sufficient control over its subsidiary to cause the parent to transact business in the judicial district within the special venue provision of the Clayton Act (Act), *15 U.S.C.S. § 15*. Sufficient control over the operations of a subsidiary renders the subsidiary the instrument, rather than merely the investment, of the parent, and supports the conclusion that the parent is transacting business in a district, despite the formal separation of corporate entities. Sufficient control does not require that the subsidiary be controlled to an ultimate degree by its parent, although something more than mere passive investment by the parent is required. The parent must have and exercise control and direction, over the affairs of its subsidiary in order for venue to be proper under § 12 of the Act.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

Day-to-day control of the activities of the subsidiary is not required in order for a parent to be carrying on business of any substantial character within a judicial district. It is enough if the parent exercises continuing supervision of and intervention in the subsidiaries affairs, especially if the parent exercises its ability to influence major decisions of the subsidiary which lead or could lead to violations of the antitrust laws.

Counsel: Counsel who presented argument on behalf of the appellant was George W. Sampson fo Seattle, WA. Steve W. Berman of Seattle appeared on the brief.

Counsel who presented argument on behalf of the appellee was Phil C. Neal of Chicago, IL. James K. Gardner and Charles Evans Gerber of Chicago, IL appeared on the brief. Francies P. Barron of New York, NY appeared on the brief. David W. Harlan and Michael A. Kahn of St. Louis, MO appeared on the brief.

Judges: Before HANSEN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and MELLOY, [1] Chief District Judge. MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

Opinion by: MELLOY

Opinion

[*1168] MELLOY, Chief District Judge.

The plaintiffs, individually and as a proposed class of popular music fans, sued Ticketmaster Corporation ("Ticketmaster") for damages and injunctive relief. Sixteen cases, originally filed in various districts, were consolidated for pretrial proceedings in the Eastern District of Missouri. Eleven of the cases were dismissed. The plaintiffs in the remaining five cases then filed a consolidated complaint superseding the individual **[**2]** complaints. The consolidated complaint alleged that Ticketmaster violated *§ 1* of the Sherman Act by engaging in price fixing with various concert venues and promoters and by boycotting the band Pearl Jam; that Ticketmaster violated § 2 of the Sherman Act by monopolizing, or attempting to monopolize, the market for ticket distribution services; and that Ticketmaster violated § 7 of the Clayton Act by acquiring its competitors. See *15 U.S.C. § 1 et seq.* The plaintiffs claimed standing to sue based on their payment of monopoly overcharges, in the form of service and handling fees, for Ticketmaster's ticket distribution services.

The district court dismissed the suit, holding that the plaintiffs lacked standing to sue because they were indirect purchasers within the meaning of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)* and its progeny. The district court also held that, even if the plaintiffs were not indirect purchasers, they were nevertheless inappropriate plaintiffs under the standards set forth by the Supreme Court in *Associated General*

[1] The Honorable Michael J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. [**3] 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). Finally, the district court held that three of the consolidated cases had been improperly venued, and dismissed the cases originally filed in Georgia, Washington, and Michigan.

The plaintiffs contend that the court erred in all of these holdings. We affirm in part, reverse in part, and remand for further proceedings.

I.

Since the case was dismissed on the pleadings, we treat all factual allegations of the complaint as true. See Haberthur v. City of Raymore, 119 F.3d 720 (8th Cir. 1997). **HN1**[] We may affirm a dismissal on the pleadings "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); see also Associated General Contractors, 459 U.S. at 526 ("We must assume that the [plaintiff] can prove the facts alleged in its amended complaint.").

According to the complaint, Ticketmaster is a monopoly supplier of ticket distribution or ticket delivery services to large-scale popular music shows. The complaint alleges that Ticketmaster has long-term exclusive contracts with almost **[**4]** every promoter of concerts in the United States. These exclusive contracts ensure that Ticketmaster will have the right to handle the vast majority of ticket sales for almost every large-scale popular music concert in the United States, regardless of whether or not Ticketmaster has exclusive contracts with the particular venues where those concerts are held.

[*1169] Ticketmaster's exclusive contracts with almost every promoter of concerts in the United States give it the right to distribute tickets over the telephone, at outlets such as retail stores, and at the venue where the promoter is presenting an event. According to plaintiffs, Ticketmaster therefore has ironclad control over ticketing for any large-scale popular music concert at major venues in the United States.

Ticketmaster uses that control, according to the complaint, to extract from the plaintiffs supracompetitive fees for ticket distribution services. Those fees can be as high as twenty dollars per ticket. By paying those fees, the plaintiffs contend that they suffer injury to their property within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15, and so have standing to sue. See Reiter v. Sonotone Corp., 442 [**5] U.S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979). The district court, while not questioning the allegation that the plaintiffs pay some increased price for concert tickets as a result of Ticketmaster's monopoly, nonetheless held that such injury did not give the plaintiffs standing under § 4.

II.

In Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977), the Supreme Court held that only the "direct purchaser" from a monopoly supplier could sue for treble damages under § 4 of the Clayton Act. See 15 U.S.C. § 15; Hovenkamp, The Indirect- Purchaser Rule and Cost-Plus Sales, 103 Harv. L. Rev. 1717 (1990). **HN2**[] "Indirect purchasers" generally lack standing under the antitrust laws and so cannot bring suits for damages. See Sports Racing Services, Inc. v. Sports Car Club of America, Inc., 131 F.3d 874, 883 (10th Cir. 1997)("The Supreme Court has consistently held that only direct purchasers suffer injury within the meaning of § 4 of the Clayton Act.").

The Supreme Court has defined an indirect purchaser as one who is not the "immediate buyer from the alleged antitrust violator[]," Kansas v. Utilicorp United, Inc., 497 U.S. 199, 207, [**6] 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990), or one who "[does] not purchase [the monopolized product] directly from the [antitrust] defendant[.]" California v. ARC America Corp., 490 U.S. 93, 96, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989). Some commentators have offered definitions of their own. See, e.g., Werden & Schwartz, Illinois Brick and the Deterrence of Antitrust Violations -- An Economic Analysis, 35 Hastings L.J. 629, 668 n. 4 (1984)("The term 'indirect purchaser'… means any party that purchases a product from any party in the vertical supply chain other than the party suspected of the antitrust violation, *i.e.*, from a direct purchaser or another indirect purchaser -- with the ultimate consumer being the last indirect purchaser."); Hovenkamp, The Indirect-Purchaser Rule and Cost-Plus Sales, 103 Harv.L.Rev. 1717

(1990)("'Indirect' purchasers [are] those who bought an illegally monopolized or cartelized product or service through the agency of a dealer, distributor, or some other independent reseller who was not a participant in the antitrust violation."). Other courts and commentators have given examples to explain the content of the indirect **[**7]** purchaser concept. See, e.g., *McCarthy v. Recordex Service, Inc., 80 F.3d 842, 852 n. 16* (3rd Cir.)(homeowner an indirect purchaser of paint used by housepainter), *cert. denied*, *136 L. Ed. 2d 42, 117 S. Ct. 86 (1996)*; Landes & Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule in Illinois Brick, 46 U.Chi.L.Rev. 602 (1979)(bread buyer an indirect purchaser of flour and oven used by bread baker). [2]

A common concept unites **[**8]** these various definitions and examples: An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser. **[*1170]** Such indirect purchasers may not sue to recover damages for the portion of the overcharge they bear. The right to sue for damages rests with the direct purchasers, who participate in the antecedent transaction with the monopolist.

Some review of the economic assumptions underlying the direct purchaser rule is necessary to understand the justification for the direct purchaser rule. For purposes of antitrust analysis, courts assume that a firm generally wishes to "minimize its input costs[.]" *Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 374 (7th Cir. 1986)*, *cert. denied*, *480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574 (1987)*; *Stamatakis Industries, Inc. v. King, 965 F.2d 469, 472 (7th Cir. 1992)*. Consequently, when a firm buys its inputs from a monopolist at a monopoly price, we may be fairly certain that it had little choice in the matter. [3] The indirect purchaser, in turn, pays some portion of the monopoly overcharge only **[**9]** because the previous purchaser was unable to avoid that overcharge. The homeowner in the example given by the Third Circuit pays some part of the monopoly overcharge for paint only because the housepainter was unable to obtain his paint at a competitive price, just as the bread buyer in Landes and Posner's example pays some part of the monopoly overcharge for the oven only because the baker was unable to obtain a competitively priced oven. The breakdown in competitive conditions occurs in transactions at least once removed from the indirect purchaser.

The monopoly overcharge exacted by the monopolist generally injures both those who deal directly **[**10]** and those who deal derivatively with the monopolist. As Judge Posner has explained, "The optimal adjustment by an unregulated firm to the increased cost of the input [*i.e.*, the monopoly overcharge] will always be a price increase smaller than the increase in input cost[.]" State of Illinois *ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., 852 F.2d 891, 894 (7th Cir. 1988)*(*en banc*), *cert. denied*, *488 U.S. 986, 102 L. Ed. 2d 573, 109 S. Ct. 543 (1988)*, *overruled on other grounds by* *Illinois v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469 (7th Cir. 1991)*; *Stamatakis, 965 F.2d at 472*. Only rarely will a firm be able to pass on the entire amount of a monopoly overcharge to its customers. See *Panhandle Eastern, supra.* In the usual case, both the firm and its customers will bear some portion of the overcharge, and thus both will suffer injury from the antitrust violation. See *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489-93, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*; *Illinois Brick, 431 U.S. at 731-33*.

Precisely what part of the overcharge will be borne by the direct purchaser, and what part will be borne **[**11]** by the indirect purchaser, is "an example of what is called 'incidence analysis,' and is famously difficult." *In re Brand*

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[2] Although direct purchaser issues usually involve a chain of distribution in which a tangible good passes from one purchaser to another, that is not always so. An indirect purchaser can bear some part of the monopoly overcharge for a product even when that product does not pass from the direct to the indirect purchaser. For example, in Landes and Posner's example of the bread buyer, the bread buyer pays a higher price for bread because the baker passes along some part of the monopoly overcharge paid for the oven.

[3] The situation may be different when the firm is party to the antitrust violation. Cf. *In re Midwest Milk Monopolization Litigation, 730 F.2d 528, 529-30 (8th Cir. 1984)*, *cert. denied*, ***469 U.S. 924, 105 S. Ct. 306, 83 L. Ed. 2d 240 (1984)***; *In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1163 (5th Cir. 1979)*, *cert. denied*, ***449 U.S. 905, 101 S. Ct. 280, 101 S. Ct. 281, 66 L. Ed. 2d 137 (1980)***; *McCarthy, 80 F.3d at 854*.

Name Prescription Drugs Litigation, 123 F.3d 599, 605 (7th Cir. 1997), *cert. denied*, *140 L. Ed. 2d 186, 118 S. Ct. 1178 (1998)*; see also Illinois Brick, 431 U.S. at 740 - 44; Utilicorp United, Inc., 497 U.S. at 206 - 209; Landes & Posner, Economic Analysis of Illinois Brick, 46 U.Chi.L.Rev. at 619 - 20. If both direct and indirect purchasers were allowed to sue for damages, the courts would be faced with the "famously difficult" task of apportioning the payment of overcharges between direct and indirect purchasers. The alternative is to allow duplicative recovery, which the Supreme Court also disapproves of and the avoidance of which constitutes another rationale for the direct purchaser rule. See Utilicorp United, 497 U.S. at 212; Southwestern Bell Telephone Co. v. FCC, 325 U.S. App. D.C. 249, 116 F.3d 593, 597 (D.C.Cir. 1997).

The Supreme Court has declined to involve the federal courts in such an analysis, except in very limited circumstances, explaining that "the direct purchaser rule serves, in part, to eliminate the complications of apportioning **[**12]** overcharges between direct and indirect purchasers." Utilicorp United, 497 U.S. at 208; see also In re Brand **[*1171]** Name Prescription Drugs Litigation, 123 F.3d at 605; In re Midwest Milk Monopolization Litigation, 730 F.2d at 530. While the Supreme Court has recognized that the "economic assumptions underlying the Illinois Brick rule might be disproved in a specific case," 497 U.S. at 217, the Court also has made it plain that it considers it an "unwarranted and counterproductive enterprise to litigate a series of exceptions." 497 U.S. at 217.

None of the limited circumstances that might warrant avoidance of the direct purchaser rule exist here. There is no "cost-plus" contract, see Hanover Shoe, 392 U.S. at 494, no allegation that the indirect purchasers own or control the direct purchasers, see In re Brand Name Prescription Drugs Litigation, 123 F.3d at 605, and no proper allegation that the direct purchasers have conspired with or otherwise been party with Ticketmaster to any antitrust violation. [4] Since the direct purchaser rule applies in this case, the question becomes whether the plaintiffs are direct or indirect purchasers of Ticketmaster's services.

[13]** III.

The plaintiffs contend that they are direct purchasers of "ticket distribution services" from Ticketmaster, primarily because they pay directly to Ticketmaster distinct service and convenience fees. However, like the Third Circuit, we do not find billing practices to be determinative of indirect purchaser status. See McCarthy, 80 F.3d at 853 n. 18 (noting that "even if a separate charge for gasoline were assessed [to a taxi passenger], the taxi passenger still could not be considered a direct purchaser [of gasoline] in any sense."). As the plaintiffs' complaint makes clear, Ticketmaster's exclusive contracts with almost every promoter of concerts in the United States require venues wishing to host concerts to use Ticketmaster for ticket distribution to those concerts. Just like the housepainter and the baker, the complaint alleges that the venues are unable to obtain a necessary input -- ticket delivery services -- in a competitive market. The plaintiffs' inability to obtain ticket delivery services in a competitive market is simply the consequence of the antecedent inability of venues to do so. Cf. *Note*, Beyond Economic Theory: A Model for Analyzing the Antitrust **[**14]** Implications of Exclusive Dealing Arrangements, 45 Duke L.J. 1009,1015 (1996)("Ticketing service companies do not compete directly for consumers' business. Instead, [those companies] compete to secure contracts with venues and event promoters for the right to sell tickets to various entertainment events."). As the plaintiff's complaint makes clear, ticket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first. As we explained above, such derivative dealing is the

[4] The plaintiffs do characterize the venues as beneficiaries of and participants in Ticketmaster's unlawful activity, but the plaintiffs have not joined the venues as defendants. In this circuit, an antitrust plaintiff cannot avoid the Illinois Brick rule by characterizing a direct purchaser as a party to the antitrust violation, unless the direct purchaser is joined as a defendant. See In re Midwest Milk Monopolization Litigation, 730 F.2d at 529 - 31. These consolidated cases are controlled by the law of this circuit, rather than that of the various circuits in which they were first filed. See Temporomandibular Joint (TMJ) Implant Recipients v. E.I. DuPont de Nemours & Co., 97 F.3d 1050, 1055 (8th Cir. 1996)("When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located."); see also In re Korean Air Lines Disaster, 265 U.S. App. D.C. 39, 829 F.2d 1171 (D.C.Cir. 1987), *aff'd sub nom* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 104 L. Ed. 2d 113, 109 S. Ct. 1676 (1989); but see Cooper, The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation, 57 Geo.Wash.L.Rev. 1145 (1989).

essence of indirect purchaser status, and it constitutes a bar under the antitrust laws to the plaintiffs' suit for damages.

Nor do we agree with the plaintiffs' contention that Ticketmaster's monopoly power is benign, so far as the venues are concerned, simply because Ticketmaster's service fees are collected immediately from ticket buyers. Although the plaintiffs describe these fees as separate from what they call the actual purchase price of concert tickets, it appears clear that the actual purchase price and the cost of the service fees amount to the single cost of attending the concert, regardless of how that cost is divided into actual purchase price and service **[**15]** fees. See *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 495,* ***[*1172]*** *119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*(Scalia, J., dissenting). [5] Since the price of the ticket (that is, the actual purchase price plus the service fees) is obviously a price that the market will bear, see *U.S. Football League v. National Football League, 842 F.2d 1335, 1357-58 n. 19 (2nd Cir. 1988)*, a venue free from Ticketmaster's domination of ticket distribution would be able to charge that price itself, without having to cede to Ticketmaster a portion of that price in the form of supracompetitive service fees. Cf. *Hanover Shoe, 392 U.S. at 492* (noting, in the course of disapproving a passing-on defense to antitrust suits, the "nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued."); *Utilicorp United, 497 U.S. at 209* (same).

[16]** Consequently, we affirm the district court's order dismissing the individual plaintiff's claims for monetary damages under § 4 of the Clayton Act.

IV.

Indirect purchaser status does not bar the plaintiffs from seeking injunctive relief under § 16 of the Clayton Act. The concerns of the direct purchaser rule have mainly to do with the complexities of incidence analysis, complexities that do not arise when the courts must consider the propriety of injunctive relief. As Professors Areeda and Hovenkamp explain, "An equity suit neither threatens duplicative recoveries nor requires complex tracing through the distribution chain. There are no damages to be traced, and a defendant can comply with several identical injunctions as readily as with one. Illinois Brick has not therefore barred an indirect purchaser's suit for an injunction." Phillip E. Areeda and Herbert Hovenkamp, ***Antitrust Law*** P371d, at 259 (1995); see also *McCarthy, 80 F.3d at 856* (holding that "plaintiffs need not satisfy Illinois Brick's "direct purchaser" requirement in order to seek injunctive relief[.]").

The case relied on by Ticketmaster as support for its contention that injunctive relief is **[**17]** unavailable to the plaintiffs, *Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*, does not apply to the facts of this case. The Court denied standing to seek injunctive relief to the plaintiff in Cargill because the injury alleged by the plaintiff was nothing more than a reduction in profit resulting from increased competition. See *479 U.S. at 114* - 15 ("Monfort's [] claim is that … Excel would lower its prices to some level at or slightly above its costs in order to compete with other packers for market share….To remain competitive, Monfort would have to lower its prices; as a result, Monfort would suffer a loss in profitability[.]"). The Cargill decision reflects the principle that ***antitrust law*** provides no remedies for those injured by competition; it does not, as Ticktemaster contends, establish an inflexible rule that no antitrust plaintiff may seek injunctive relief unless he may also seek damages. In fact, footnote six of the Cargill decision explains the different standing requirements under § 16 and § 4 of the Clayton Act, cites to Illinois Brick, and concludes that a party who lacks standing under **[**18]** § 4 may still have standing to seek injunctive relief under § 16. See *479 U.S. at 111 n. 6*.

In this case, the pleadings establish anti-trust standing to seek injunctive relief. All of the plaintiffs claim to have purchased tickets from Ticketmaster and claim to have paid the monopolistic service fees. The payment of those fees establishes standing to pursue a claim for injunctive relief.

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[5] We note that, unlike in the Eastman Kodak case, there are no information costs here that may prevent the plaintiffs from separating out from the total purchase price the actual purchase price and service fee components. See *Eastman Kodak, 504 U.S. at 473* - 74.

V.

Finally, the plaintiffs appeal the portion of the district court's order that found that Ticketmaster was not transacting business in Georgia, Washington, or Michigan within the meaning of § 12 of the Clayton Act, the Act's venue provision. See *15 U.S.C. § 22*; *U.S. ex rel. Thistlethwaite v. Dowty Woodville* **[*1173]** *Polymer, Ltd., 110 F.3d 861, 865 (2nd Cir. 1997)*. Relying on *O.S.C. Corp. v. Toshiba America, 491 F.2d 1064 (9th Cir. 1974)* and *San Antonio Tel. Co. v. American Tel. & Tel. Co., 499 F.2d 349 (5th Cir. 1974)*, the district court held that Ticketmaster was not transacting business within those judicial districts because it did not exercise "day to day" control over the operations of its subsidiaries located in those districts. We conclude that the district court applied **[**19]** the wrong legal standard for venue under the Clayton Act.

HN3[] Section 12 of the Clayton Act provides in pertinent part that "any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business[.]" *15 U.S.C. § 22*. In *U.S. v. Scophony Corp. of America, 333 U.S. 795, 92 L. Ed. 1091, 68 S. Ct. 855 (1948)*, the Supreme Court held that the "transacts business" language of § 12 was intended to make "the practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' [] the test of venue." *333 U.S. at 807*. The "highly technical distinctions" that had characterized venue determinations under the previous venue provision, § 7 of the Sherman Act, were to be "sloughed off" by the "practical and broader business conception" embodied in § 12. *333 U.S. at 807*; *Reynolds Metals Co. v. Columbia Gas System, Inc., 669 F. Supp. 744, 747 (E.D.Va. 1987)*("The 'transacts business' language of the Clayton Act enlarged the more limited 'found' standard of the Sherman Act.").

HN4[] When venue is **[**20]** asserted over a parent corporation on the basis of a subsidiary's business activities, the question is whether the parent "exercises sufficient control over its [] subsidiary to cause the parent to 'transact business' [in the judicial district] within the special venue provision of the Clayton Act." *Tiger Trash v. Browning-Ferris Industries, Inc., 560 F.2d 818, 822 (7th Cir. 1977)*, *cert. denied*, *434 U.S. 1034, 98 S. Ct. 768, 54 L. Ed. 2d 782 (1978)*. Sufficient control over the operations of a subsidiary renders the subsidiary the instrument, rather than merely the investment, of the parent, and supports the conclusion that the parent is transacting business in a district, despite the formal separation of corporate entities. See *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634, 637 (8th Cir. 1975)*. Sufficient control does not require that the subsidiary be controlled to an ultimate degree by its parent, *560 F.2d at 824*, although something more than mere passive investment by the parent is required. *560 F.2d at 823*; see also *Phone Directories Co., Inc. v. Contel Corp., 786 F. Supp. 930, 939 (D. Utah 1992)*; *Reynolds, 669 F. Supp. at 749*. The parent must **[**21]** have and exercise control and direction, *560 F.2d at 823*, over the affairs of its subsidiary in order for venue to be proper under § 12.

HN5[] Day-to-day control of the activities of the subsidiary is not required in order for a parent to be carrying on business of any substantial character within a judicial district. *Scophony, 333 U.S. at 807*. It is enough if the parent exercises continuing supervision of and intervention in the subsidiaries' affairs, see *Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182, 1200 (D.D.C. 1984)*, especially if the parent exercises its "ability … to influence major decisions of the subsidiary which lead or could lead to violations of the antitrust laws." *Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 131 (D.N.H. 1975)*; *Scophony, 333 U.S. at 814* (holding that venue was proper for British corporation in Southern District of New York when British corporation demonstrated a "continuing exercise of supervision over and intervention in [American subsidiary's] affairs.").

In reaching the conclusion that Ticketmaster was not transacting business in Georgia, Washington, or Michigan, the district court relied on the affidavit **[**22]** of Ned Goldstein, Senior Vice President and General Counsel of Ticketmaster, who affirmed that Ticketmaster owns no property and has no bank accounts or offices in Georgia, Washington, or Michigan. Goldstein further affirmed that all the day-to-day operations of the subsidiaries were under the control of the officers of those subsidiaries. While these affirmations may have been enough to resolve the venue issue under the standard **[*1174]** applied by the district court, they do not resolve the question under the standard we have explained here. Accordingly, we vacate the district court's venue ruling so that the district court may allow further discovery on the venue issue, as may be appropriate, and reconsider the issue under the appropriate standard.

VI.

In conclusion, we affirm the district court's judgment that the plaintiffs lack standing to pursue their claims for damages under § 4 of the Clayton Act. We reverse the district court's ruling that the plaintiffs lack standing to seek injunctive relief under § 16, and we vacate and remand for further proceedings on the issue of proper venue.

Dissent by: MORRIS SHEPPARD ARNOLD

Dissent

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

The **[**23]** court holds that *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, precludes these plaintiffs from bringing an antitrust action against Ticketmaster under Section 4 of the Clayton Act, *see 15 U.S.C. § 15(a)* . I respectfully disagree.

The court begins its opinion by attempting to clarify the meaning of the phrase "indirect purchaser" in the antitrust context. Citing *Illinois Brick* itself, numerous other cases, and several law review articles, the court concludes that "an indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and [a direct purchaser]." The phrase "antecedent transaction," however, appears nowhere in the authorities relied on, and, in fact, a mere "antecedent transaction" will not turn all purchasers of a monopolized product into indirect purchasers for the purposes of *Illinois Brick*. *Illinois Brick, 431 U.S. at 727*, uses the term "indirect purchaser" to mean someone in a vertical supply chain who purchases a monopolized product from someone other than a monopolist. Both the direct and the indirect purchaser will usually suffer **[**24]** some injury as both ordinarily will have to absorb a portion of the monopolist's overcharge. *See id. at 746*. Because the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, had rejected the argument that monopolists could avoid liability to direct purchasers to the extent that those direct purchasers had "passed on" any or all of their markups to indirect purchasers, without *Illinois Brick*, both direct and indirect purchasers would have standing to sue for the same antitrust injury. *Illinois Brick, 431 U.S. at 746*, in the interests of economic and administrative efficiency, holds that only parties who are directly injured may sue for antitrust violations, thus avoiding the need to apportion damages among direct and indirect purchasers, and preventing double recovery (or sextuple recovery under Section 4 of the Clayton Act) when both indirect and direct purchasers sue.

Thus *Illinois Brick* requires more than a mere antecedent transaction for an antitrust defendant to avoid suit from an "indirect purchaser" under Section 4. Instead, the antecedent transaction must have been one in a direct **[**25]** vertical chain of transactions and it must have resulted in the "passing on" of monopoly costs from the direct purchaser to the indirect purchaser. *Illinois Brick, 431 U.S. at 746*. In this case, neither of these conditions is met.

The monopoly product at issue in this case is ticket distribution services, not tickets. Ticketmaster supplies the product directly to concert-goers; it does not supply it first to venue operators who in turn supply it to concert-goers. It is immaterial that Ticketmaster would not be supplying the service but for its antecedent agreement with the venues. But it is quite relevant that the antecedent agreement was not one in which the venues bought some product from Ticketmaster in order to resell it to concert-goers. More important, and more telling, is the fact that the entirety of the monopoly overcharge, if any, is borne by concert-goers. In contrast to the situations described in *Illinois Brick* and the literature that the court cites, the venues do not pay any portion of the alleged monopoly overcharge -- in fact, they receive a portion of that overcharge from Ticketmaster.

[*1175] An unhappy result of the holding in this case is that it is now likely **[**26]** that no one can bring a Section 4 suit against Ticketmaster in this circuit. The plaintiffs in this appeal (and other similarly situated "indirect purchasers") are the only parties who are actually injured by Ticketmaster's alleged illegal price-fixing, if any. The venues themselves, the parties whom the court seems to favor as candidates for bringing this Section 4 suit, are not injured, and therefore cannot bring an action at all.

For the reasons indicated, I dissent from the judgment in this case.

Intergraph Corp. v. Intel Corp.

United States District Court for the Northern District of Alabama, Northeastern Division

April 10, 1998, Decided

CV 97-N-3023-NE

Reporter
3 F. Supp. 2d 1255 *; 1998 U.S. Dist. LEXIS 4820 **; 1998-1 Trade Cas. (CCH) P72,126

INTERGRAPH CORPORATION, Plaintiff, vs. INTEL CORPORATION, Defendant

Disposition: **[**1]** Intel Corporation PRELIMINARY ENJOINED from terminating Intergraph's rights as a "strategic customer in current and future programs," or from otherwise taking any action adversely affecting Intel's business relationship with Intergraph or Intergraph's ability to design, develop, produce, manufacture market or sell products incorporating, or based upon, Intel products or information.

Core Terms

Chips, microprocessors, competitors, products, workstations, termination, customers, graphics, technology, distributors, unconscionable, terms, technical information, monopoly power, manufacturer, relevant market, antitrust, Samples, injunctive relief, subsystem, compete, parties, preliminary injunction, court concludes, high-end, monopoly, supplied, merits, percent, patent

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN1[] **Antitrust & Trade Law, Sherman Act**

Under *Fed. R. Civ. P. 65*, in order to prevail on its motion for a preliminary injunction, a party must prove: (1) it has a substantial likelihood of ultimate success on the merits of one or more of its substantive claims; (2) there is a substantial threat that it will suffer irreparable injury in the absence of preliminary relief; (3) the likely injury to itself is greater than that likely to be suffered by the defendant; and (4) entry of the preliminary injunction would not disserve the public interest. Where the plaintiff advances anti-trust claims, preliminary relief is specifically authorized by *15 U.S.C.S. § 26*.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Antitrust & Trade Law, Sherman Act**

See 15 U.S.C.S. § 26.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Monopolies & Monopolization, Actual Monopolization**

See 15 U. S.C.S. § 2.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Sherman Act, Claims**

In order to prevail on its § 2 of the Sherman Anti-Trust Act, codified at 15 U.S.C.S. § 2, monopolization claim, a plaintiff only needs to establish that a defendant (1) possesses monopoly power in the relevant market and (2) has willfully acquired or maintained that power.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

A sixty to sixty-five percent market share establishes a prima facie case of market power and creates a genuine issue of dangerous probability of monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN6[] **Monopolies & Monopolization, Actual Monopolization**

Strong customer brand loyalty is an impediment to competition and aids the exercise of market power and facilitates monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

A rapidly evolving high technology market such as microprocessors provides a market environment favorable to increased concentration of market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN8[] Monopolies & Monopolization, Actual Monopolization

The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN9[] Monopolies & Monopolization, Actual Monopolization

Even conduct by a monopolist that is otherwise lawful may violate the antitrust laws where it has anticompetitive effects. Legal actions, when taken by a monopolist, may give rise to liability, if anticompetitive. Otherwise lawful conduct may be unlawfully exclusionary when practiced by a monopolist. When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN10[] Monopolies & Monopolization, Actual Monopolization

A refusal to deal may be unlawful because a monopolist's control of an essential facility, sometimes called a "bottleneck" can extend monopoly power from one stage of production to another, and from one market into another. The antitrust laws protect customers and purchasers in cases when a monopolist refuses to deal in order to control a downstream market or to frustrate litigation.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Monopolies & Monopolization, Actual Monopolization

The antitrust laws impose on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN12[] Monopolies & Monopolization, Actual Monopolization

Technical information is "essential" if it is vital to competitive viability and competitors cannot effectively compete in the relevant market without access to it.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN13[] Monopolies & Monopolization, Actual Monopolization

Reasonable and timely access to critical business information that is necessary to compete is an essential facility.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Monopolies & Monopolization, Actual Monopolization

Power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next. Unlawful monopoly leveraging occurs where a firm uses its market power in one market to gain competitive advantage in another market other than by competitive means. The use of monopoly power attained in one market to gain a competitive advantage in another is a violation of *§ 2* of the Sherman Anti-Trust Act, codified at *15 U.S.C.S. § 2*, even if there has not been an attempt to monopolize the second market.

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] Antitrust & Trade Law, Sherman Act

The requirements for liability under a monopoly leveraging claim include monopoly power in one market; the use of that power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another market; and injury caused by the challenged conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Reciprocal Dealing

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] Monopolies & Monopolization, Actual Monopolization

Coercive reciprocity refers to the practice of using economic leverage in one market coercively to secure competitive advantage in another. Coercive reciprocity presupposes the existence of economic leverage in one market to gain an unfair advantage in another. Coercive reciprocity is a per se violation of the antitrust laws because of its pernicious effect and economic similarity to illegal tying cases.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Limitations

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN17[] **Ownership & Transfer of Rights, Licenses**

Patent rights do not confer an absolute immunity from antitrust claims. Unlawful exclusionary conduct can include a monopolist's unilateral refusal to license a patent or copyright or to sell a patented or copyrighted work. A monopolist cannot use the pretext of protecting intellectual property in order to violate the antitrust laws. Neither the aims of intellectual property law nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Monopolies & Monopolization, Actual Monopolization**

Contracts used as part of an anticompetitive scheme are unlawful under the antitrust laws. The policies expressed in the federal antitrust laws will override any agreement in contravention of those policies, regardless of the agreement's legality under private contract law.

Antitrust & Trade Law > Sherman Act > Claims

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN19[] **Sherman Act, Claims**

Section 1 of the Sherman Anti-Trust Act, codified at *15 U.S.C.S. § 1*, provides that every contract, combination or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. In order to prevail on a *§ 1* claim a party must prove: (1) an agreement to enter a conspiracy; (2) designed to achieve an unlawful objective; and, (3) actual unlawful effects or facts which radiate a potential for future harm to competition. The plaintiff is not required to show that a defendant's conspiracy under *§ 1* has a dangerous probability of successfully achieving its objectives. It is not necessary for a plaintiff to provide evidence of actual, present competition to show a violation of *§ 1* so long as it shows that the potential for competition exists.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN20[] **Monopolies & Monopolization, Actual Monopolization**

A plaintiff need not prove an intent on the part of the co-conspirators to restrain trade or to build a monopoly so long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under *§ 1* of the Sherman Anti-Trust Act, codified at *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN21[] **Remedies, Injunctions**

Section 16 of the Clayton Act, codified at *15 U.S.C.S. § 16* specifically provides for preliminary injunctive relief for threatened ***antitrust law*** violations, whereby any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws. *Section 16* requires a showing only of threatened loss or damage. The legislative history of *§ 16* clearly shows a strong congressional policy supporting preliminary injunction because an antitrust plaintiff does not have to wait to be ruined in his business before he has his remedy.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN22[] **Injunctions, Preliminary & Temporary Injunctions**

Courts have granted preliminary injunctions when there is a serious antitrust issue, serious harm to an antitrust plaintiff and little or no harm to defendant.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN23[] **Antitrust & Trade Law, Sherman Act**

Courts often grant mandatory injunctions when necessary to remedy an antitrust violation. District courts are invested with large discretion to model their judgments to fit the exigencies of the particular case.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Output & Requirements Contracts

Commercial Law (UCC) > ... > Subject Matter > Goods > General Overview

Commercial Law (UCC) > Sales (Article 2) > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Commercial Law (UCC) > ... > Remedies > Buyer Remedies > General Overview

Commercial Law (UCC) > ... > Remedies > Buyer Remedies > Replevin & Specific Performance

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

HN24[] **Types of Contracts, Output & Requirements Contracts**

In a commercial case involving the sale of "goods," the Uniform Commercial Code authorizes the court to specifically enforce an agreement where the goods are unique or in other proper circumstances. *Ala. Code § 7-2-716(1)*. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Contracts Law > Remedies > Specific Performance

HN25[] **Injunctions, Grounds for Injunctions**

The loss of a prestigious brand of product line may create a threat of irreparable injury if it is likely that customers--or prospective customers--will turn to competitors who do not labor under the same handicap.

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

HN26[] **Contract Provisions, Contract Terms**

See *Ala. Code § 7-2-302* (1975), *Cal. Civil Code § 1670.5*.

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > Unconscionable Terms

Contracts Law > Defenses > Unconscionability > General Overview

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

HN27[] **Contract Terms, Unconscionable Terms**

While unconscionability is not defined by the code or the comments, the commentary to *Ala. Code § 7-2-302* (1975), describes the basic test as whether, in light of the general commercial background and the commercial needs of the particular trade or the case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

HN28[] **Jury Trials, Province of Court & Jury**

The determination of unconscionability is a question of law, to be determined by the court with each case decided on its own facts. Alabama courts have identified four factors to be considered in determining whether a contract is unconscionable: (1) whether there was an absence of meaningful choice on one party's part, (2) whether the contractual terms unreasonably favor one party, (3) whether there was unequal bargaining power among the parties, and (4) whether there were oppressive, one-sided, or patently unfair terms in the contract. While unconscionability cases most often arise in the consumer context, the principle applies with equal force in the commercial field.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

Contracts Law > Contract Conditions & Provisions > General Overview

Energy & Utilities Law > Utility Companies > Contracts for Service

Commercial Law (UCC) > Sales (Article 2) > General Overview

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

Commercial Law (UCC) > ... > Contract Terms > Gap Filler Provisions > General Overview

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > Unconscionable Terms

Contracts Law > Defenses > Unconscionability > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > Uniform Commercial Code

HN29[] **Standards of Performance, Discharge & Termination**

The Uniform Commercial Code deals with the subject of unconscionability when one party to a commercial agreement seeks to exercise its claimed rights under an automatic termination clause, and where no advance notice to the other party is required under the clause. *Ala. Code § 7-2-309(3)*, focuses on contract termination, and provides that an agreement dispensing with notification of termination is invalid if its operation would be unconscionable. *Ala. Code § 7-2-309(3)*, *Cal. Com. Code § 2309*. The commentary to this provision directs attention to the "results" of exercising such power: An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this subsection unless the results of putting it into operation would be the creation of an unconscionable state of affairs.

Commercial Law (UCC) > ... > Contract Terms > Gap Filler Provisions > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

Commercial Law (UCC) > Sales (Article 2) > General Overview

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

HN30[] Contract Terms, Gap Filler Provisions

Ala. Code § 7-2-309(3), intends the focus of an unconscionability determination under 7-2-309 be on the result of its application as seen at the time of termination.

Commercial Law (UCC) > ... > Contract Terms > Gap Filler Provisions > General Overview

Commercial Law (UCC) > Sales (Article 2) > General Overview

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > Unconscionable Terms

HN31[] Contract Terms, Gap Filler Provisions

Ala. Code. § 2-309(2), imposes an obligation to give "reasonable notification" of termination. This commercially imposed standard embraces both policy and economic rationales.

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

HN32[] Contract Provisions, Contract Terms

See Ala. Code § 7-2-309, Cal. Comm. Code § 2309 (Official Comment 8).

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

HN33[] Contract Provisions, Contract Terms

The question of "reasonable notification" is typically one for the trier of fact. However, little or no notice is unreasonable as a matter of law. Reasonable notice is that time period that, under the circumstances of the particular case, would allow a party to make alternate arrangements upon termination of the contract and would allow a party to minimize losses.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN34[] Injunctions, Preliminary & Temporary Injunctions

The court is possessed with inherent and broad equitable powers to fashion an appropriate remedy to deal with the particular wrong in each case. The court also has the power to grant preliminary injunctive relief where a party's conduct is calculated to frustrate litigation.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN35[] Injunctions, Preliminary & Temporary Injunctions

A preliminary injunction to be fashioned by the court is designed solely to preserve the status quo, to prevent the irreparable harm that threatens a plaintiff and to achieve the appropriate equitable balance of what is necessary, what is fair, and what is workable.

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN36[] **Injunctions, Mandatory Injunctions**

To establish the need for a mandatory injunction a plaintiff must establish (1) a substantial likelihood of success on the merits of one or more of its claims, (2) the imminent threat of irreparable injury in the absence of injunctive relief, (3) that the threatened harm to Intergraph outweighs any potential harm to Intel that would be caused by an injunction, and (4) that the grant of an injunction will not disserve the public interest.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN37[] **Injunctions, Preliminary & Temporary Injunctions**

Loss of good will and harmed reputation are types of injuries that are sufficient to establish the need for injunctive relief. By its very nature, injury to good will and reputation is not easily measured or fully compensable in damages.

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Judges: Edwin L. Nelson, United States District Judge.

Opinion by: Edwin L. Nelson

Opinion

[*1258] Memorandum [2] of Opinion and Preliminary Injunction**

I. Background.

The court has for consideration the motion and the renewed motion of plaintiff Intergraph Corporation for a preliminary injunction. The motions essentially seek to prevent defendant Intel Corporation from refusing to engage in future business with the plaintiff in the same or similar manner that it has done from approximately 1993 until the present dispute arose between the parties in 1997. The amended complaint is in twenty-three counts and includes, *inter alia,* claims under state law theories of fraud, fraudulent suppression, negligent failure to warn, negligence, wantoness and willfulness, breach of contract, intentional interference with business relationships, breach of express warranty, breach of implied warranty of fitness for a particular purpose, and violation of the Alabama Trade Secrets Act. The complaint contains three claims for patent infringement and a single count charging anti-trust violations under *15 U.S.C. §§ 1* and *2*. Jurisdiction in this court is founded upon *28 U.S.C. § 1331* (federal question), *28 U.S.C. § 1332* (diversity of citizenship), *28 U.S.C. § 1338(a)* and *(b)* (patent infringement **[**3]** and unfair competition), and *28 U.S.C. § 1367(a)* (supplemental jurisdiction).

On Monday, December 8, 1997, the court held a hearing (the "Hearing") on Intergraph's verified motion to enjoin Intel from cutting off or delaying its supply of computer chips and product information (the "Verified Motion"), which was filed in open court on November 21, 1997 (Document # 16). [1]

At the Hearing, Intergraph presented the live testimony of Wade Patterson, currently the President of Intergraph's Computer Hardware Division (Tr. 51), who testified that he holds a B.S. degree in Electrical Engineering (Tr. 207) and that he has previously worked as Intergraph's Vice-President of Engineering and its Executive Manager for Systems Development (Tr. 101-02). [2] Intergraph also submitted **[**4]** and served in open court during the Hearing Mr. Patterson's supplemental affidavit on which Intel was allowed to cross-examine him. (Intergraph Ex. I; Tr. 236-41). In support of its motion for a preliminary injunction, Intergraph also filed the affidavits of Allen Blaxton, Bryan Floyd, Mike Ellard, James Meadlock, Terry Phillips, and Wade Patterson. (Document # 29).

Prior to the Hearing, on December 3, 1997, Intel filed and served on Intergraph the affidavits of Keith Johnson and Ron Epstein (Documents 26 and 27). At the Hearing, Intel presented no live testimony from its **[**5]** own employees, but it called as its own witness, James Meadlock, Chairman and CEO **[*1259]** of Intergraph, who was voluntarily present in the courtroom. (Tr. 241). Intel also submitted the affidavit of Anand Chandrasekher during the Hearing. (Tr. 122; Intel Ex. 2).

Then on December 10, 1997, with permission of the court, Intel supplemented its hearing presentation with the affidavit of Edwin Bauernfreund under seal. Intergraph responded with the affidavits of Sanford C. Morris, Jr., Kirk Totten, and Allen Blaxton and the Second Supplemental Affidavit of Wade Patterson on December 12, 1997. Also, the parties have each submitted proposed findings of fact and conclusions of law for the court's consideration, and those submissions have been helpful.

Generally, ***HN1***[] under *Fed. R. Civ. P. 65*, in order to prevail on its motion for a preliminary injunction, Intergraph must prove: (1) it has a substantial likelihood of ultimate success on the merits of one or more of its substantive claims; (2) there is a substantial threat that it will suffer irreparable injury in the absence of preliminary relief; (3) the likely injury to itself is greater than that likely to be suffered by the defendant; and **[**6]** (4) entry of the preliminary injunction would not disserve the public interest. *Lucero v. Operation Rescue of Birmingham, 954 F.2d 624, 627 (11th Cir. 1992)*, *reh'g denied, 961 F.2d 224 (1992)*. Where, as here, the plaintiff advances anti-trust claims, preliminary relief is specifically authorized by *15 U.S.C. § 26*. [3]

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[1] In this opinion, the court will often identify the particular document that is the subject of discussion by referring to the clerk's document number. For example, the plaintiff's motion is Document # 16 in the clerk's official file.

[2] References to the Hearing transcript are made parenthetically with "Tr." and the relevant page number(s). References to affidavits and declarations under *28 U.S.C. § 1746* are made parenthetically using the affiant's last name and the relevant paragraph or exhibit number. For convenience, both affidavits and declarations will be referred to as affidavits. Hearing exhibits are referenced by party name and exhibit number or letter.

[3] ***HN2***[] Title 15, *section 26* provides:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against

[7]** Upon due consideration, the plaintiff's motion for a preliminary injunction will be granted.

II. Findings of Facts.

Based upon the affidavits filed by the parties, the testimony at the Hearing and the exhibits received at the Hearing, the court makes the following findings of fact. [4]

A. Intel's Position in the Microprocessor Market.

Defendant Intel Corporation is the world's largest designer, manufacturer, and supplier of high-performance microprocessors, [5] frequently described as the "brains" of a computer because they control the central processing of data in personal computers. [6] **[**9]** (Intergraph Ex. F). Intel also designs, **[*1260]** manufactures, and supplies: (1) "chipsets" which, in conjunction with **[**8]** the CPUs, perform essential logic functions surrounding the CPU in computers based on Intel architecture processors; [7] *(Id.);* (2) motherboards which combine Intel microprocessors

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threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C. § 26.

[4] It should be clearly understood that the "facts" found here are for purposes of ruling on the motions for a preliminary injunction only. They are based upon the evidence received to this point and may prove illusory after a full trial on the merits of the parties' contentions.

[5] In the technical community comprising the personal computer industry, these microprocessors are also called "central processing units," or "CPUs." The court may from time to time in this opinion refer to them using any of those three terms.

[6] Of primary interest in the present context is the "workstation" which comprises the largest part of Intergraph's business. A "workstation" is defined as

[A] machine designed to run as fast as possible, that includes not only the CPU, such as a Pentium II, but all the different subsystems that go within the machine. That means that the machines cost a little bit more, in some cases a lot more, but the customers that we sell those to are willing to pay more because performance is everything to them.

Workstations are powerful computers designed to run demanding scientific, engineering, design and graphic intensive applications. They are generally used in the design of complex facilities such as nuclear power plants and bridges. They are also used in the entertainment and motion picture industry for creating special effects and animation for movies and for television commercials.

(Tr. 54-55).

[7] By affidavit, Mr. Patterson testified:

Intel's 386 and 486 computer chips became popular in the early eighties, through their inclusion in the IBM personal computer ("PC"). The Intel x86 chips were the brain of the IBM PC, but were only designed to handle low end tasks. Intel's x86 chips were not capable of handling high-end workstation needs. However, the IBM PC was an "open architecture" system which permitted others to design their own IBM "compatible" PCs. As a result, "open architecture" and "compatibility" became of utmost importance to personal computer users. "Open architecture" compatibility also became of utmost importance to workstation users.

(First Patterson Aff. 5).

and "chipsets" to form the basic subsystem of a PC or server; [8] *(Id.);* and (3) graphics subsystems to provide graphic functions for computers and workstations. (Patterson Supp. Aff. PP 7-9).

Most of the entire world's personal computers **[**10]** today are powered by Intel designed and manufactured microprocessors of the "x86" variety, originally created by Intel. [9] *See* Competitive Impact Statement and Complaint in *United States v. Microsoft,* 59 Federal Reporter 42845, August 14, 1994. In 1996, Intel received eighty-eight percent of the total revenue derived from microprocessors sold for use in desktop computers, laptops, [10] servers, and workstations, or $ 14.6 billion out of a total of $ 16.6 billion. Within the "x86" market, Intel had a market share of eighty-five percent. (Patterson Supp. Aff. P 7). *See* December 22, 1997, *Business Week* article.

In its fiscal year 1996, Intel had total revenues of $ 20.8 billion and net income **[**11]** before taxes of $ 7.9 billion a profit percentage of approximately thirty-eight percent. It has consistently made very high profits. (1996 Intel Annual Report) [11]

Intel, over a period of almost twenty years, has continued to develop the "x86" line of microprocessors, creating ever faster and more powerful units. Its current generation of the "x86" microprocessors, the Pentium series, is an extraordinarily complex product, which is difficult and expensive to design and manufacture. According to Intel, the Pentium Pro processor has 5.5 million transistors and can execute 300 million instructions per second. More than 200 major steps are required to produce the Pentium Pro. (1996 Intel Annual Report). [12]

[12]** Intel's dominance in the market for personal computer CPUs is reflected in its name recognition among the computer buying public, the great majority of whom insist upon having a genuine Intel CPU in their computers. [13] The "Intel Inside" brand promotion has helped to create a remarkable demand for the Intel product. More than 1,300 licensees worldwide participate in the "Intel Inside" program with each computer bearing a distinctive Intel logo. In 1996, the journal *Financial World* designated the Intel brand **[*1261]** as the tenth most valuable brand in the world. (1996 Intel Annual Report).

The Intel microprocessors are compatible with a number of computer operating systems, but they are used primarily with operating systems created and supplied by Microsoft **[**13]** Corporation. [14] In other litigation, the United

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[8] A "PC" is generally described as a less powerful computer than a "workstation" and is generally used by individuals for business, academic, and pleasure uses. Many PCs, also called "desktops," are quite powerful and many, particularly those used in businesses and academia, are interconnected through networks" that are hosted by one or more servers.

[9] The "x86" line of computer chips apparently derives its name from the Intel 8086 and 8088 chips, which powered the first IBM line of personal computers, beginning in the early 1980s.

[10] A "laptop" is a small battery powered portable computer that, at least in theory, will fit on one's "lap."

[11] "With a ninety percent market share in PC microprocessors, Intel's sales have headed skyward, growing fifty to eighty percent annually for the past four years. That made it "the eighth-most-profitable company in the world in 1996…." Business Week, December 22, 1997, p. 70.

[12] In its issue of December 22, 1997, Business Week reported that Intel was spending $ 4.5 billion in 1997 on new chip making plants.

[13] Other manufacturers of personal computer CPUs based upon the "open" architecture previously used by Intel are Cyrix, AMD, and IBM. (Tr. 106). As noted, combined they, and perhaps other manufacturers, share less than fifteen percent of the market.

[14] These operating systems are Microsoft DOS, Microsoft Windows, Windows 95, and Windows NT. Just as other microprocessors may be used with the Microsoft computer operating systems, those operating systems are capable of being used with microprocessors other than those made by Intel. It would be a mistake, however, to assume that microprocessors and computer operating systems are freely interchangeable. They are not. Instead, operating systems, microprocessors, and computer subsystems, such as Intergraph's graphics subsystems, must be carefully matched to assure reliable optimum performance. For example, several years ago IBM and Motorola engaged in a joint effort to create and produce an alternative to Intel's high performance microprocessors. The IBM/Motorola microprocessor, the PowerPC, was originally supported by Microsoft with its Windows NT operating system. As noted at the Hearing by Mr. Patterson, however, Microsoft has now

States Department of Justice has contended for a number of years that Microsoft itself has a monopoly on operating systems for personal computers. *See* *United States v. Microsoft, supra.* Intergraph uses Microsoft's Windows NT, a thirty-two bit operating system powerful enough to run both business and technical applications for all Intergraph workstations and other products. (Tr. 75-76).

[14]** Until the development of its latest generation of Pentium II microprocessors, Intel used an "open architecture," which was available generally to all participants in the industry. For example, other manufacturers such as Cyrix, AMD, and IBM designed, developed and marketed microprocessors that were more or less compatible with the earlier Intel CPUs. Beginning with the Pentium II, however, Intel changed to a closed or proprietary architecture, which included the use of a new "bus," the P6. This means that the Pentium II and planned Intel microprocessors, the Deschutes and the Merced, are not and will not be compatible with other CPUs. (Tr. 64-65). Moreover, the latest Intel CPUs are technologically superior, at least in terms of their ability to interact with and handle the advanced graphics functions required by high-end workstations, [15] **[**15]** to all other so-called Intel compatible microprocessors. (Tr. 70-71). [16]

[16]** Computers manufactured by Original Equipment Manufacturers ("OEMs") to use Intel microprocessors must be specifically designed and manufactured to meet the precise physical and technical requirements of the Intel architecture. For example, Intel chips, before the Pentium II, were mounted on flat sockets, the P7 Bus, that physically accepted similar chips from other manufacturers. (Plaintiff's Exhs. C and D). The Pentium II is mounted on its edge in the P6 Bus, which, as of the date of the Hearing, accepts microprocessors from no other manufacturer. (Plaintiff's Exhs. A and B). These **[*1262]** physical differences may be only the most obvious ones, vis-a-vis other Intel CPUs. Intel has purposely changed its CPU architecture by using proprietary sockets and otherwise, converting from the previously "open architecture" to a new "closed architecture." [17] **[**18]** (Tr. 85). This "closed architecture," for practical purposes, allows Intel, by exercising its intellectual property rights in its "closed architecture," to wield absolute power over who will and who will not be allowed to participate in that part of the high-end computer industry that is based upon the "x86" microprocessor. Inasmuch as it **[**17]** requires two or

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withdrawn its support for the PowerPC microprocessor, making it unavailable to manufacturers, such as Intergraph, who are committed to the Windows NT operating system. (Tr. 165-166).

[15] Intel submitted the affidavit of Keith Johnson, its Huntsville, Alabama, representative, in which he states that some other manufacturers produced microprocessors that are "advertised to be comparable to" Intel's Chips. (Johnson Aff. 14).

[16] There are, in fact, microprocessors on the market that are faster than any current version of the Pentium II. The Alpha microprocessor from Digital Equipment Company was the fastest CPU available as of the time of the Hearing, and there are others that are faster than the Intel products. None of these, however, are compatible with, and therefore usable, in the Pentium based workstations designed and manufactured by Intergraph. (Tr. 103-104). Not all of these CPUs are capable of running on the Windows NT operating system. See, for example, the PowerPC. Also, it is not mere operating speed that distinguishes the Pentium II. The Pentium II microprocessor also has the capability to handle the advanced graphics requirements of high-end workstations. In cross-examining Mr. Patterson, counsel for Intel implied that the Alpha CPU would be a potential alternative to Intel's products. While not a part of the evidence, counsel for Intergraph stated (Tr. 25), and the court is aware of reports in the media, that as a part of the settlement of litigation between Intel and Digital Equipment Company, Intel will acquire ownership and control of the Alpha chip. Thus, even if it were economically and technologically feasible for Intergraph to switch its products to the Alpha chip, it could still be forced into a customer/seller relationship with Intel.

[17] Mr. Patterson testified that the new P6 Bus is not compatible with products available from others in the computer industry and that no one else in the industry is working on an alternative product that would be compatible with the P6 Bus. (Tr. 66, 70-71). Intel's lawyer suggested that Intel had licensed the rights to the P6 Bus to others, including IBM, implying that such licensees could soon produce a product that would be competitive with the Pentium II. (Tr. 109-10). Intel, however, introduced no evidence to support this suggestion. In any event, Mr. Patterson confirmed (on re-direct) that the mere license of rights to the P6 Bus does not solve the problem of lack of alternative products that confronts Intergraph (or others similarly situated). (Tr. 217-18). The court finds that Intel manufactures the only microprocessor with the necessary speed and graphics handling capabilities that also will "fit" the P6 Bus, the Bus that has been designed into and used on Intergraph's most recent mother boards. Furthermore, there was no evidence that IBM or any other chip maker could produce a P6 compatible CPU within a reasonable time or even that any chip maker might be inclined to invest the billions of dollars that would be required to duplicate the performance of Intel's latest products.

more years and millions of dollars to design and develop a mother board and graphics subsystem to accept and take advantage of a CPU such as the Pentium II or any possible alternative, (Tr. 69) [18] OEMs, such as Intergraph, who rely entirely on Intel for their supply of microprocessors and chip sets have become technologically and financially locked in to the Intel CPU, its associated chip sets, and the P6 Bus, and they have no feasible alternative to it. (Patterson Supp. Aff. P 14). The evidence makes clear that Intel has 100 percent of the market for the high-end CPUs that are used in "x86" based computer workstations, approximately 60 percent of the total workstation market. (Tr. 262).

In addition to requiring an adequate supply **[**19]** of the fastest and most powerful Intel microprocessors, OEMs, such as Intergraph, are capable of competing in the marketplace only if they also have access to: (1) Intel's advance confidential technical information, which is necessary to develop new products and to service existing products, (2) advance samples of Intel's development chips, which are needed by Intergraph to develop its own next-generation products using those chips (hereinafter referred to as "Chips Samples"); and (3) early releases of Intel chips, related products, and related technical information, which is necessary for Intergraph to test and produce its products (hereinafter referred to as "Early Release Chips").

The evidence suggests, and the court finds for present purposes, that, because of Intel's dominant position in the microprocessor market, no other computer industry participant can realistically be expected to expend the enormous sums required to develop and produce a product that could compete with the Pentium II and its anticipated successors. (Tr. 160-61). Moreover, it would not be possible for any potential Intel competitor to create a competitive product sufficiently soon to provide a viable **[**20]** alternative to which Intergraph could switch in the immediate future.

[*1263] In sum, the court finds if Intergraph is to compete in the high-end work station market for the foreseeable future, it has no alternative but to do so using Intel's latest and most powerful microprocessors and associated chip sets, and in order to use those microprocessors, it must have the cooperation of Intel, whether given willingly or by compulsion.

In the words of Mr. Patterson, Intergraph is both "technologically and economically 'locked in'" to its relationship with Intel. (First Patterson Aff. P 19). Unless it is able to secure a continued supply of Intel chips, advance chip samples, essential advance technical information, support and advice, Intergraph cannot continue to design, manufacture and sell competitive workstations. (Id.) Moreover, if Intergraph is not allowed to participate on a competitive basis in that market, it will suffer enormous losses of revenue, adversely impacting on the employment opportunities of its 8,500 employees. Finally, Intergraph's reputation for technical excellence and its business goodwill in the workstation market and the computer industry will suffer long-term **[**21]** injury. These are harms that, in the opinion of the court, cannot be recompensed merely by the payment of money because jobs, reputation, and good will, once lost, may never be regained.

B. Intergraph and the Workstation Market.

Intergraph Corporation was begun as M&S Computing, Inc. in 1969 with three employees for the purpose of providing computer assisted guidance systems to the United States military services, but it soon changed direction toward the development of advanced computer-aided designing and drafting systems, which, as noted above,

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[18] Defendant, though admitting that there is no other CPU presently available that could give the plaintiff the performance it requires to be competitive in the high-end workstation market, suggested at the Hearing that Intergraph could easily substitute a different microprocessor for the Intel Pentium II. That contention is simply fantasy. The record refutes any such notion. In response to the court's question regarding a substitute CPU, Intel's counsel stated, "If you are asking me does there exist a chip out there today that they could pull out the Intel chip and plug it in, I think the answer to that is no." (Tr. 164). The simple fact is there is presently no practical substitute for the Pentium II, and if there were, it would be two years or more before Intergraph could design and produce the mother board and graphics subsystems necessary to use any such substitute. Even then, in the words of Intel's counsel, "They [Intergraph] may be downgraded from first class to coach, but they haven't been told they can't get on the plane." (Tr. 232).

became known as "workstations." (Meadlock Aff. P 3; Tr. 71). [19] **[**22]** Intergraph's first graphical interface computer was built and sold in 1972. [20] Those early "workstations" were based upon computers Intergraph purchased from Digital Equipment Corporation ("DEC"), which were then integrated with its own automated design software. (Meadlock Aff. P 4). Intergraph developed a "Graphics Processor" in 1982, a component that allowed computer modeling and shading for very high quality images. (Meadlock Aff. P 5). [21]

Beginning in 1986, Intergraph workstations were based upon a then advanced high powered microprocessor called the "Clipper," which was then the property of Fairchild Semiconductor. [22] Upon learning that Fairchild was to be sold, Intergraph purchased Fairchild's Advanced Processor Division ("APD") in 1987, thereby acquiring ownership of the Clipper technology and lessening its own reliance on outside sources for its supply of microprocessors. This purchase also enabled Intergraph to design and build future products more rapidly. Until 1993 Intergraph used the Clipper microprocessor **[**23]** in all its workstations. (Meadlock Aff. P 7).

In the early 1990s, after the computer industry began to shift from the Microsoft **[*1264]** DOS to the Microsoft Windows operating system, Intergraph learned that Microsoft planned to create a very high-end operating system to be called Windows NT, and Intergraph became convinced that this new operating system would likely become the dominant operating system for future high-end workstations. Intergraph further concluded that its own future lay with the development of a Windows NT based workstation **[**24]** product to supplement the Clipper (RISC microprocessor) [23] and Unix based operating system (Tr. 76) workstations it was then producing.

In 1992, Intel was, and had been for **[**25]** years, the predominant designer and producer of microprocessors for the "open architecture" PC market, that segment of the market previously called the IBM compatible market. Based on Intel's assurances and representations that Intel's CPUs had the necessary computing power and speed for Intergraph's high-end workstations and that Intel would supply its CPUs to Intergraph on fair and reasonable terms, [24] in late 1992, Intergraph began a major and expensive two-year development and engineering effort to convert its

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[19] Intergraph has approximately 8,500 employees around the world, with approximately 4,500 of those being in Huntsville, Alabama. Its business is conducted through three divisions. The Intergraph Computer Systems Division handles all hardware activities for the company. The Intergraph Software Division creates and markets software applications for the engineering market. The Intergraph Federal Systems Division sells commercial systems to and provides consulting work for the federal government. (Tr. 72).

[20] A graphical interface allows the user to operate the system and applications software by using a cursor and screen image instead of using programming languages. (Meadlock Aff. 4).

[21] Mr. Patterson testified:

Back in those early days, you didn't have enough horsepower that you could put it all in one box. So Intergraph made a business selling systems wrapped around Digital Equipment Corporation minicomputers and Intergraph designed a very high-end graphic termals [sic] to work with those. (Tr. 75).

[22] Mr. Patterson stated in testimony at the Hearing:

Then in the mid 1980's, Intergraph decided that the horsepower that you would need to have an all in one solution was going to become available and so Intergraph used Fairchild's RISC microprocessor called Clipper and designed an all in one workstation for doing graphics and high-end work within that workstation. That was based on the Unix operating system, not on Windows. Windows wasn't around in those days. (Tr. 75).

[23] "RISC" is an acronym for "Reduced Instruction Set Computer," a type of microprocessor designed for faster computers. Intergraph claims ownership to all of the patent rights to Clipper, including patent rights on advanced designs of Clipper, (Meadlock Aff. 7), though it should be noted that one or more of those patents are at issue in this case and in litigation now pending in the United States District Court for the Northern District of California. In this litigation, Intergraph alleges that Intel has incorporated some of Intergraph's key Clipper technology into Intel's CPUs and infringes Clipper patents owned by Intergraph. See Counts 19-21 of Intergraph's First Amended Complaint. According to Intergraph, the internal architecture of Intel's Pentium CPUs incorporate RISC technology covered by the Clipper patents. (Tr. 159-160).

[24] By affidavit, James Meadlock testified:

products from incorporating its own Clipper microprocessor to incorporating the Intel microprocessors and to convert its technical software applications to the Microsoft Windows NT operating system. (Meadlock Aff. P 9; Tr. 78-79).

[26]** By the end of 1993, Intergraph had discontinued further development of its own Clipper microprocessor, eliminating the Clipper as a competitor of Intel and other producers of microprocessors in the high-end work station market. (Tr. 79-80). [25] Intergraph has, since 1992, invested enormous financial and engineering resources to design and build its products and systems based on Intel's CPUs. As noted earlier, Intergraph cannot for the foreseeable future either economically or technically switch to any other CPU. (Tr. 79-80). As a result of the migration to Intel's CPUs, Intergraph is now technologically and economically "locked-in" to Intel's CPUs for at least the next two to three years. (Patterson Supp. Aff. P 14). [26]

[27] [*1265]** The court concludes that, before it was induced by the representations of Intel CEO Andy Grove to abandon its own Clipper technology, Intergraph competed successfully in the relevant market for high-end microprocessors. Because of the conduct of Intel, inducing the plaintiff to abandon the Clipper, Intergraph has been eliminated as a competitor in the high-end microprocessor market and is now locked-in to Intel as its sole source of CPUs and relevant technical data. Moreover, the cessation of further development of the Clipper technology may well have diminished further innovation and competition generally because no further efforts were made to improve or advance the Clipper CPU technology. [27]

C. The Relationship Between Intergraph and Intel.

In 1993, I personally met with Andy Grove of Intel to discuss Intel's future development plans. Mr. Grove represented to me that Intel's chips would soon have the necessary computing power and speed for the development of an Intergraph workstation. I also expressed my concern with Intel being the sole source supplier of its chips, but was assured by Mr. Grove that Intel was sensitive to such issues and that Intel treated all of its developers fairly and equally. Based upon such representations, the company began development of an Intel-based workstation and discontinued further development of the Clipper and Clipper-based workstations and servers.

(Meadlock Aff. 9). Mr. Meadlock acknowledged, however, that Mr. Grove did not commit Intel to provide a perpetual supply of chips, pre-released chips, or confidential information. (Tr. at 242-3.) Mr. Meadlock also acknowledged that Mr. Grove did not commit Intel to any continued or "perpetual business relationship" with Intergraph. (Tr. at 243.)

[25] On direct examination, Mr. Patterson was asked whether Intergraph could now return to its own Clipper based CPU technology, abandoning the Intel product. He answered, "No. All the people [technical staff] are gone and we have not been developing Clipper now for about three years, so there is no way to start that up." (Tr. 80).

[26] The court is aware that technology in the computer/workstation industry changes so rapidly that what is true today may not be true six months from now. Mr. Patterson stated in his affidavit, "Due to ever-changing chip technology and market demand, Intergraph's workstations have an average market life of six months before the company must release its next generation product." (Patterson Aff. 16). Today, Intel stands as the victor in the so-called "platform war," dominating the competition between RISC-Unix workstations and Intel-Windows workstations. Currently Intel-Windows workstations outsell RISC-Unix by a ratio of about two to one. (Tr. 212-214). Projections of future market shares indicate sales of RISC-Unix products will remain flat while Intel-Windows workstations will grow very rapidly. (Id.). An industry research company, IDC, projects that Intel's share of technical workstations will surge to eighty-six percent by the year 2000. See *Business Week, supra,* p. 74. Nevertheless, the court is also aware of press reports that IBM will soon demonstrate a new microprocessor that it claims will be more powerful than Intel's Pentium II and will run at speeds of one gigahertz. Thus, assuming IBM can produce what it claims, to say that Intergraph has no alternative to Intel products now is not to say it will have no alternative in the future. The critical point is that it has no practical alternative to Intel products today.

[27] That the Clipper technology held some potential for future innovation will be demonstrated if, as Intergraph contends in this lawsuit, Intel has indeed incorporated some of the Clipper RISC technology in the Pentium products.

In 1993, when **[**28]** Intergraph and Intel began their business relationship, it was the practice of Intel to freely share with its OEM customers technical information about its products. (Patterson Aff. P 7; Tr. 83-84). [28] As Intel moved to a closed architecture and Intergraph became dependent upon the use of Intel microprocessors, Intel began insisting that Intergraph and its other customers sign comprehensive Non-disclosure Agreements ("NDAs") and Restricted Use Non-disclosure Agreements ("RUNDAs"). (Meadlock Aff. P 11; Tr. 84-85). NDAs were often accompanied by Confidential Information Transmittal Records ("CITRs"). The CITRs are executed by both parties and identify the specific Intel Confidential Information to be disclosed. The CITRs expressly incorporate the terms of the respective NDA. (Johnson Aff. P 6; Patterson Aff. PP 8-10; Johnson Aff. Exh. 2.) These Agreements established procedures for exchanging product information that previously had been freely exchanged. (Patterson Aff. P 7; Tr. 84-85). The NDAs, CITRs and RUNDAs were forms prepared by Intel to which it allowed no changes. (Patterson Aff. P 9-10; Tr. 128-29; Johnson Aff. P 6).

[29]** The parties signed NDAs, which contain standard provisions including: (1) one provision that expressly negates any obligation on the part of either party to supply confidential information; [29] (2) a second provision that establishes that the NDA does not create a business relationship, joint venture, partnership or other form of business association, between the parties and does not create an obligation on the part of Intel to sell products to Intergraph; [30] **[**30]** and (3) a third provision **[*1266]** that states that the agreement can be terminated at any time without cause. [31] (Johnson Aff. Exh. 1.) Other documents signed by the parties also provide that they create no obligations to supply products or confidential information and to engage in future business activities. [32]

[31]** Information supplied by Intel under the NDAs, RUNDAs, and CITRs contained the necessary technical data to provide OEM engineers and designers with the ability to develop their own products. This data would not permit any third party to duplicate Intel's own technology. (Tr. 85, 185-86). There is no evidence that Intergraph has

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[28] By affidavit, Mr. Patterson testified:

Initially, most of the information necessary to develop products using Intel's chips was provided in product data books. Product data books were generally available from Intel or its distributors. However, as each subsequent generation of chips were made available, the technical information contained in the product data books became less comprehensive. Information which was no longer contained in product data books, but necessary for product development, was migrated into packets of confidential information commonly referred to as "yellow books." The information contained in yellow books was considered by Intel to be confidential information. Intel managed the supply of such yellow books, and the information disclosed therein, through the use of non-disclosure agreements.

(Patterson Aff. 7).

[29] NDA 6: "No Obligation of Disclosure. Neither party has any obligation to disclose Confidential Information to the other. Either party may, at any time, cease giving Confidential Information to the other party without any liability or request in writing the return of Confidential Information previously disclosed."

[30] NDA 8(a): "This Agreement is neither intended to nor shall it be construed as creating a joint venture, partnership or other form of business association between the parties, nor an obligation to buy or sell products using or incorporating the Confidential Information, nor as creating an implied or express license grant from either party to the other."

[31] NDA 7: "Termination and Duty to Return. Either party may terminate this Agreement at any time without cause upon notice to the other party. However, all obligations of confidentiality shall survive the termination of this Agreement. In the event this Agreement is terminated, and the disclosing party so requests, the receiving party shall promptly return or destroy (and certify destruction of) all Confidential Information which is received from the disclosing party along with copies which it made."

[32] RUNDA 14(a): "This Agreement is neither intended to nor shall it be construed as creating a joint venture, partnership, or other form of business association between the parties, nor an obligation to buy or sell products or services using or incorporating Confidential Information." (Johnson Aff. Exh. 3.)

MERCED DISCLOSURE AGREEMENT 10: "Neither party warrants that the information that it discloses is necessarily complete. Neither party undertakes to advise the other of any changes in its plans. Neither party shall be obligated to take into consideration any plans of the other or to design any of its products specially to accommodate the products of the other or to do business with the other in the future." (Johnson Aff. Exh. 4.)

misused or mishandled Intel's confidential data in any way at all. The record is not to the contrary. (Patterson Aff. P 11-12). [33]

[32]** In 1995, Intergraph successfully participated as a "Validation Partner" in the development and release of Intel's Pentium Pro product, (Johnson Aff. P 12), prompting Intel to feature Intergraph's workstations in the "roll out" of the Pentium Pro chip and in its 1995 Annual Report. [34]

[33]** In 1997, some OEM customers of Intel made inquiries about whether Intel would indemnify them with regard to claims of patent infringement they had received from Intergraph. (Epstein Aff. P 4; Epstein Aff. **[*1267]** Exh. 1). In response, Intel's Senior Licensing Counsel contacted Intergraph about the possibility of negotiating a cross-license arrangement so that Intel and Intergraph each would then have access to certain patent rights held by the other. (Epstein Aff. P 5; Epstein Aff. Exh. 2).

Those negotiations were unsuccessful, and eventually, at some point that is not clear, Intel changed the text of the NDAs it presented to Intergraph for execution in connection with the development of future projects. (Tr. 88-89). Specifically, in those proposed NDAs, Intel inserted a new provision that would have given Intel a license to use all of Intergraph's patented technology without cost (Patterson Aff. P 12; Tr. 154). When Intergraph asked for the provision, which would license its patented technology to Intel, to be removed, Intel withdrew the proposed NDAs and refused to allow Intergraph to participate in the new programs or to provide any of its confidential information to Intergraph, **[**34]** which was necessary for Intergraph to continue product development. (Tr. 89, 133).

On March 28, 1997, responding to Intergraph's expressed concerns about the relationship between Intel and itself, the defendant's Huntsville, Alabama-based Field Representative, Keith Johnson, provided Allen Braxton, a purchasing agent for Intergraph, a letter in which he confirmed that Intel intended to: (1) treat Intergraph "as a strategic customer in current and future programs; " (2) support Intergraph with "product supply, design, quality, manufacturing and marketing;" and (3) provide Intergraph "the benefit of additional price reductions." [35] (Johnson

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[33] Mr. Patterson stated by affidavit:

As noted, the company has entered into numerous non-disclosure agreements with Intel, for a variety of products and information. The company has maintained the confidentiality of information supplied under such non-disclosure agreements. The company took reasonable precautions to protect the confidentiality of information supplied by Intel, to the satisfaction of Intel. The company has maintained such information in its restricted access facilities, and by only supplying such information to specifically named personnel who needed the information for development or support efforts.

Intel has never accused Intergraph of violating, or disregarding, any non-disclosure agreement, or improperly disclosing such information. Nor has Intel ever complained to Intergraph about confidentiality or compliance issues pertaining to information supplied under a non-disclosure agreement. In fact, the first time Intel ever raised an issue about information provided under a non-disclosure agreement was after Intergraph refused to grant Intel royalty free rights under the company's Clipper patents. Specifically, I was advised by both Pat Gelsinger and Annand Chandreshaker, on four separate occasions, that Intel would not enter into any future non-disclosure agreements or supply any information normally provided under non-disclosure agreements, unless Intergraph conceded and granted Intel rights under its Clipper patents. Shortly thereafter, Intel first demanded the return of information under (sic) non-disclosure agreement. Even then Intel did not allege that we had failed to comply with the non-disclosure agreements, rather that said they [sic] could unilaterally terminate for any reason at any time.

(Patterson Aff. 11 and 12).

[34] Intel's validation partners enjoy a mutually beneficial, but transitory, relationship whereby an Intel customer participates in the developmental testing of a specific Intel product that would potentially be useful for integration into the customer's own product. (Johnson Aff. 11-12). As part of this relationship, the customer receives Intel confidential information with respect to the product, and sample products, before such information and products are available to others. (Johnson Aff. 11). Intergraph was a validation partner with respect to Intel's Pentium Pro processor, which has now been on the market for approximately two years. (Johnson Aff. 11). Intergraph has not been a validation partner for any subsequent Intel products. (Johnson Aff. 12).

[35] The entire text of Mr. Johnson's letter was as follows:

This is to confirm Intel's intent of supporting Intergraph as a strategic customer in current and future programs. This support includes product supply, design, quality, manufacturing and marketing.

Aff. Ex. E; Blaxton Aff. P 3-4). In his March 28, 1997, letter Mr. Johnson specifically includes the "Deschutes" and "Merced"" programs under development by Intel. (*Id.*). Additionally, the undisputed evidence shows that, at the time of the letter, Intel already had projected "current and future programs" through the year 1999. (Patterson Second Supp. Aff. Ex. C) (filed under seal).

[35]** Notwithstanding the representations made by Mr. Johnson on behalf of Intel in the March 28, 1997, letter, Intel continued to propose a cross-license agreement whereby Intergraph would be required to surrender its patent rights in the Clipper related technology. (Tr. 155). The court is not persuaded by Intel's suggestion that its offer to license some of its patents to Intergraph created a *quid pro quo,* a tit-for-tat. (*Id.*). As Mr. Patterson observed, Intergraph no longer has need of the Intel patents because it is no longer in the business of producing microprocessors. (Tr. 155-159).

On August 13, 1997, after Intel was unable to secure the Intergraph patent rights on terms it considered acceptable, it summarily and unilaterally canceled all Intergraph's outstanding NDAs and RUNDAs and demanded the return of all confidential information it had provided to Intergraph. (Verified **[*1268]** Motion Ex. A). Apparently, Intel backed away from its decision to terminate Intergraph's NDAs at that time, because, immediately after Intergraph filed this action, Intel wrote to Intergraph terminating NDAs and demanding the return of all confidential information. [36]

[36] D. Intel's Conduct with Respect to Intergraph.**

1. Intel's Product Distribution System.

Mr. Patterson testified that Intergraph is unable to obtain Production Chips through distributors unless Intergraph has previously obtained an allocation of such chips from Intel. (Tr. 170-73). Mr. Patterson testified that Intergraph has attempted to purchase Production Chips through a distributor and has been informed that such a purchase is not possible unless advance approval is received by the distributor from Intel. (Tr. 173-74). In response to the testimony of Mr. Patterson, Intel submitted the affidavit of Edwin Bauernfreund, who testified that Intel's sales to distributors are based on allotments to the distributors themselves, rather than allotments to the ultimate purchaser.

As a strategic customer, Intel is offering Intergraph the benefit of additional price reductions on all microprocessor products placed direct with Intel. Intel and Intergraph are currently involved in multiple programs efforts. I have outlined several below for your review.

1. Pentium(R) Processor, Pentium(R) II Processor and Pentium Pro(R) Processor production programs.

2. Pentium(R) Processor, Pentium(R) II Processor and Pentium Pro(R) Processor design programs.

3. Development efforts with Intel's next generation microprocessor and chipset technology, i.e., Deschutes, Merced, etc. These are currently being managed under Non-Disclosure.

4. Marketing involvement and new product introduction events. The Pentium(R) II Processor and Wired for Management efforts being the most recent. Intergraph is also active in the Intel Inside(R) Program.

It is Intel's intent to assist Intergraph in its efforts whenever possible. These efforts are integral to our respective companies (sic) future success.

Intel's goal is to lead the market in personal computer, workstation and server industry. We look forward to a mutually beneficial business relationship and appreciate Intergraph's continued support toward this goal.

(Intergraph's Preliminary Injunction Motion Exh. 7).

[36] Intergraph filed this action on Monday, November 17, 1997, in this court. Within hours Intel filed an action in the Northern District of California seeking a declaratory judgment asserting that Intergraph's patents were invalid and that it had not infringed those patents. One week later, Intel filed a second action in the Northern District of California by which it claimed that Intergraph had breached its contract with Intel by refusing to return confidential information that had been provided under the canceled NDAs. On December 1, 1997, the court issued a temporary restraining order to prevent Intel from proceeding with the California law suits. That order was allowed to expire after Intel counsel represented to the court that Intel would not pursue the California actions pending resolution of its motion under *28 U.S.C. § 1404(a)*. That motion has been filed and briefed and is under consideration by the court.

(Bauernfreund Aff. P 3). Mr. Bauernfreund further testified that Intel's microprocessors are generally available through distributors without allocation figures or specific approval from Intel. (Bauernfreund Aff. P 4). Finally, Mr. Bauernfreund stated that there currently is a supply of a particular chip, the Intel Pentium II 300 MHz, through distributors, which is adequate to supply **[**37]** Intergraph's needs of approximately 10-20,000 units per quarter. *(Id).*

Intergraph responded to the Bauernfreund affidavit with an affidavit of one of its own employees, Sanford C. Morris, Jr., who formerly was employed by one of Intel's distributors. Mr. Morris stated that Intel's allotments to distributors are directly and specifically related to the ultimate purchaser of the chips, and that distributors lack sufficient inventory to fill customer orders, especially larger orders such as those placed by Intergraph, without a specific allotment and approval from Intel. (Morris Aff. P 3). Kirk Totten, an Intergraph employee who previously was employed by a contract computer manufacturer, testified that Intel sold chips to the contractor for resale to a third party only through specific allotments that identified the ultimate purchaser of Intel's chips. (Totten Aff. P 7). Mr. Totten further testified that, since November, Intergraph has been unable to fill through distributors an order for approximately 5,000 Pentium II 300 MHz chips. (*Id.* P 8). Allen Blaxton testified that Intergraph has been unable to purchase Intel chips from distributors, which have informed Intergraph **[**38]** that they require a specific allocation in order to sell Intel chips to Intergraph. (Blaxton Supp. Aff. P 3-4).

Mr. Bauernfreund goes on to state that, without an allocation, the new Pentium II processor, the 333 MHz version, will not be available through distributors until 30-90 days after introduction by Intel. (Bauernfreund Aff. P 8). This testimony confirms Intergraph's position that purchasing through distributors is an inadequate means by which it can procure the Production Chips necessary for its manufacturing needs. A 30-90 day delay was described by Mr. Patterson as extremely injurious to Intergraph efforts to maintain a competitive presence in the high-end workstation market. (Patterson Aff. P 16).

The court accepts Mr. Bauernfreund's testimony that Intel does not explicitly "tell" its distributors to whom they may sell Intel Products. (Bauernfreund Aff. P 4). This, testimony, however, begs the ultimate question of whether Intel Product would be available to Intergraph without an allocation from **[*1269]** Intel. On this issue, even Mr. Bauernfreund admitted that Intergraph would fall 30-90 days behind its competitors. Mr. Morris confirms that such delays occur due to inventory **[**39]** shortages. (Morris Aff. P 3). At least as important, advance samples of Intel microprocessors, which are necessary for Intergraph to have its products ready for deployment at the same time as its competitors, are available only from Intel. (Blaxton Supp. Aff. P 5).

The delay conceded by Mr. Bauernfreund would prevent Intergraph from maintaining a competitive presence in the high-end workstation market. Though Mr. Bauernfreund stated generally that there was an "adequate supply" of Intel's previously released 300 MHz Pentium II available (Bauernfreund Aff. P 7), the available evidence is to the contrary. In late November Intergraph sought to purchase 5,000 such microprocessors for delivery in February and was told repeatedly that this small quantity was not available. (Totten Aff. P 8).

2. Intel, Intergraph and Essential Facilities.

Before mid-1996, Intel and Intergraph enjoyed a mutually beneficial business relationship. As a result of this relationship, Intel regularly provided Intergraph with CPUs, technical information, and support essential for Intergraph to be competitive in its chosen field Intel regularly supplied Intergraph with early samples of its **[**40]** CPUs for testing and development, often within weeks of their first production. (Phillips Aff. P 4-5). Intel provided motherboard design assistance, and it reviewed Intergraph's design schematics to ensure that any "bugs" or defects in the Intel CPU or chips were avoided. *Id.* Intel provided detailed information on its technology and future plans, and it solicited Intergraph information and technology for incorporation into future Intel designs. *Id.* Intel provided advance information on its own design and development efforts, and it supported Intergraph's development efforts. *Id.*

The court finds that essential to Intergraph's competitive survival is for it to have access to Intel's CPUs, Advance Chips Samples, and advance technical and design assistance and information as quickly as possible and no later than Intergraph's competitors. [37] (Meadlock Aff. PP 13-16; Patterson Aff. PP 13-17).

[41] [*1270]** The court also finds that Intel has no legitimate business purpose in refusing to deal with Intergraph in accordance with the previously established business relationship between the parties, especially in view of Intel's exclusive control of the CPUs used by Intergraph and the complete lack of feasible alternatives available to Intergraph. The patent dispute that arose between the parties could and should be resolved without linking it to the supply of products and information that are essential to Intergraph's business survival. [38]

The court finds that the Advance Chips Samples and advance design and technical **[**42]** information are essential products and information necessary for Intergraph to compete in its markets. Denial of these products and information will seriously impair Intergraph's competitive ability, thereby severely injuring Intergraph as a competitor and injuring competition generally.

3. The Graphics Subsystem Market.

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[37] In his affidavit, Terry Phillips, Manager of Workstation Development for Intergraph for some three years, described the manner in which Intergraph and Intel had previously worked together:

I have worked directly with Intel's technical support personnel to obtain advance technical information and ongoing development assistance for the development of Intergraph's workstations. I have also worked with Intel's technical support personnel to obtain information on Intel defects and corrections for Intel products incorporated into Intergraph's workstations. Additionally, I have worked with Intel's local representative in Huntsville, Keith Johnson, to obtain early releases of advance product samples for workstation development. All of which are necessary for continued development and support of Intergraph's workstations.

Intel has supplied Intergraph with advance technology, product information and advance product samples since 1993 as an integral part of Intergraph's purchase of Intel chips. The technical information and advance product samples are essential for the incorporation of Intel's products into Intergraph workstations, "debugging" Intel's chips, and providing support to Intergraph customers. For instance, new shipments and revisions of microprocessors and chips generally contain new technical information made available under a non-disclosure agreement, including information on debugging and errata as such problems become known to Intel. Intel's products cannot be utilized without this essential product information, much of which was provided in years past to the general public in "data books," but which now is parceled out through non-disclosure agreements.

Intel supplied advance technical product information and support, as well as early releases of advance product samples until about August 1997. Since August, Intel has refused, or delayed, access to product information, defect and defect correction information, technical support and advance product samples. As a result, Intergraph has had to expend significant time and resources to work through development issues and delays caused by Intel's refusal to supply such necessary technical information and support. Further, Intergraph has been significantly delayed in releasing previously announced workstation products. If Intel is permitted to continue to withhold advance technical information and support, Intergraph will be unable to properly utilize the product obtained from Intel, and unable to correct defects in Intel's products or errors in Intergraph's designs based upon such defects.

Intergraph cannot continue to develop competitive workstation products without a sustained supply of microprocessors, chips, early release product samples, and technical product information and support. Further, Intergraph cannot continue to support customers utilizing Intergraph's Intel-based workstations, without ongoing technical support and defect information and assistance.

Without a sustained supply of microprocessors, chips, early release product samples, technical information and support, Intergraph will not be able to supply competitive workstation products or ongoing support, and will lose its significant technological lead, reputation and goodwill in the highly technical workstation market.

(Phillips Aff. 4-8).

[38] The conduct of Intel in this dispute contrasts sharply with that of IBM. Mr. Patterson testified that Intergraph and IBM have been engaged in a continuing dispute over their respective patent rights. That dispute has apparently not risen to the level of litigation but, in any event, Intergraph and IBM continue an amicable and profitable business, each being a customer of the other.

An essential component of Intergraph's business is the design and production of graphics subsystems. These are critical systems for high-end workstations, which provide high performance 2D or 3D graphics capabilities essential to the work of design and graphics engineers, as well as graphics artists. Intergraph designs its own graphics cards and motherboards to create its high performance graphics subsystems. (Patterson Supp. Aff. PP 3-6).

Intel has entered the graphics subsystem market (Patterson Second Supp. Aff. Ex. C (filed under seal)) and is now a direct competitor of Intergraph in that market. Intel has recently signed an agreement to purchase Chips & Technology Company, an experienced and successful producer of graphics chips and chip sets. (Patterson Supp. Aff. P 7). The proposed acquisition of Chips & Technology is currently being **[**43]** reviewed by federal antitrust regulators. Intel has also entered into a joint development relationship to form a company called Real 3D, Inc. to create 3D graphics technology. Intel has already incorporated graphics technology, called MMX, into its own CPUs. (Tr. 67-68; Patterson Supp. Aff. P 7). Intel has announced that its motherboard graphics subsystem will be available in early 1998. *See* December 12, 1997, Article "Intel's Graphics Chip Due Soon;" (Tr. 67-68). By withholding advance CPU samples and essential design and technical information from Intergraph, Intel restrains Intergraph's ability to compete in the graphics subsystem market and may be using its monopoly power in the "x86" CPU market to obtain a monopoly in the graphics subsystem market.

The motherboard and graphics subsystems markets are fast-evolving, high technology markets. Users of high-end workstations such as those produced by Intergraph and others demand the most current and best performing technology available. If these consumers cannot get the most advanced product from Intergraph, they will get it from Intergraph's competitors who have not been denied access to the advance information, sample chips, **[**44]** and production chips that Intel has denied to Intergraph. By its conduct toward Intergraph, Intel threatens to substantially restrain actual and potential competition in the graphics subsystem market. The effect of Intel's conduct may be to leverage its monopoly in the "x86" CPU market **[*1271]** and to create a monopoly power in the graphics subsystem market.

4. Intel's Use of NDAs to Coerce Intergraph.

Intel provides its products, as well as technical and design information, to Intergraph under NDAs, which are terminable at will by Intel. These NDAs are documents drafted by Intel and presented to Intergraph and other customers on a take-it-or-leave-it basis. Intel simply dictates the terms under which it provides its products and design information to customers such as Intergraph. (Patterson Tr. 128-130).

The evidence suggests strongly that Intel has used the threatened or actual termination of NDAs as a contractual weapon, coercing customers such as Intergraph to accede to Intel's demands and restraining competition. The court takes judicial notice of the fact that, when Intergraph and Digital Equipment separately asserted their patent rights against Intel, Intel **[**45]** immediately used the termination provisions of their respective NDAs to deny both Intergraph and Digital further technical information, samples, and products and demanded the return of all Intel confidential information provided to them. *See Intel v. Intergraph* and *Intel v. DEC* lawsuits. Also, the court takes judicial notice of the current government antitrust investigation of Intel by the Federal Trade Commission involving allegations of similar conduct by Intel in withholding crucial technical or design information or terminating NDAs to restrain competition. (Verified Motion Ex. D).

In view of Intel's previous policy of providing much of the same type of information now subject to NDAs in a much less restricted manner and in view of the fact that Intel has offered no reasonable explanation of any present need for the use of the NDAs, it seems reasonable to conclude that Intel's present use of one sided and terminable-at-will NDAs and its retaliatory cancellation of the NDAs are unreasonable and anticompetitive contractual restraints using Intel's monopoly in CPUs and related design and technical information. Furthermore, the chilling effect which Intel's arbitrary enforcement **[**46]** of the NDAs in this manner must have on other members of the industry, who are dependent upon Intel for microprocessors, is obvious.

Other than Intel's position that it does not wish to do business with those who sue it (Tr. 313 - 314), the court perceives of no rational or legitimate business reason why Intel would immediately terminate its NDAs with Intergraph. As noted before, there is no suggestion in the record that Intergraph has failed in any way to fully honor and comply with its obligations of confidentiality under the NDAs.

5. Intel's Conduct to Restrain Competition in the Graphics Subsystem and Workstation Markets.

Intergraph will likely prove that Intel has recently entered into agreements, conspiracies and combinations with Intergraph's competitors and suppliers to restrain competition from Intergraph in the graphics subsystem and workstation markets. Intel has offered Intergraph customers in the digital media market funding for projects or other support on condition that such customers use workstations from Intergraph's competitors and that they not deal with Intergraph. (Patterson Supp. Aff. P 8; Tr. 91-93). Intel has agreed with competitors **[**47]** of Intergraph, such as Compaq and NetPower, to make joint presentations to Intergraph's customers to convince them not to deal with Intergraph and to buy from Intergraph's competitors instead. (Tr. 199-201).

Intel has used the termination of a three-way NDA to prevent a test equipment supplier from doing business with Intergraph, to prevent that supplier from providing needed test equipment to Intergraph, and to prevent Intergraph from fixing a "bug" in Intel's product. [39] Moreover, Intel refused to provide **[*1272]** information to Intergraph, which was needed to fix the "bug," requiring Intergraph to spend substantial time and resources to solve the problem and delaying Intergraph's product entry into the market. (Tr. 205-211). The court can find no legitimate business justification for Intel's conduct. By preventing Intergraph from acquiring the data necessary to fix the "bug," Intel failed to comply with its own warranties and contractual obligations.

[48]** The court also finds that Intel has attempted to leverage its monopoly power in the "x86" CPU market to prevent Intergraph from competing in the graphics subsystem and workstation markets and to control and dominate competition in these markets through discriminatory and favored agreements and understandings with some of Intergraph's competitors. This reduces competition in the markets in which Intergraph competes, depriving customers of alternative and improved technology in these markets, stifling innovation, reducing competition in price and quality, and impairing competition generally.

6. Intel's Conduct Toward Intergraph Since the Hearing.

Intel originally promised Intergraph that it would deliver samples and technical information pertaining to Intel's latest microprocessor (code named "Deschutes") by December 15, 1997. Those samples were not delivered to Intergraph until January 26, 1998, the date on which Intel publicly released that product as the 333 MHZ, "Pentium II" microprocessor. That same day, Intergraph's competitors announced that they had Deschutes-based workstations available for delivery. Likewise, based upon the assurances of Keith Johnson, **[**49]** as reaffirmed by the affidavit of Mr. Bauernfreund, Intergraph also announced that its TDZ 2000 workstation would incorporate the new 333 MHz Pentium II microprocessors. (Second Meadlock Aff. P 6).

On January 26, 1998, however, Mr. Johnson, at a meeting at Intergraph in Huntsville, Alabama, informed Intergraph, for the first time, that Intel would not honor its commitment to supply Intergraph with technical design, defect or user information pertaining to the newly released Deschutes processors. Mr. Johnson also advised Intergraph that Intel would not supply Intergraph with the revised Deschutes "BIOS" code. [40] As a result, Intergraph lacked the information and software necessary to complete the system integration of the Deschutes processor and a third-party motherboard for the TDZ 2000. (Phillips Aff. P 5). Mr. Johnson further advised Intergraph that the only information that would be made available to it was the information already available on Intel's publicly accessible site on the World Wide Web, information that did not include the technical data necessary to design or support

[39] The evidence was that after Intel refused to provide Intergraph with technical data required to "fix" a bug in one of its processors, which prevented the computer from being turned off, Intergraph sought to purchase certain equipment from Tektronix, a manufacturer and provider of test machines, so that it might analyze and "fix" the bug without the aid of Intel. Because Intel had canceled its NDAs and three-way NDAs with Intergraph, Tektronix refused to sell the test equipment to Intergraph. (Tr. 204-06).

[40] BIOS is an acronym for Basic Input Output System. It is the most basic level of software which provides communications services between the CPU and other hardware components of a computer.

Deschutes/Pentium II-based products. (Dobbins Aff.) Mr. Johnson even refused to give Intergraph **[**50]** the address of the Intel Web Site [41] containing the public information. (Dobbins Aff.).

Subsequent to the Huntsville meeting with Mr. Johnson, Intergraph requested a copy of the revised BIOS from the BIOS developer, but it was told that Intel had instructed the developer to withhold the BIOS from Intel's customers. Intergraph was able to acquire a copy of the BIOS from a local Intel distributor, but still has not been supplied **[**51]** with the necessary Des chutes technical information. (Elliott Aff. P 3, Greg Vance Aff. P 3.) As a result, Intergraph still cannot complete a deliverable Deschutes-based product. (Phillips Aff. P 5, Ellard Aff. P 5, Farmer Aff. PP 3, 4, Elliott Aff. P 3).

[*1273] With respect to other Deschutes-based products, Intergraph had to cancel several motherboard developments and the F5 server project. (Phillips Aff. P 3, 4, Hall Aff. P 3, Worden Aff. P 3). Intergraph has also been compelled to contract with third-party manufacturers on an emergency basis to design and build mother boards so that it will have some product to offer. Third party contracting delayed Intergraph's ability to get a competitive product to market, and will yield motherboards and systems which are not specifically tailored to Intergraph's needs. (Ellard Aff. P 5, Farmer Aff. P 3, Vance Aff. P 3)

Because Intel has continued to withhold technical information from Intergraph, the plaintiff has no Deschutes-based "next generation" products available. (Ellard Aff. P 5, Elliott Aff. P 3.) According to Mr. Meadlock, Intel's refusal to deal continues to further erode Intergraph's goodwill and reputation with its customers **[**52]** and the industry. (Meadlock Aff. P6.) The termination of Intergraph's Deschutes-based projects is irreparably effecting Intergraph's future product development, "and the effect of that is going to be to put Intergraph in a position where it cannot compete in its market." (Transcript page 232, lines 1-3.)

III. Monopoly Power and the Relevant Market.

In addition to the relevant market of high performance microprocessors (or "CPUs"), the court finds that Intel CPUs are a separate relevant product market or relevant submarket based on the following facts:

(a) Intel's Pentium CPUs and Intel's next generation CPUs (such as Deschutes and Merced) are not interchangeable with other CPUs; (Tr. 64-65);

(b) Intel's Pentium CPUs have performance capabilities that surpass the performance of other CPUs; (Tr. 70-71);

(c) Intel has enormous brand recognition and appeal among consumers, who demand an Intel CPU, and end-user consumers do not consider other systems to be substitutes or alternatives. (1996 Intel Annual Report 1996); [42]

(d) Once customers are technologically and financially locked-in to an Intel CPU, they cannot feasibly switch to an alternative **[**53]** CPU. (Patterson Supp. Aff. P 14);

(e) Intel has a huge installed base of customers locked in to Intel's network. This creates network barriers, compatibility barriers and increasing returns to scale [43] that further entrench Intel; and

(f) Intel has deliberately designed its related CPU architecture (such as proprietary sockets) to prevent other CPUs from being compatible, thereby converting its CPU architecture from an "open" to a "closed" system; (Tr. 85).

[41] The court is not impressed that withholding this readily available web site address was significant except to the extent that it demonstrates the level of Mr. Johnson's own animus toward Intergraph. His attitude may or may not reflect that of his superiors at Intel, though the court is impressed with the manner in which Intel apparently plays "hard ball" with those who cross it.

[42] Because of the demand for Intel's newest generation CPUs, Intel operates an allocation system to control supply of CPUs to its customers. (Keith Johnson Aff. 16).

[43] See Section V.A. 1.e, infra, for discussion of "returns to scale" as a basis for finding the existence of monopoly power.

It is self-evident, as admitted by Intel's counsel, that Intel has a 100 percent absolute monopoly of Intel CPUs. (Tr. 262).

There are enormous and extreme financial and technological barriers to entry so that no other company can feasibly **[**54]** enter the relevant market and provide effective competition to Intel. IBM and Motorola unsuccessfully attempted to compete with Intel with the PowerPC CPU. But Microsoft no longer supports the PowerPC with a compatible Windows program, so it is not an alternative. (Tr. 165-166). Counsel for Intel alluded to the Alpha CPU, owned by Digital Equipment Corporation, as a potential competitive CPU, but the court takes judicial notice of published reports of the settlement between Intel and Digital giving Intel ownership and control of Alpha.

Based on the foregoing facts, the court finds that Intel has monopoly power in the relevant market of high performance CPUs **[*1274]** and the separate relevant market of Intel CPUs on a worldwide basis.

IV. Harm to Intergraph and Hardship to Intel if the Injunction is Granted.

As the court has found, Intergraph has no viable alternative to Intel's Pentium II microprocessor for its high-end computer workstations. Because it has no such alternative, there is no way Intergraph can mitigate the harm it faces from Intel's conduct during the foreseeable pendency of this lawsuit. Intergraph has established to this court's satisfaction that Intel **[**55]** dominates the high-end Windows-based workstation market in which Intergraph operates and in which Intergraph has built its reputation. (Tr. at 96-97; Patterson Aff. PP 18-19).

Intel advanced technical information, samples, and products, which are distributed through the use of NDAs, are all necessary to Intergraph's survival as a competitor in the high-end computer work station market, which depends upon its ability to adequately service and provide customer support for its existing products, as well as its ability to create, manufacture, and sell competitive products in the future. (Patterson Aff. P 16; Tr. at 97). Adequate supplies of Intel Production Chips are necessary to Intergraph's manufacturing operations because of its technological and economic lock-in to Intel. Virtually all of Intergraph's manufacturing is dedicated to the production of Intel-based computers and graphics subsystems. (Meadlock Aff. P 15). Intel Chips Samples and Early Release Chips are critical to Intergraph's development of new products, and, particularly because of the short shelf life of these products, those Chips Samples and Early Release Chips are critical to Intergraph's ability to compete. For **[**56]** instance, while the Pentium II 300 MHz processor was the fastest and most powerful microprocessor available in the Windows-based workstation market at the time of the Hearing, the testimony indicates that Intel planned to release a faster version in January 1998. [44] (Tr. 55-56). Competitors of Intergraph apparently have already received substantial lead time in developing new workstations based upon Early Release Chips and Chips Samples. (Meadlock Aff. PP 13-14; Patterson Aff. PP 14, 17, 21).

The court is persuaded that disruption in the supply of Intel Products will adversely affect Intergraph's relations with its customers, employees, shareholders, creditors, distributors and suppliers. (Meadlock Aff. P 16; Patterson Aff. PP 23, 25; Blaxton Aff. P 7; Floyd Aff. PP 3-5; Phillips Aff. P 8; Ellard Aff. P 7; Tr. at 97-100). Disruption in the supply of Intel Products has the serious potential of shutting **[**57]** down the development and manufacturing efforts at Intergraph, potentially causing the loss of thousands of jobs. (Tr. 99; Meadlock Aff. P 17; Patterson Aff. P 22).

Some of Intel's actions directed against Intergraph in 1996 and early 1997 were in response to Intergraph's refusal to license its Clipper patent rights. Apparently, that conduct was exacerbated and continued because Intergraph filed the present lawsuit. Recent events demonstrate that the potential damage to Intergraph in terms of loss of good will, harm to reputation, and other losses is difficult, if not impossible, to calculate. Intel's counsel has admitted that Intel withheld Information from Intergraph on "bug" problems with Intel Chips in the fall of 1997. *See* December 5, 1997, Letter from Intel's counsel. Intel's failure to detect a design problem as simple as turning a computer on and off cost Intergraph thousands of design hours. Further, Intel then failed to provide Intergraph with curative

[44] In fact, the court takes judicial notice that Intel has released a 333 mhz. version since the Hearing.

information and later denied Intergraph access to testing equipment. (Tr. 89-91; 210-212). Because of Intel's conduct, Intergraph was delayed in getting its TDZ 2000 products to the market. (Floyd Aff. P 4). Most recently, **[**58]** Intel reneged on its commitment to supply the Deschutes Chips Sample in mid-December of 1997. (Blaxton Aff. P 5). The effect of this delay is to put Intergraph materially behind its competitors.

[*1275] In 1996, Intel reported net earnings of Five Billion Dollars ($ 5,000,000,000), while Intergraph reported a net loss of Sixty-Nine Million Dollars ($ 69,000,000). Intergraph has improved its system sales for 1997, as its sales of high performance workstations were projected to increase by eighty percent over 1996 sales. (Tr. 215). These are the very workstations that are dependent on Intel Products.

Given Intel's position as the exclusive supplier of microprocessors in this market, the court finds that Intel's actions are likely to cause harm to Intergraph that would thwart this court's ability to provide meaningful relief at the conclusion of this action, should Intergraph prevail on its claims. On the other hand, if the injunction is issued, Intel will be required to do nothing more than what it willingly, and apparently profitably, did with Intergraph for several years. It will merely be required to engage in business with Intergraph on substantially the same terms that it did **[**59]** between 1993 and 1997 and on substantially the same terms it does with others in the computer industry today. The balance of the harm to Intergraph and the hardship to Intel weighs heavily in favor of issuing the injunction.

V. Conclusions of Law.

A. Section II of the Sherman Anti-Trust Act.

HN3[] *Section 2* of the Sherman Anti-Trust Act ("*§ 2*") provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…." *15 U.S.C. § 2*. ***HN4***[] In order to prevail on its *§ 2* monopolization claim, Intergraph only needs to establish that Intel (1) possesses monopoly power in the relevant market and (2) has willfully acquired or maintained that power. *Eastman Kodak v. Image Technical Services, Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 2089-90, 119 L. Ed. 2d 265 (1992)* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778 (1966))*. The court concludes that Intergraph has established a substantial likelihood of proving **[**60]** both elements at trial.

1. Intel Monopoly Power.

a. The Relevant Market.

Based on the Findings of Fact, the court concludes there are two relevant markets in which Intel has monopoly power: (a) the relevant market for high performance microprocessors or CPUs and (b) the separate relevant market for Intel CPUs. Intel's counsel conceded the first relevant market at the Hearing. (Tr. 289: "I think there is one market which is a market for CPUs or microprocessors that are supplied to high-end workstations.").

The court concludes that Intel CPUs are also a separate relevant market under well-established criteria for determining relevant markets. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 998 (11th Cir. 1993)* (holding that the market for a premium-priced anchor, which is part of a broader anchor market, constituted its own relevant market); *Los Angeles Mem. Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1393 (9th Cir. 1984)*, *cert. denied sub. nom., Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd., 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984)*; *Eastman Kodak, 504 U.S. 451, 119 L. Ed. 2d 265, **[**61]** 112 S. Ct. 2072* (Kodak spare parts are a separate relevant market).

b. Intel's Extraordinary Market Share.

Intel's extraordinarily high market shares in the relevant markets clearly exceed the legal threshold for presumptive monopoly power. In the market for Intel CPUs, Intel has an absolute monopoly of 100 percent of the market. In the market for "x86" CPUs, Intel has a ninety percent share of the market. These shares alone support the court's conclusion that Intel possesses monopoly power in the relevant markets. ***HN5***[] A sixty to sixty-five percent market share establishes a prima facie case of market power and creates a genuine issue of dangerous probability of monopolization. *U.S. Anchor, 7 F.3d at 999*; *see also* *United States v. Microsoft Corp., 980 F. Supp. 537, 1997 U.S. Dist. LEXIS 19496* **[*1276]** (approximately eighty percent market share in PC operating system software constitutes monopoly power); *United States v. Grinnell Corp., 384 U.S. 563, 570, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)* (eighty percent market share is a "substantial monopoly" and eighty-seven percent "leaves no doubt" of monopoly power).

c. Intergraph is Technologically and Economically [62] "Locked-In" to Intel's Microprocessor and Technical Information.**

Because, Intergraph has re-designed its workstation program around Intel's microprocessor in reliance on Intel's representations that it would be a reliable source of technical information and technology to Intergraph--Intergraph is "locked-in" to Intel's microprocessor technology and cannot feasibly switch to other microprocessors. Intel's other customers are similarly "locked-in." This reinforces and magnifies Intel's monopoly power. *Eastman Kodak, 504 U.S. at 477* (antitrust concerns are heightened where "locked-in" customers cannot readily switch to alternative technology).

d. Customer Loyalty To Intel Enhances Its Monopoly Power.

HN6[] Strong customer brand loyalty is an impediment to competition, aids the exercise of market power and facilitates monopolization. *U.S. Anchor, 7 F.3d at 998*; *see also* *United States v. E.I. du Pont de Nemours and Co., 351 U.S. 377, 392-93, 76 S. Ct. 994, 1005-06, 100 L. Ed. 1264 (1956)*; *Ware v. Trailer Market, Inc., 623 F.2d 1150, 1154 (6th Cir. 1980)*. Intel clearly has brand identification through its "Intel Inside" program and other brand recognition **[**63]** that reinforces and magnifies Intel's monopoly power. Intel enjoys the extraordinary loyalty of its customers with almost all purchasers of personal computers and the great majority of workstation buyers insisting upon having a genuine "Intel Inside" their computers.

e. Intel's Large Installed Base And Network Of Customers Further Enhances its Market Power.

As the installed base of Intel-based computers, servers, and workstations increases, Intel's market power is magnified, entry barriers are raised higher, and competitors are foreclosed from the market. *See* *United States v. Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448 (D.C. Cir. 1995)*, *on remand,* 1995-2 Trade Cases P 71,096, 1995 WL 505998 (D.D.C. 1995) (increasing returns to scale represent a significant entry barrier in computer software market to compete against Microsoft with its large installed base; antitrust consent decree approved). This factor also supports the court's conclusion that Intel possesses monopoly power in the relevant markets. ***HN7***[] A rapidly evolving high technology market such as microprocessors provides a market environment favorable to increased concentration of market power. *Greyhound Computer Corp., Inc. v. IBM, 559 F.2d 488, 497 **[**64]** (9th Cir. 1977)* ("But rapid technological progress may provide a climate favorable to increased concentration of market power rather than the opposite.")

The court concludes that the combination of all the foregoing factors establishes that Intel has monopoly power as a matter of law in the two microprocessor relevant markets.

2. Intel has Willfully Acquired and Maintained Its Monopoly Power.

The second element of a *§ 2* monopolization violation is the willful acquisition or maintenance of monopoly power. The court concludes that the facts amply establish this element. "Market power is the power to force a purchaser to do something that he would not do in a competitive market." *Eastman Kodak, 504 U.S. at 464*. This describes Intel's power and the exercise of this power in the relevant markets in this case, for it strongly appears that Intel has attempted to coerce Intergraph into relinquishing its intellectual property rights as a condition of Intel permitting

Intergraph to continue as a competitor in the high-end graphics workstation market. Intel induced Intergraph to discontinue the use and further development **[**65]** of its then competitive Clipper microprocessor. Intel has won the microprocessor platform competitive war and dominates the high-performance CPU market.

[*1277] Because Intel is a monopolists, the law imposes upon it affirmative duties to refrain from acting in a manner that unreasonably harms competition. It is not necessary for Intergraph to establish that Intel acquired its monopoly unlawfully. It is enough to show that Intel has misused or maintained that monopoly, even if lawfully acquired. ***HN8***[] "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *U.S. v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L. Ed. 1236 (1948)*.

HN9[] Even conduct by a monopolist that is otherwise lawful may violate the antitrust laws where it has anticompetitive effects. *Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1207 (9th Cir. 1997)* ("Legal actions, when taken by a monopolist, may give rise to liability, if anticompetitive."); *Greyhound Computer v. IBM, 559 F.2d 488, 498 (9th Cir. 1977)*, *cert. denied, 434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978)* (otherwise **[**66]** lawful conduct may be unlawfully exclusionary when practiced by a monopolist); *Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802, 811 (3d Cir. 1984)*, *cert. denied, 477 U.S. 908, 106 S. Ct. 3284, 91 L. Ed. 2d 572 (1986)* ("When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act."); *Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360, 368 (9th Cir. 1988)*, *cert. denied, 488 U.S. 870, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988)* ("Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties.").

Accordingly, the court concludes that Intel has violated its affirmative duties as a monopolist not to misuse its monopoly power and to compete in a manner that does not unreasonably or unfairly harm competition. Moreover, the court has concluded that Intergraph is likely to prevail on its *§ **[**67]** 2* monopolization claims under one or more established theories of antitrust liability discussed below and that the preliminary injunction is due to be granted.

B. Intel's Unlawful Refusal to Deal and Denial of Access to Essential Facilities.

HN10[] A refusal to deal "may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another." *MCI Communications Co. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983)*, *cert. denied, 464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*. Courts have held that the antitrust laws protect customers and purchasers in cases when a monopolist refuses to deal in order to control a downstream market or to frustrate litigation. *Image Technical Services, 125 F.3d 1195 at 1211* (supplier's refusal to deal with its "customers" in order to control a downstream market); *Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725, 726 (3d Cir. 1962)* (preliminary injunction granted where defendant drug company refused to sell its products to "purchasers" on the same terms as they are sold to other purchasers).

HN11[] The antitrust **[**68]** laws impose on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms. *MCI Communications Co., 708 F.2d at 1132*; *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*, *reh'g denied, 411 U.S. 910, 93 S. Ct. 1523, 36 L. Ed. 2d 201 (1973)*; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* (access to essential facility must be granted by ski lift owner controlling seventy-five percent of the ski lifts); *Tic-X-Press, Inc. v. Omni Promotions Co. of Ga., 815 F.2d 1407, 1420 (11th Cir. 1987)* (Omni arena was unique facility with substantial economic advantages; lack of viable alternative arenas gave the owner substantial market power).

Intel's advanced CPUs and Intel's ***HN12***[] technical information are "essential" if they **[*1278]** are vital to competitive viability and competitors cannot effectively compete in the relevant market without access to them. *City of Anaheim v. Southern Calif Edison Co., 955 F.2d 1373, 1380 n.5 (9th Cir. 1992)* (a facility is "essential" if it is otherwise unavailable and cannot be "reasonably or practically **[**69]** duplicated"). Intel's Advanced Chips Samples, Early Release Chips and Technical Information need not be indispensable, but their denial must "impose a severe handicap on potential market entrants." *TCA Bldg. Co. v. Northwestern Resources Co., 873 F. Supp. 29, 39 (S.D. Tex. 1995)*.

HN13[] Reasonable and timely access to critical business information that is necessary to compete is an essential facility. *Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 719 F. Supp. 1551, 1566 (S.D. Fla. 1988)*, *aff'd*, *933 F.2d 952 (11th Cir. 1991)*. Furthermore, a monopolist's unilateral refusal to deal violates *§ 2* of the Sherman Act where such conduct unreasonably handicaps competitors or harms competition. *Image Technical Services, 125 F.3d at 1209*.

Accordingly, the court concludes that Intel's refusal to supply advanced CPUs and essential technical information to Intergraph likely violates *§ 2* of the Sherman Act, because they are not available from alternative sources and cannot be feasibly duplicated, and because competitors cannot effectively compete in the relevant markets without access to them. Moreover, the court concludes that Intel has no legitimate business **[**70]** reason to refuse to deal with Intergraph. Intergraph has been a loyal and beneficial customer of Intel. The dispute over Intergraph's patent claims could be resolved separately without Intel denying Intergraph the essential CPUs and technical information it needs.

C. Intel's Unlawful Monopoly Leveraging.

The court also finds that Intel has improperly used its monopoly power in microprocessors to extend or leverage its power into the markets for graphic subsystems and workstations in which Intergraph competes. *Eastman Kodak, 504 U.S. at 479 n.29* ("The Court has held many times that ***HN14***[] power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next."). Unlawful monopoly leveraging occurs where a firm uses its market power in one market to gain competitive advantage in another market other than by competitive means. *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979)*, *cert. denied, 444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)* (The use of monopoly power attained in one **[**71]** market to gain a competitive advantage in another is a violation of *§ 2*, even if there has not been an attempt to monopolize the second market.").

HN15[] The requirements for liability under a monopoly leveraging claim include: "monopoly power in one market; the use of that power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another market; and injury caused by the challenged conduct." *Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 681 (2d Cir. 1985)*; *see also* *Kerasotes Mich. Theatres v. National Amusements, Inc., 854 F.2d 135, 136-37 (6th Cir. 1988)*, *reh'g denied,* (1988), *cert. dismissed, 490 U.S. 1087, 109 S. Ct. 2461, 104 L. Ed. 982 (1989)*.

Recently, in *United States v. Microsoft, 980 F. Supp. 537, 1997 U.S. Dist. LEXIS 19496*, the court concluded that a preliminary injunction was proper because of the danger that Microsoft would be able to leverage its existing monopoly in the computer operating systems market over the market for Internet browsers. "The probability that Microsoft will not only continue to reinforce its operating system monopoly by its licensing practices, **[**72]** but might also acquire yet another monopoly in the Internet browser market, is simply too great to tolerate indefinitely. . . . Those practices should be abated until it is conclusively established that they are benign." Microsoft, 980 F. Supp. 537, 544, 1997 U.S. Dist. LEXIS 19496, at *23. This court similarly concludes that Intel is unlawfully using its monopoly in the high-performance CPU relevant market to foreclose or restrain competition by Intergraph in the graphic subsystem relevant market. Intel has already entered **[*1279]** that market and has clearly announced plans to expand in that market while at the same time denying Intergraph access to the CPUs and technical information it needs to compete. This will unnecessarily "handicap" or restrain Intergraph's ability to compete in that market.

D. Intel's Unlawful Coercive Reciprocity.

HN16[] Coercive reciprocity refers to the practice of using economic leverage in one market coercively to secure competitive advantage in another. Betaseed, Inc. v. U and I, Inc., 681 F.2d 1203, 1216 (9th Cir. 1982) ("coercive reciprocity presupposes the existence of economic leverage in one market to gain an unfair advantage in another. . . ."). Courts have held **[**73]** that coercive reciprocity is a *per se* violation of the antitrust laws because of its pernicious effect and economic similarity to illegal tying cases. *See* Id. at 1216-17; Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 425 (5th Cir. 1978), *cert. denied, 444 U.S. 831, 100 S. Ct. 59, 62 L. Ed. 2d 39 (1979)*. According to the Ninth Circuit:

> Because the labels tie-in and coercive reciprocal dealings refer to similar phenomena, coercive reciprocal dealings should be judged according to the standards applied in a *per se* tie-in analysis.... [In] our view, the malevolent economic results of market foreclosure and raising of artificial entry barriers in a market tinged with coercive reciprocity evinces the anticompetitive and predatory nature of the practices.
> ***
> The two labels (tying and reciprocal dealings) refer to similar phenomena. In each case one side of a transaction has special power in the market place. It uses this power to force those with whom it deals to make concessions in another market.... In both cases, the key is the extension of economic power in one market to another market.

681 F.2d at 1216-17, 1221. *See also Spartan Grain* **[**74]** *&* Mill, 581 F.2d at 425. Once a plaintiff has established a prima facie case of a *per se* violation, no specific showing of anticompetitive effect is necessary. Betaseed supra, 681 F.2d at 1228.

Accordingly, the court concludes that Intel's overall course of conduct, including its tying of a continued supply to Intergraph of CPUs and technical information with its demand for Intergraph's relinquishment of its Clipper technology patents without costs to Intel, is a form of coercive reciprocity proscribed under both §§ 1 and 2 of the Sherman Act.

E. Intel's Use of Patented Technology to Restrain Trade.

That Intel owns patent rights to its CPUs does not confer upon it a privilege or immunity to violate the antitrust laws. ***HN17***[] Patent rights do not "confer an absolute immunity from antitrust claims." Image Technical Services, 125 F.3d at 1216 (citing Eastman Kodak, 504 U.S. at 479 n.29, 112 S. Ct. at 2089 n.29). Unlawful "exclusionary conduct can include a monopolist's unilateral refusal to license a [patent or] copyright or to sell a patented or copyrighted work." Image Technical Serv., 125 F.3d at 1218 (citing Data Gen. Corp. v. Grumman ***[**75]*** Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994)).

A monopolist cannot use the pretext of protecting intellectual property in order to violate the antitrust laws. Image Technical Serv., 125 F.3d at 1218-1219 ("Neither the aims of intellectual property law nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct.")(citing *Eastman Kodak,* 504 U.S. at 484, 112 S. Ct. at 2019).

The Court concludes that Intel has no legitimate intellectual property basis with which it can refuse to supply Intel microprocessors and technical information to Intergraph, especially since Intel has been doing so for the last four years on a mutually beneficial basis.

F. Intel's Retaliatory Enforcement of the NDAs.

HN18[] Contracts used as part of an anticompetitive scheme are unlawful under the antitrust laws. *CVD, Inc. v. Raytheon Co., **[*1280]** 769 F.2d 842, 854-55 (1st Cir. 1985)*, *cert. denied, 475 U.S. 1016, 106 S. Ct. 1198, 89 L. Ed. 2d 312 (1986)* ("the policies expressed in the federal antitrust laws will override any agreement in contravention of those policies, regardless of the agreement's **[**76]** legality under private contract law").

The Court concludes that Intel's retaliatory lawsuits and the threatened and actual termination of its nondisclosure agreements (NDAs) with Intergraph, under which Intel provided technical information to Intergraph, constitute unlawful restraints of trade. *See e.g. United States v. Microsoft Corp.,* 1995-2 Trade Cas. P 71,096, at p. 75,245 (Microsoft enjoined from using NDAs for purpose of restraining competition).

The Court concludes that Intel had no legitimate business justification for the immediate termination of its NDAs with Intergraph, particularly since there is no evidence that Intergraph ever failed to conform to its obligations under any of the NDAs. The Court concludes that Intel's enforcement of the at-will termination provisions through two retaliatory lawsuits and other threatened actions is unreasonably onerous and intended to restrain competition by Intergraph and others.

G. Intel's Agreements are Unlawful Restraints of Trade in Violation of *Section 1* of the Sherman Act.

HN19[] *Section 1* of the Sherman Act ("*§ 1*") provides that "every contract, combination . . ., or conspiracy, in restraint of trade **[**77]** or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. In order to prevail on this claim, Intergraph must prove: (1) an agreement to enter a conspiracy; (2) designed to achieve an unlawful objective; and, (3) actual unlawful effects or facts which radiate a potential for future harm to competition. *Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 622, 73 S. Ct. 872, 888, 97 L. Ed. 1277 (1953)*; *Bolt v. Halifax Hosp. Med Ctr., 891 F.2d 810, 820 (11th Cir. 1990)*, *cert. denied, 495 U.S. 924, 110 S. Ct. 1960, 109 L. Ed. 2d 322 (1990)*, *appeal after remand, 980 F.2d 1381 (11th Cir. 1993)*; *U.S. Anchor Mfg., 7 F.3d at 1001*. The plaintiff is not required to show that Intel's conspiracy under *§ 1* has a dangerous probability of successfully achieving its objectives. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628 (1984)*; *U.S. Anchor Mfg., 7 F.3d at 1001*.

It is not necessary for Intergraph to provide evidence of actual, present competition to show a violation of *§ 1* so long as it "shows that the potential for competition exists." *Sullivan **[**78]** v. National Football League, 34 F.3d 1091, 1100 (1st Cir. 1994)*, *cert. denied, 513 U.S. 1190, 115 S. Ct. 1252, 131 L. Ed. 2d 133 (1995)*; *Los Angeles Mem'l Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1391-92* (9th Cir.), *cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984)*. The court is satisfied that Intel is an actual and serious potential competitor of Intergraph in the graphics subsystem market and that Intel controls essential tools that Intergraph needs to compete in that market. It is also obvious to the court that Intergraph will be seriously impaired in that competition without the benefit of a preliminary injunction.

HN20[] Intergraph "need not prove an intent on the part of the co-conspirators to restrain trade or to build a monopoly . . . so long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under *Section 1*." *Bolt, 891 F.2d at 819-20*; *U.S. Anchor Mfg., Inc., 7 F.3d at 1001*. Intergraph has established a *§ 1* violation and antitrust injury by showing it has suffered "a loss of opportunity to compete" resulting from Intel's discontinuing Intergraph's supply of essential CPUs and technical **[**79]** information while conspiring with Intergraph's competitors to take away Intergraph's customers. *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1198-99 (11th Cir. 1993)*, *cert. denied, 510 U.S. 1012, 114 S. Ct. 604, 126 L. Ed. 2d 569 (1993)* (terminated distributor had valid *§ 1* claim against favored distributors and supplier which cut off plaintiff from supply of vital product needed to compete).

The Court concludes there is a substantial likelihood that Intergraph will succeed in **[*1281]** proving that Intel has entered into one or more agreements and contracts in restraint of trade in violation of *§ 1*.

H. Necessity of Preliminary Relief to Prevent Threatened Anti-Trust Harm.

HN21[] *Section 16* of the Clayton Act ("*§ 16*") specifically provides for preliminary injunctive relief for threatened ***antitrust law*** violations, as follows: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ." *15 U.S.C. § 26*; *see also* *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* **[**80]** (*Section 16* "requires a showing only of 'threatened' loss or damage"). The legislative history of *§ 16* clearly shows a strong Congressional policy supporting preliminary injunction because an antitrust plaintiff "does not have to wait to be ruined in his business before he has his remedy." *Id. at 112 n.8*.

HN22[] Courts have granted preliminary injunctions when there is a serious antitrust issue, serious harm to an antitrust plaintiff and little or no harm to defendant. *Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962)*; *Stenberg v. Cheker Oil Co., 573 F.2d 921 (6th Cir. 1978)*; *Foremost Int'l Tours, Inc. v. Qantas Airways, Ltd., 379 F. Supp. 88, 97 (D. Haw. 1974)*, *aff'd*, *525 F.2d 281 (9th Cir. 1975)*, *cert. denied, 429 U.S. 816, 97 S. Ct. 57, 50 L. Ed. 2d 75 (1976)*; *Gilder v. PGA Tour, Inc., 936 F.2d 417, 422-24 (9th Cir. 1991)* (preliminary injunction upheld prohibiting enforcement of rule banning type of golf club).

HN23[] Courts often grant mandatory injunctions when necessary to remedy an antitrust violation. *Bergen Drug Co., 307 F.2d at 726* (preliminary antitrust injunction granted based on rule of equity that a court may "by **[**81]** mandatory injunction compel a restoration of the status quo" pending final resolution of the case). "District courts are invested with large discretion to model their judgments to fit the exigencies of the particular case." *United States v. Glaxo Group Ltd., 410 U.S. 52, 64, 93 S. Ct. 861, 35 L. Ed. 2d 104 (1973)* (stating that mandatory selling on specified terms or compulsory licensing of intellectual property are appropriate antitrust remedies); *Image Technical Serv., 125 F.3d 1195* (upholding a permanent injunction compelling Kodak to sell its spare parts and related equipment to plaintiffs for all existing copiers and all new model copiers Kodak introduced during the 10-year term of the injunction).

I. Public Interest in the Anti-Trust Laws.

The Court concludes that Intergraph has antitrust standing to assert its antitrust claims against Intel as a former microprocessor competitor (the "Clipper technology") of Intel, as a current competitor of Intel in the graphics subsystem market, as a potential competitor in related markets utilizing CPUs, and as a long-standing customer/competitor of Intel, dependent on Intel as the sole source provider of high **[**82]** performance CPUs and related technical information necessary for Intergraph to compete. The Court is aware, and takes judicial notice, of the current Federal Trade Commission investigation of Intel involving claims of similar conduct toward others by Intel (such as withholding technical information). The Court is also aware of the pending government antitrust case against Microsoft involving claims of monopoly leveraging similar to those made against Intel in this case.

The court is also aware of the important public interest and policies in enforcement of the antitrust laws. Given the clear monopoly power of Intel in the market for high performance CPUs and in the market for its own CPUs, and given the evidence of joint action by Intel with some of Intergraph's competitors to persuade Intergraph's customers to boycott Intergraph, the Court concludes that Intergraph has established a likelihood of success in proving antitrust violations of *Sections 1* and *2* of the Sherman Act.

In light of the strong purposes behind the antitrust laws, to prevent threatened harm to competition and to protect potential and actual competition, the court concludes that a preliminary injunction **[**83]** is necessary and appropriate to restore the status quo so that **[*1282]** Intergraph will not be driven out of business or severely impaired pending trial.

J. Specific Performance of Intel's Commitments.

During the course of their business relationship, Intergraph facilitated Intel's entry into the workstation market, respected the confidentiality of Intel's information and participated in all major programs upon which reasonable conditions were imposed by Intel. Until this dispute over the use of Intergraph's intellectual property rights arose, Intel never canceled an NDA or RUNDA with Intergraph. Even when friction between the companies emerged in early 1997 over unrelated patent issues, Intel made a number of commitments to Intergraph in its March 28, 1997, letter to Intergraph. In this letter, Mr. Johnson's specific references to the Deschutes and Merced programs, as well as "future programs" for which there was a known time frame, convince the court that this is a promise of determinable duration, one that is not terminable at will.

In *UFE Inc. v. Methode Electronics, Inc., 808 F. Supp. 1407 (D. Minn. 1992)*, the Court affirmed the finding by a jury that an **[**84]** agreement, which was silent as to its duration, was for a five year minimum term. The parties' discussion of a five year term, and references to that same time period in both parties' internal documents, were cited in support of this conclusion. *See also Panhandle Agri-Service, Inc. v. Becker, 231 Kan. 291, 644 P.2d 413 (Kan. 1982)* (reference to specific quantity of material to be supplied gave the contract a duration: the time necessary for that quantity in fact to be supplied). Here, the writing between Intel and Intergraph, in the form of a letter from Mr. Johnson, contains sufficient evidence of a determinable duration to their agreement.

The letter also contemplates a reciprocal obligation or consideration on the part of Intergraph: its "continued support" (as well as payment for Intel Products). Accordingly, this court finds that there is a substantial likelihood that Intergraph will establish on the merits that the letter and surrounding circumstances constitutes an enforceable agreement of definite duration. [45] For purposes of this Opinion, then, the March 28, 1997 letter is hereinafter referred to as "the Letter Agreement."

[85]** Intel contends that the Letter Agreement, or any agreement between the parties, "incorporates by reference" all terms in the NDAs and RUNDAs. One of those provisions is the unilateral right to terminate an NDA or a RUNDA at will (i.e., the "Termination Clause"). But, if the Termination Clause is incorporated by reference, then the promises in the Letter Agreement, which Intel contends are "aspirational," are actually illusory. It is axiomatic that courts will not interpret agreements so that they become meaningless. An incorporation by reference theory that renders a contract meaningless simply cannot overcome Intel's specific commitments to Intergraph.

An NDA typically is very limited in duration and scope; this fact further undercuts Intel's claim that its terms are incorporated into broad commitments such as those set forth in the Letter Agreement.

The court, accordingly, finds there is a substantial likelihood that Intergraph will establish on the merits that the Letter Agreement and surrounding circumstances form the basis for an agreement between the parties without the right on the part of either party to unilaterally and arbitrarily terminate the agreement. **[**86]** Moreover, the court finds there is a substantial likelihood that Intergraph will be able to establish on the **[*1283]** merits that the agreement was of a sufficiently definite duration: at a minimum through the time period in which Intel develops the Deschutes and Merced programs, and perhaps longer.

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[45] Notwithstanding the presence of open terms, the promises in the Letter Agreement are sufficiently definite to be enforceable. *Thermal Sys. Of Ala. v. Sigafoose, 533 So. 2d 567, 571 (Ala. 1988); H.C. Schmieding Prod Co. v. Cagle, 529 So. 2d 243, 248 (Ala. 1988).* In cases such as this, the UCC's "gap-filler" provisions supply the open terms. See *Ala. Code §§ 7-2-305 to 310*.

Intel has submitted a single NDA containing a California choice of law provision. However, the Letter Agreement originated in Huntsville, Alabama. Accordingly, Alabama law applies to the interpretation of this Agreement. In any event, California has adopted verbatim the same provisions of the Alabama Uniform Commercial Code discussed herein. Moreover, California commercial law is more favorable to Intergraph, as, unlike Alabama, it allows the UCC's obligation of "good faith and fair dealing" (Section 1-203) to stand alone as a cause of action.

Because this is HN24[] a commercial case involving the sale of "goods," the Uniform Commercial Code ("UCC") authorizes the court to specifically enforce an agreement where the "goods are unique or in other proper circumstances." *Ala. Code § 7-2-716(1)*. "Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation. . . ." *Id.* at Official Comment, Note 2.

The Court finds several cases to be of particular importance. The first such case is *Kaiser Trading Co. v. Associated Metals & Minerals Corp., 321 F. Supp. 923, 925 (N.D. Cal. 1970)*, *appeal dismissed, 443 F.2d 1364 (9th Cir. 1971)*, involving an aluminum manufacturer that sought a preliminary injunction to enforce a supply agreement. The agreement in *Kaiser Trading* was for the supply of cryolite, a unique, scarce and indispensable **[**87]** chemical compound used in the production of aluminum. *321 F. Supp. at 925*. The only natural source of cryolite had been effectively exhausted, requiring aluminum manufacturers to rely on a synthetically produced substitute. There was no question but that synthetic cryolite was available on the open market; however, the court found it was not available in the quantity, or in the time-frame needed, by the manufacturer. *Id. at 933*. Accordingly, the court granted the preliminary injunction, requiring the supplier to specifically perform its obligations. *Id. at 932, 937*.

Equally persuasive is *Ross-Simons of Warwick Inc. v. Baccarat, Inc., 102 F.3d 12 (1st Cir. 1996)*, even though that decision avoided strict UCC analysis. In *Ross-Simons,* the First Circuit affirmed the trial court's mandatory injunction requiring a manufacturer of crystal to specifically perform its obligation to supply its product to a jewelry and gift retailer. Even though the crystal constituted less than one percent (1 percent) of the retailer's sales, the court relied upon its "uniqueness." *Id. at 19*. It observed, in this regard, that "several courts have recognized that HN25[] the loss of a prestigious **[**88]** brand of product line may create a threat of irreparable injury if it is likely that customers (or prospective customers) will turn to competitors who do not labor under the same handicap." *Id.* at 10 (citations omitted). *See also Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 433 (S.D. Fla. 1975)* (under certain "circumstances, a decree of specific performance becomes the ordinary and natural relief rather than the extraordinary one.").

Intel Products are "unique." The evidence establishes there is no alternative source for these items. If specific performance can apply to an agreement to supply a particular type of crystal to a jewelry and gift retailer, as it did in *Ross-Simon,* it certainly can apply to the supply of products for which there exists no present replacement. This is particularly so given the "Intel Inside" marketing program and the prestige associated with Intel Products. Furthermore, as demonstrated in *Kaiser Trading,* specific performance is also appropriate where an alternative distribution system for the unique product cannot assure it will be received in the time, or in the quantities, necessary to maintain the status quo.

Accordingly, **[**89]** the court finds that there is a substantial likelihood that Intergraph will be able to establish on the merits that it is entitled to specific performance of the Letter Agreement, including Intel's support of Intergraph as a "strategic customer" at least through 1999, when the Merced program is publicly launched, and perhaps through the year 2000.

K. Relief from the Unconscionable Nature of NDAs.

Intel contends the Termination Clause applies--because, either the March 28, 1997, letter is not an enforceable agreement, leaving the NDAs or RUNDAs to control, or because the termination clauses of the NDAs and RUNDAs are incorporated by reference into the letter agreement. Even if Intel is correct, the court concludes, in the alternative, that the deliberate termination of the parties' relationship by Intel, under the **[*1284]** terms of the NDAs and RUNDAs, is unconscionable for two independent reasons. First, the circumstances in existence at the time the NDAs and RUNDAs were executed between the parties reveal that the respective Termination Clauses are unconscionable at the outset. Second, the evidence demonstrates that operation of the respective Termination Clauses in the **[**90]** way now advocated by Intel would create an unconscionable situation with regard to Intergraph.

1. The NDA's Were Unconscionable At The Time They Were Made.

HN26[] Applicable provisions of both the Alabama and California versions of the UCC provide:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Ala. Code § 7-2-302 (1975); *Cal. Civil Code § 1670.5*. ***HN27***[] While unconscionability is not defined by the code or the comments, the commentary to *Section 7-2-302* describes the basic test as "whether, in light of the general commercial background and the *commercial needs* **[**91]** *of the particular trade or the case,* the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." *Ala. Code § 7-2-302* (Official Comment 1) (emphasis added).

HN28[] The determination of unconscionability is a question of law, to be determined by the court with each case decided on its own facts. *E & W Bldg. Material v. American Sav. & Loan Ass'n of Brazoria County, Tex., 648 F. Supp. 289, 290 (M.D. Ala. 1986)*. Alabama courts have identified four factors to be considered in determining whether a contract is unconscionable: (1) whether there was an absence of meaningful choice on one party's part, (2) whether the contractual terms unreasonably favor one party, (3) whether there was unequal bargaining power among the parties, and (4) whether there were oppressive, one-sided, or patently unfair terms in the contract. *See e.g. Lloyd v. Service Corp. of Ala., Inc., 453 So. 2d 735, 739 (Ala. 1984)*. While unconscionability cases most often arise in the consumer context, the principle applies with equal force in the commercial field.

In *Allen v. Michigan Bell Telephone Co., 18 Mich. App. 632, **[**92]** 171 N.W.2d 689 (Mich. Ct. App. 1969)*, the plaintiff sued Michigan Bell for its failure to include plaintiff's advertisements in the "yellow pages" directory. Michigan Bell raised as an affirmative defense a contract term relieving it from liability for the failure to include items of advertising in its directory. *171 N.W.2d at 690*. Finding this term unconscionable, the court explained:

> Implicit in the freedom of contract is the concept that at the time of the contracting each party has a realistic alternative to acceptance of the terms offered. *Where goods and services can only be obtained from one source (or several sources on non-competitive terms) the choices of one who desires to purchase are limited to acceptance of the terms offered or doing without.* Depending on the nature of the goods or services and the purchaser's needs doing without may or may not be a realistic alternative. Where it is not, one who successfully exacts agreement to an unreasonable term cannot insist on the courts enforcing it on the ground that it was "freely" entered into, when it was not.

Id. at 692 (emphasis added).

The Alabama Supreme Court, in *Morgan v. South Central Bell* ***[**93]*** *Telephone Co., 466 So. 2d 107 (Ala. 1985)*, also found invalid an exculpatory clause that sought to limit a telephone company's liability when it failed to publish a professional association's advertisement. While the *Morgan* court focused on the company's status as a regulated utility (though its "yellow pages" business was not regulated), it nevertheless focused on the fundamental commercial purpose behind the **[*1285]** unconscionability doctrine, stating, "We are satisfied that the plaintiffs did not have a meaningful choice . . . and that the defendants had the bargaining power in a gross and unbalanced manner in determining the terms and conditions [of the contract]." *Id. at 118*.

What the evidence demonstrates in the instant case, regarding the circumstances under which Intel and Intergraph entered into NDAs and RUNDAs, is that: (1) after Intergraph shifted its design and production efforts away from the

Clipper/UNIX based systems it had been producing and entered into a relationship with Intel, the defendant began to condition the delivery of Intel Products and information to Intergraph upon the execution of NDAs and RUNDAs, which contained a unilateral and unconditional **[**94]** termination provision; (2) as Intel and Intergraph enjoyed a mutually beneficial and productive relationship, there was no special commercial need in the computer industry for automatic termination of ongoing agreements; (3) while the termination provision was available to both parties, Intergraph had no suitable alternatives and, in a practical sense, had no real option to exercise its right to terminate; (4) Intel was the sole source of Information and Chips necessary for Intergraph to stay in business; (5) Intel had a greatly disproportionate bargaining power that enabled it to impose terms and conditions in the NDAs and RUNDAs that benefitted it, to the detriment of Intergraph; and (6) Intel, using its disproportionate bargaining power, imposed terms and conditions unfavorable to Intergraph in the NDAs and RUNDAs, making them non-negotiable.

Accordingly, the court finds it likely that Intergraph will be able to establish on the merits of its claims that the Termination Clause in each respective NDA and RUNDA was unconscionable at the time it was made and would not be enforceable even if it applied.

2. Termination of the NDAs Would Be Unconscionable.

Furthermore, **[**95]** the court finds that, even if the Termination Clauses are applicable and were not unconscionable at the time they were made, it would be unconscionable to permit Intel to enforce them against Intergraph today. ***HN29***[] The UCC deals with the subject of unconscionability in a context similar to the present circumstances, namely when one party to a commercial agreement seeks to exercise its claimed rights under an automatic termination clause, and where no advance notice to the other party is required under the clause. *Section 2-309(3)*, which focuses on contract termination, provides: ". . . an agreement dispensing with notification [of termination] is invalid if its *operation* would be unconscionable". *Ala. Code § 7-2-309(3)*; *Cal. Comm. Code § 2309* (emphasis added). The commentary to this provision directs attention to the "results" of exercising such power: "An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this subsection unless the results of putting it into operation would be the creation of an *unconscionable state of affairs." Id.* (Official Comment, Note 8) (emphasis added).

In **[**96]** *Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598, 602 (N.J. 1973)*, *cert. denied, 415 U.S. 920, 94 S. Ct. 1421, 39 L. Ed. 2d 475 (1974)*, the court voided a clause giving an oil company the right to terminate a dealership agreement on 10 days' notice, even though the dealer knew and understood the terms of his lease at the time it was signed. Notwithstanding the dealer's sophistication, the court found the termination clause grossly unfair because, if the oil company terminated the contract, it could always get another dealer. The dealer, in contrast, had everything to lose, since, even if he could move to another location, the going business and trade he built would remain with the old location.

It is apparent that the drafters of *Section 2-309(3) of the UCC* focused upon the circumstances created by the threatened or actual use of the termination clause and not upon the circumstances under which the agreement was made. "The conclusion seems inescapable that ***HN30***[] the Code intends the focus of an unconscionability determination under 2-309 be on the result of its application as seen at the time of termination. " White & Summers, Uniform Commercial **[*1286]** Code, 4th Ed., Vol. 1, p. **[**97]** 139-140; *see also* Hillman, McDonnel & Nickles, Common Law & Equity Under the UCC, p. 3-42 (1985) ("the court must focus on its effect at the time of contract breakdown"). It follows that the focus in this case must be on the circumstances present at the time of "contract breakdown," which was in or about August of 1997. That was when Intel first terminated the NDAs and RUNDAs, and when Intel denied Intergraph critical information or equipment necessary to debug Chips previously supplied by Intel. Significantly, at no time has Intergraph been in breach of any NDA or RUNDA, which makes the abrupt termination even less justified.

With respect to the "results" that Intel's exercise of the Termination Clause would have on the "state of affairs" between the parties, the Court finds: (1) Intel presently maintains 100 percent of the market for microprocessors and related products in the high speed workstation market in which Intergraph specializes; (2) Intergraph has taken reasonable steps to investigate alternatives to Intel Products; (3) presently, Intergraph has no viable alternative to

Intel Products; (4) Intel concedes there will be no alternative in the immediate future; and **[**98]** (5) if it does not receive Intel Products on a timely basis and in sufficient quantities, then Intergraph very quickly will fall behind its competitors, and Intel, rather than the marketplace, will determine whether or not Intergraph will stay in business.

Furthermore, the court also concludes that there is a substantial likelihood that Intergraph will establish on the merits that Intel's present attempt to invoke the Termination Clause, or otherwise delay Intergraph's involvement with future Intel Products, will create an unconscionable state of affairs. The Termination Clause therefore is unenforceable even if it applies.

3. Intergraph is Entitled to "Reasonable Notification" of Termination.

Under the Court's earlier finding, the Letter Agreement is specifically enforceable. If it is not, or if it is a contract of indefinite duration, then an unconscionable result must yet be avoided. ***HN31***[] *Section 2-309(2) of the UCC* imposes an obligation to give "reasonable notification" of termination. This commercially imposed standard embraces both policy and economic rationales. While it is a fluid standard--what is reasonable turns upon the particular circumstances of **[**99]** the situation--its purpose is unwavering: a supplier may not abandon its purchaser until that purchaser has made suitable, alternative arrangements, which are least disruptive to its business.

HN32[] The commentary to *Section 2-309* amplifies the policy and economic rationales behind the "reasonable notification" requirement:

> Subsection (3) recognizes that the application *of principles of good faith and sound commercial practice normally call for such notification* of the termination of a going contract relationship *as will give the other party reasonable time to seek a substitute arrangement.*

Ala. Code § 7-2-309; *Cal. Comm. Code § 2309* (Official Comment 8) (emphasis added).

HN33[] The question of "reasonable notification" is typically one for the trier of fact. However, little or no notice is unreasonable as a matter of law. In *Jo-Ann, Inc. v. Alfin Fragrances, Inc., 731 F. Supp. 149, 160 (D.N.J. 1989)*, the court determined that no notice was unreasonable as a matter of law. Instead, the court in *Jo-Ann* observed, with respect to distribution agreements, that the notice must allow the buyer reasonable time to find other arrangements. *Id. at **[**100]** 160*. In *Pharo Distributing Co. v. Stahl, 782 S.W.2d 635*, 11 U.C.C.R. Serv. 2d(Callaghan) 814, 817 (Ky. App. 1990), the court held that six days notice left no "inference" other than that is was unreasonable. There, the court commented that reasonable notice is that time period that, under the circumstances of the particular case, would allow a party to make alternate arrangements upon termination of the contract and would allow a party to minimize losses. 11 U.C.C.R. Serv. 2d(Callaghan) at 816.

One court has held that one-year advance notice of termination was not, as a matter of law, sufficient. *Hamilton Tailoring Co. v. **[*1287]** Delta Air Lines, Inc., 14 U.C.C. Rep. Serv. 1310, 1316, 1974 WL 21756 (S.D. Ohio 1974)*. Even cases finding a certain amount of advance notice to be "reasonable" illustrate the policy and economic factors at work. In *Monarch Beverage Co. v. Tyfield Importers, Inc., 823 F.2d 1187, 1190-91 (7th Cir. 1987)*, a wholesaler of wine products sued its supplier, the exclusive importer of a brand of sparkling wine, on an oral distribution agreement. The Seventh Circuit ruled that a district court's determination, finding that thirty days' notice of termination was reasonable, was not clearly **[**101]** erroneous after considering the nature, purpose, and circumstances of the action. *Id. at 1189*. In affirming the district court's conclusion, the Seventh Circuit was influenced by the following factors:

1. Advance notice of 30 days provided the wholesaler with sufficient time to find a substitute product.
2. The wholesaler also distributed a competitor's brand of sparkling wine, so the wholesaler could easily use that brand as a substitute.

3. The sales of the product at issue constituted only one percent or less of the wholesaler's total sales.

Id. at 1190. *See also* Teitelbaum v. Hallmark Cards, Inc., 25 Mass. App. Ct. 555, 520 N.E.2d 1333 (Mass. App. Ct. 1988) ("the adequacy of the notice is generally coextensive with the amount of harm that can be proved by the party who has incurred the loss of a supplier."); Aaron E. Levine & Co. v. Calkraft Paper Co., 429 F. Supp. 1039 (E.D. Mich. 1976) (ten months' advance notice was reasonable; supplier gave dealer the names of competing suppliers and dealer did, in fact, find a substitute).

In this instance, Intel has sought to abuse its dominant market position in the workstation microprocessor **[**102]** industry by terminating, without notice, its supply relationship with Intergraph. Such conduct is not permitted by the Uniform Commercial Code and the circumstances of this case.

Accordingly, the Court alternatively concludes that a substantial likelihood exists that Intergraph will establish on the merits that Intel failed to give "reasonable notification" of its intent to terminate the parties' agreements. The Court further finds that, under these circumstances, reasonable notification would take effect at the conclusion of the Deschutes and Merced Programs continuing through 1999.

VI. The Propriety of Injunctive Relief Against Intel.

A. The Court's Inherent Power to Order Injunctive Relief.

HN34[] The court is possessed with inherent and broad equitable powers to fashion an appropriate remedy to deal with the particular wrong in each case. *See* Williams v. City of Dothan, Ala., 818 F.2d 755, 760 (11th Cir. 1987), *opinion modified and reh'g denied, 828 F.2d 13 (1987)* (finding mandatory injunction issued by district court valid in later proceeding to enforce injunction). Accordingly, the power resides in this court to "do equity and to mould each **[**103]** decree to the necessities of the particular case." Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S. Ct. 587, 592, 88 L. Ed. 754 (1944) (equity jurisdiction distinguished by flexibility rather than rigidity); *see also* FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984) (affirming trial court's power to issue a preliminary injunction and order a freeze of assets during pendency of action for permanent injunctive relief).

The Court also has the power to grant preliminary injunctive relief where a party's conduct is calculated to frustrate litigation. Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962) ("True enough, the defendant can choose customers, but it should not be permitted to do so in order to stifle the main action, especially where it is apparent that such conduct will further the monopoly which plaintiff alleges defendant is attempting to bring about and which, if proved, would entitle plaintiff to permanent relief.").

In the present case, Intel has engaged in a number of acts that justify the exercise of this Court's inherent equitable power For example, on March 28, 1997, Intel delivered to Intergraph a letter containing a **[**104]** significant number of commitments. **[*1288]** While the Court believes this communication rises to the level of a contract, it at least evidences conduct that easily could support Intergraph's claim of fraud. At a time when patent disputes between the parties already had surfaced, Intel wrote in friendly terms about the parties' relationship and declared its "intent of supporting Intergraph as a strategic customer in current and *future* programs." Intel did not in any way link these promises to a resolution of the separate dispute involving Intergraph's patent rights, much less the surrender of those rights. At the very least, Intel's assurances, contained in the letter of March 28, 1997, could have lulled Intergraph into believing that its relationship with Intel was secure and that there was then no need to investigate and seek out alternatives to Intel's products.

HN35[] The preliminary injunction to be fashioned by the court is designed solely to preserve the status quo, to prevent the irreparable harm that threatens Intergraph and to achieve the appropriate equitable balance of "what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman, 411 U.S. 192, 200-01*. *93 S. Ct. 1463, 1469, **[**105]** 36 L. Ed. 2d 151 (1973)*.

B. Standard for Granting Injunctive Relief.

Intergraph has adequately established a need for mandatory injunctive relief at this stage of the proceedings. The court is of the opinion that Intergraph has ***HN36***[] established (1) a substantial likelihood of success on the merits of one or more of its claims, (2) the imminent threat of irreparable injury in the absence of injunctive relief, (3) that the threatened harm to Intergraph outweighs any potential harm to Intel that would be caused by an injunction, and (4) that the grant of an injunction will not disserve the public interest. *Johnson v. U.S. Dept. of Agriculture, 734 F.2d 774, 781 (11th Cir. 1984)*.

In making these determinations, the court specifically finds that the issuance of preliminary injunctive relief is necessary "to preserve [this court's] ability to render a meaningful decision on the merits." *United States v. State of Ala., 791 F.2d 1450, 1459 (11th Cir. 1986)*, *reh'g denied*, *796 F.2d 1478 (1986)*, *cert. denied sub. nom., Board of Trustees of Ala. State Univ. v. Alabama State Bd. of Educ., 479 U.S. 1085, 107 S. Ct. 1287, 94 L. Ed. 2d 144 (1987)*. **[**106]** For instance, the court believes that the potential for the loss of thousands of jobs at Intergraph by the time this case is ready for trial would be an untenable result that could not be remedied by an award of money damages to Intergraph.

C. Substantial Likelihood of Success on the Merits.

Intergraph has established a substantial likelihood of success on the merits on one or more of its claims. *Johnson, 734 F.2d at 789* ("it is sufficient to note that plaintiffs will likely prevail at least in part"). While Intel has raised questions about Intergraph's ability to ultimately prove several elements of its causes of action, the court's role at this juncture is not to make final determinations on the merits. *See University of Texas v. Camenisch, 451 U.S. 390, 394, 101 S. Ct. 1830, 1833, 68 L. Ed. 2d 175 (1981)*; *Johnson, 734 F.2d at 781-82* (findings at preliminary injunction hearing have "no conclusive bearing at the trial on the merits"); *Meis v. Sanitas Serv. Corp., 511 F.2d 655, 656 (5th Cir. 1975)* (plaintiff's allegations of misrepresentations, not conclusively controverted in the record on preliminary injunction, are sufficient to sustain temporary **[**107]** injunction). Instead, the Court must determine whether the evidence presented demonstrates a substantial likelihood that Intergraph will prevail on one or more of its claims on the merits.

Intergraph has sufficiently demonstrated that it is substantially likely to establish on the merits one or more of its claims that support the grant of injunctive relief. While not necessary to the Court's conclusions, this is particularly so in light of the severity of the injury that Intergraph faces in the absence of injunctive relief. [46] *Cf. Canal Authority* **[*1289]** *of State of Fla. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974)* (severity of hardship may lessen the showing needed on the merits); *Gartrell v. Knight, 546 F. Supp. 449, 455 (N.D. Ala. 1982)*; *Clark Const. Co. v. Pena, 895 F. Supp. 1483, 1489 (M.D. Ala. 1995)*.

[108]**

D. Threat Of Irreparable Harm.

Intergraph has carried its burden of showing the threat of irreparable harm. While Intel would ask the court to await a more complete record that establishes actual harm to Intergraph, this request ignores the fact that injunctive relief is only meaningful if used to counter the threat of such harm. To wait for actual irreparable harm to occur would render this relief futile, or at the very least, incomplete. Moreover, particularly in the context of the heavy media

[46] It is important to note that on a preliminary injunction determination, the quality of evidence is not restricted to what would be admissible at trial At this stage, Intel has had an opportunity to rebut, but has failed to rebut, the key evidentiary assertions made by Intergraph, and therefore, the court finds the quality of evidence submitted by Intergraph to be sufficient to support the findings herein.

scrutiny attendant in this case, Intergraph has established that Intel's refusal to deal likely will have an immediate impact on Intergraph's good will and reputation with its customers. ***HN37***[] Loss of good will and harmed reputation are types of injuries that are sufficient to establish the need for injunctive relief. *Ross-Simons, 102 F.3d at 19-20* ("By its very nature, injury to good will and reputation is not easily measured or fully compensable in damages"); *see also* *American Hosp. Supply v. Hospital Prods., Ltd., 780 F.2d 589, 595 (7th Cir. 1985)* (finding that good will is a common factor showing irreparable harm); *Computer Assocs. Int'l Inc. v. State Street Bank* ***[**109]*** *and Trust Co., 789 F. Supp. 470, 471-72 (D. Mass. 1992)* (finding of irreparable harm to Bank's business and reputation because lack of maintenance support threatened "functionality" of computer program, or alternatively, raised questions about the program's continued "availability" to the Bank and its customers).

The Court is convinced that Intel's current course of action in cutting off the supply of Chips, Information and Support to Intergraph, if not certain to force Intergraph out of business, would almost certainly create losses impossible to calculate in terms of monetary value. *Ferrero v. Associated Materials Inc., 923 F.2d 1441, 1449 (11th Cir. 1991)*.

In *Ross-Simons,* the First Circuit Court of Appeals affirmed the grant of an injunction to maintain the status quo, i.e., to require Baccarat, Inc., a supplier of fine crystal, to continue to supply Ross-Simons, a distributor, with crystal in the manner which it had previously agreed upon before the interruption. *102 F.3d 12*. With only the substantial likelihood of prevailing and the irreparable harm factors at issue, the appellate court found that the plaintiff had carried its burden of showing the elements **[**110]** entitling it to an injunction. In particular, the court found that, because of the "unique top-shelf" nature of the product at issue, plaintiff's "inability to supply products as advertised would wreak substantial (but immeasurable) damage to the good will that [the plaintiff] painstakingly had created over the years." *Id. at 19*. Further, "the lost sales . . . alienation of future [bridal] registrants, and harm to its reputation, would defy accurate quantification." *Id.*

Intergraph has adequately demonstrated to the court that, at the very least, it will suffer a loss of good will and harm to its reputation--in other words, irreparable harm--in the absence of injunctive relief.

E. Balancing the Harms.

The court is persuaded that the harm to Intergraph, in the absence of injunctive relief, would outweigh any harm that Intel will potentially suffer if the court grants the relief. Intel's counsel has argued that Intel would be harmed by a mandatory injunction because it would not be allowed to fully control its intellectual property, but that is the sort of harm to any party that is subject to injunctive relief. The question is whether that loss of **[**111]** control causes it any harm and, if so, whether that harm outweighs the threatened harm to the movant.

Intel has failed to show that providing its intellectual property and products to Intergraph causes it any significant harm. The lack of control of this intellectual property **[*1290]** would only be as to Intergraph. There is no record of Intergraph providing Intel's confidential information to others or otherwise using such information in a way that harms Intel. Further, the relief proposed by Intergraph includes its obligation to maintain the confidentiality of information disclosed pursuant to the NDAs, the RUNDAs or the injunction. The court finds that, at most, Intel's partial loss of control of its intellectual property will cause a *de minimus* harm, which in no way outweighs the substantial threatened harm shown by Intergraph. As noted earlier, Intel will be required to do now only what it did willingly until the parties were unable to resolve a completely unrelated matter, the use of Intergraph's patent rights.

F. The Public Interest.

Finally, the court finds that granting the mandatory injunction will not disserve the public interest. On the contract, injunctive **[**112]** relief at this stage of this proceeding is more likely to serve the public interest than to disserve that interest. Intel currently is the subject of a Federal Trade Commission investigation that appears to target similar alleged conduct by Intel in using its control of the microprocessor market in a coercive manner. The only effect on the market that this court can foresee, as a result of its mandatory injunction, would be to enhance competition, not to harm competition. In addition, granting the injunction is likely to preserve the jobs of Intergraph employees that otherwise are at risk because of the demonstrated threat to the continued viability of Intergraph during the pendency of this action.

In conclusion, the court's burden in weighing the standards for injunctive relief is not to make binding determinations of fact about the ultimate merits of this case. Instead, the court is to judge the likelihood of success, along with the threatened harm to Intergraph, as balanced against any harm to Intel that an injunction would cause. In doing so, the court should not take action which would disserve the public interest. In light of these factors, the court finds that it is appropriate **[**113]** for an injunction to issue in order to protect its ability to render a meaningful decision on the merits of this action.

G. Administrative Burdens Associated with Administering Injunctive Relief.

Intel suggests that injunctive relief of the sort requested by Intergraph will impose undue administrative burdens on the court. The court is satisfied that burdens will fall to it regardless of whether the requested relief is granted or denied. The parties have made it clear that the court should anticipate a hard-fought, paper-intensive litigation process. Since Intergraph refused to relinquish its patent rights to Intel:

a. Intel mailed a letter to Intergraph on August 13, 1997, which terminated all NDAs, demanded the immediate return of confidential information, and cut off the supply of Chips after December 31, 1997. It thereafter withdrew this termination.

b. Within hours of the time this lawsuit was filed on November 17, 1997, Intel again canceled all NDAs, demanded the immediate return of confidential information, and cut off the supply of Chips after December 31, 1997, even though it already had committed to supply Chips through March 31, 1998. After **[**114]** this conduct was called to the attention of this Court, Intel agreed to supply chips through March 31, 1998.

c. One day after suit was filed, Intel imposed a three day deadline for Intergraph to submit a request for the allocation of Chips for the Second Quarter of 1998. There is no evidence the letter was received by Intergraph until December 1, 1997. In any event, the deadline of November 21, 1997, was several weeks earlier than that previously imposed by Intel. Intel thereafter agreed to permit Intergraph to submit an allocation on December 9, 1997.

d. Within a week of suit being filed, Intel informed Intergraph that it was reneging on its earlier promise to supply 25 sets of Advance Chip Samples for the Deschutes program by the middle of December 1997.

e. Within 10 days of Intergraph's suit, Intel filed two separate lawsuits in the **[*1291]** federal courts in California that clearly have a substantial overlap with the claims made in the instant case.

f. Intel withheld information it was obligated to provide Intergraph. It thereafter supplied some of the needed information.

g. Intel refused to provide a supply of its Deschutes chip to Intergraph until those chips **[**115]** were publicly released, and then it refused to provide the technical data necessary for the plaintiff to make proper use of those chips.

Whether, as counsel to Intel suggests, Intergraph seeks "most favored nation" status, Intel should be assured that the court has no intention of granting it any special status. The terms of the injunctive relief will not require Intel to designate Intergraph a "Validation Partner" or to afford it other unusually favorable treatment. Rather, the relief is directed to the "nuts and bolts" of Intergraph's business, and it simply requires that Intel supply Intel products to Intergraph at the same time, and in proportionate quantities, that such items are supplied to Intergraph's competitors. If, however, Intel insists that the practical effect of the relief is to grant Intergraph rights beyond the status quo that existed prior to the contract breakdown, then the court is willing to examine the terms of Intel's deals with Intergraph's competitors and craft an appropriate remedy consistent with the intent of this Order.

To reiterate, it is the intent of the court that Intel treat Intergraph similarly to the way it treats its customers who are **[**116]** similarly situated to Intergraph, no better and no worse. Men and women of good will should have no difficulty doing as the court will direct. Should any party not be able or willing to follow the court's instructions, they should be advised now that the court can and will take appropriate steps to enforce its order. That conceivably could include the appointment of a special master, whose duty it would be to examine the parties' compliance with the court's order and to report the facts and make a recommendation to the court. Counsel and the parties should also clearly understand that the court has little patience with lawyer "word games," but tends instead to cut through to the heart of a matter.

VII. Preliminary Injunction.

Accordingly, pending further order of the court, it is hereby **Ordered, Adjudged, and Decreed:**

Intel Corporation, its officers, agents, servants, employees, and attorneys, and anyone acting in concert with any of them, shall be and they hereby are **PRELIMINARY ENJOINED** from terminating Intergraph's rights as a "strategic customer in current and future programs," or from otherwise taking any action adversely affecting Intel's business **[**117]** relationship with Intergraph or Intergraph's ability to design, develop, produce, manufacture market or sell products incorporating, or based upon, Intel products or information, including but not limited to the following:

a. Intel shall supply Intergraph with all Intel product information, including but not limited to technical, design, development, defect, specification, support, supply, future product, product release or sample data, whether existing in product data books, "yellow backs," Confidential Information Transmittal Records, email or other mediums (hereinafter "Information"), in such form and content as supplied to and at the same time Intel supplies such Information to Intergraph's similarly situated competitors, such as Hewlett Packard, Compaq, Dell, IBM, NetPower and Silicon Graphics (hereinafter "the Competitors"), whether it is on an advance basis for the development of motherboards, graphics subsystems or workstations utilizing Intel's existing, or future generation products (hereinafter "Product Development"), on current products as needed for support of such products. Intel shall be required to maintain a log of the disclosure of Information to Intergraph **[**118]** and its similarly situated Competitors, and upon request of the court, certify to this court its compliance with the procedures and timely delivery of such Information.

b. Intel shall supply to Intergraph all Information of the type or content made available by Intel to Intergraph through third parties (hereinafter "Third Party Information"), **[*1292]** at the same time it permits, or provides, the disclosure of such Third Party Information to Intergraph's similarly situated Competitors, whether it is on an advance basis for Product Development or on a current basis for the support of products in distribution. Intel shall be required to maintain a log of the disclosure of Third Party Information to Intergraph and its Competitors, and upon request of the court, certify to this court its compliance with the procedures and timely delivery of such Information.

c. Intel shall supply Intergraph with an allocation, and set aside a supply of microprocessors, semiconductors, chips, and buses (hereinafter "Chips") on an advance basis for product development ("Chips Samples"), in such quantities as forecasted by Intergraph in the same manner and the same terms as is done by Intergraph's similarly **[**119]** situated Competitors, or in proportional quantities as supplied to Intergraph's similarly situated Competitors, and at the same time Intel supplies such Chips Samples to Intergraph's similarly situated Competitors, at the prevailing rate charged to Intergraph's similarly situated Competitors. Intel shall be required to maintain a log of the release, or delivery, of Chips Samples to Intergraph and its Competitors, and upon request of the court, certify to this court its compliance with the procedures and delivery of such Chips Samples.

d. Within eleven (11) days of the date on which Intergraph posts the bond, as required by subsection (h) of this order, Intel shall supply Intergraph with 25 sets of Deschutes Chips Samples, together with all technical data needed to permit Intergraph to develop, design, and manufacture its products. Such technical data shall be of the same type, nature, and extent of technical data provided to Intergraph's similarly situated Competitors.

e. Intel shall supply Intergraph with an allocation, and set aside a supply, of Chips which have been manufactured by or on behalf of Intel for distribution (hereinafter "Production Chips"), as well as all **[**120]** future chips proposed by, or available from Intel, including but not limited to 333 mhz Pentium II, BX, Deschutes and Merced Chips, in accordance with a forecast supplied by Intergraph. Intergraph shall provide

Intel with a forecast for Production Chips at least one (1) quarter in advance of the quarter in which Intergraph desires to receive delivery of such Production Chips.

(i) Intel shall supply its authorized distributors with sufficient quantities of Production Chips to fulfill Intergraph's allocation of Production Chips, when such allocation has been presented by Intergraph to Intel's authorized distributor for fulfillment. Intergraph shall, as it has agreed to do, purchase Production Chips available through Intel's authorized distributors by placing an order for such an authorized distributor to fulfill Intergraph's Production Chips allocation. Intergraph shall negotiate the terms and conditions for the supply of its Production Chips allocation with any Intel authorized distributor of its choosing, and Intel shall not take any action, or fail to take any action, that will interfere with or effect Intergraph's terms, conditions, negotiations or relationship with **[**121]** the Intel authorized distributor selected by Intergraph, including but not limited to actions pertaining to prices, discounts, volumes, shipping or delivery pertaining to such Production Chips. Intel shall be required, upon request of the court, to certify to this court its compliance with the procedures with the applicable authorized distributor and delivery of such Production Chips.

(ii) Intel shall supply Intergraph with Production Chips not yet available from Intel's authorized distributors ("Early Production Chips") in such quantities as forecasted by Intergraph, or in proportional quantities as supplied to Intergraph's similarly situated Competitors, at the same time Intel supplies such Early Production Chips to Intergraph's similarly situated Competitors, at the prevailing rate charged to Intergraph's similarly situated Competitors. Intel shall be required to maintain a log of the simultaneous release, or delivery, of Early Production Chips to Intergraph and its similarly situated Competitors, and upon request of the court certify to this court its compliance with the procedures and delivery of such Early Production Chips. Notwithstanding the foregoing, Intel shall supply **[**122]** Intergraph those Early Production Chips ordered by Intergraph **[*1293]** for the 1st Quarter of 1998 at the prices previously agreed to by the parties.

f. Intel shall include Intergraph as an "active member of the Intel Inside program," and provide it all rights, privileges and opportunities made available to all other members.

g. Intel shall provide Intergraph "marketing involvement" and include it in "new product introduction events" of the type in which Intel includes Intergraph's similarly situated Competitors.

h. Within eleven (11) days of the date on which this order is entered, Intergraph shall post a bond with the clerk of the court, subject to approval by the clerk of the court, as required by *Fed. R. Civ. P. 65(c)*, in the amount of $ 25,000.00, as security against and as payment for such costs and damages as may be incurred or suffered by Intel in the event that Intel is found to have been wrongly enjoined by this order.

i. Intergraph shall maintain the confidentiality of all Information, Third Party Information, Chip Samples and Early Production Chips, in accordance with the terms, conditions and procedures of the applicable non-disclosure agreements as previously **[**123]** agreed to by the parties. The Confidentiality provisions of any applicable non-disclosure agreements previously entered into by and between Intel and Intergraph are expressly incorporated herein.

Done and ordered at Birmingham, Alabama, this 10th day of April, 1998, at 1:21 o'clock p.m.

Edwin L. Nelson

United States District Judge

Southeast Fla. Laborers Dist. Heath & Welfare Trust Fund v. Philip Morris

United States District Court for the Southern District of Florida

April 13, 1998, Decided ; April 13, 1998, Filed

Case No. 97-8715-CIV-RYSKAMP

Reporter
1998 U.S. Dist. LEXIS 5440 *; 1998-1 Trade Cas. (CCH) P72,163

SOUTHEAST FLORIDA LABORERS DISTRICT HEALTH AND WELFARE TRUST FUND, Plaintiff, vs. PHILIP MORRIS, et al., Defendants.

Disposition: [*1] Defendant's motion to dismiss for failure to state claim [DE-8] GRANTED.

Core Terms

tortfeasor, antitrust, unjust enrichment, third-party, injuries, motion to dismiss, damages, tobacco, failure to state a claim, proximate cause, costs, plaintiff's claim, anti trust law, defendants', subrogation, remote

LexisNexis® Headnotes

Estate, Gift & Trust Law > Trusts > General Overview

Governments > Fiduciaries

Pensions & Benefits Law > ... > Fiduciaries > Fiduciary Responsibilities > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Arbitration Coverage Limits

HN1[] **Estate, Gift & Trust Law, Trusts**

The Employee Retirement Income Security Act of 1974 and § 302(c)(5)(A) of the Labor Management Relations Act (Taft-Hartley), codified at *29 U.S.C.S. § 186(c)(5)(A)*, require a multi-employer trust fund to hold fund assets in trust for the purpose of providing benefits to participants in the trust and their beneficiaries. The fund is administered by a board of trustees, typically union officers. The trustees' performance of their fund-related duties is governed by statutory standards of fiduciary responsibility.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN2[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 8(a)(2) provides that a complaint need only be a short and plain statement of the claim. As long as the pleadings give the defendant fair notice of what the plaintiffs claim is and the grounds up which it rests, notice pleading is satisfied. A complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. When considering a motion to dismiss, the court must construe the allegations of the complaint favorably to the pleader. The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3[] Defenses, Demurrers & Objections, Motions to Dismiss

If a court grants a motion to dismiss, the court must determine whether the complaint should be dismissed with or without prejudice. Dismissal of a claim on the basis of the bare bone pleadings is a precarious one with a high mortality rate. However, where the allegations are well plead and amendment would be futile, a court may properly prohibit amendment.

Public Health & Welfare Law > Social Security > Medicaid > General Overview

HN4[] Social Security, Medicaid

The state cannot pursue common law claims directly against third-party tortfeasors prior to enactment of the Medicaid Third-Party Liability Act, Fla. Stat. Ann. § 409.901 (1995), which gives the state an independent cause of action.

Public Health & Welfare Law > Social Security > Medicaid > General Overview

Torts > ... > Elements > Causation > General Overview

HN5[] Social Security, Medicaid

Florida common law does not permit a plaintiff to recover in its own name from defendants for injuries that defendants allegedly caused to individual third party health care recipients.

Governments > Courts > Common Law

Torts > ... > Elements > Causation > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Torts > Intentional Torts > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN6[] **Courts, Common Law**

The common law rule regarding proximate cause is that: where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in increasing the plaintiffs expense or labor of fulfilling such contract, unless the wrongful act is willful for that purpose. The rule applies to negligent as well as intentional torts.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN7[] **Types of Contracts, Quasi Contracts**

To maintain a claim for unjust enrichment, a plaintiff must make clear from the face of their complaint that no adequate legal remedy exists.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN8[] **Types of Contracts, Quasi Contracts**

To survive a motion to dismiss on an unjust enrichment claim, the plaintiff must allege that the plaintiff conferred a benefit upon the defendant.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN9[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Section 1962 of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), codified at *18 U.S.C.S. § 1962*, provides that any person injured in his business or property by reason of a violation of *§ 1962* may sue therefor. The language limits standing to plaintiffs whose injuries were proximately caused by the RICO predicate acts. A central element of proximate cause is a showing of some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts is too remote a distance to recover. There are three considerations to guide a proximate cause inquiry: the difficulty of ascertaining damages, the need to avoid multiple recoveries, and the fact that the law will be vindicated. Causation principles generally applicable to tort liability must be considered applicable in RICO cases.

Antitrust & Trade Law > Clayton Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Torts > ... > Elements > Causation > General Overview

HN10[] Antitrust & Trade Law, Clayton Act

Section 4 (15 U.S.C.S. § 15(a)) of the Clayton Act states that any person who shall be injured by reason of anything forbidden in the antitrust laws may sue. The federal courts do not interpret § 4 as expansively as its literal language suggests. The limitations include common-law tort concepts such as proximate cause, directness of injury, and certainty of damages. Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Accordingly, a court must evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. The first inquiry that a court must undertake is whether the plaintiff has suffered an antitrust injury. Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN11[] Regulated Practices, Private Actions

An antitrust injury cannot be alleged by a party that is neither a consumer nor a competitor in the market in which trade was restrained.

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For The Council for Tobacco Research - U.S.A., Inc.: Joseph P. Moodhe, Esq., Debevoise & Plimpton, New York, New York.

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For Hill & Knowlton, Inc.: Barton S. Sacher, Esq., Stanley A. Beiley, Esq., Hornsby, Sacher, Zelman, Stanton, Paul & Beiley, P.A., Miami, Florida.

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For Smokeless Tobacco Council, Inc.: Jose E. Martinez, Esq., Martinez, Gutierrez & De Cordoba, Miami, Florida.

Judges: KENNETH L. RYSKAMP, UNITED STATES DISTRICT JUDGE.

Opinion by: KENNETH L. RYSKAMP

Opinion

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE came before the Court upon the defendants' motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim [DE-8] and alternative motion to dismiss under *Rule 12(b)(7)* for failure to join necessary parties [**DE-11**]. The motions have been fully briefed and the Court has heard oral argument.

I. BACKGROUND

1. The Complaint

In its 123 page thirteen-count complaint, the plaintiff, Southeast Florida Laborers District Counsel Health and Welfare Trust Fund ("Fund" or "plaintiff"), brings suit directly against the nation's **[*4]** leading tobacco companies [1] and their lobbying and public relations agents. [2] The Fund seeks to recover the health care costs expended to treat its participants who have suffered from tobacco-related illnesses, to require defendants to finance tobacco-use cessation programs for Fund participants, and to obtain various forms of injunctive relief. [3] **[*5]** The claims are as follows: fraud (Counts IV), breach of special duty (Count IX), unjust enrichment (Count XIII), violation of the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962* (Counts I and II), and federal and

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[1] Phillip Morris, R.J. Reynolds, Brown & Williamson, B.A.T. Industries, American Tobacco, Lorillard, United States Tobacco, and Liggett ("Tobacco Companies").

[2] The Council for Tobacco Research, The Tobacco Institute, Smokeless Tobacco Council, and Hill & Knowlton (with the Tobacco Companies, "Defendants").

[3] The Fund also seeks certification as a class action with a number of similar funds operating in Florida. The Court has stayed the motion for class certification pending resolution of the instant motions to dismiss. For the purpose of this motion to dismiss, the Court will consider only the Fund which is the named plaintiff.

state antitrust laws pursuant to the Sherman Act, *15 U.S.C. § 1*, and the Florida Antitrust Act of 1980, F.S.A. § 542 (Counts III, V, VI, and VII). [4]

2. The Plaintiff

The Fund is a nonprofit, multi-employer trust which operates solely in the State of Florida to provide comprehensive health care benefits for union members and their families through an employee welfare benefit plan. The plan is financed by collectively-bargained contributions made by employers of the participating workers. Instead of receiving money in their paychecks, the workers -- through the unions -- negotiate to have their employers contribute to the Fund to finance health care coverage for themselves and their families. *See UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562, 572, 102 S. Ct. 1226, 1232, 71 L. Ed. 2d 419 (1982)*; *Miree Constr. Corp. v. Dole, 930 F.2d 1536 (11th Cir. 1991)*.

The Fund is governed by ***HN1***[] ERISA and by the Labor Management Relations ("Taft-Hartley") **[*6]** Act, § 302(c)(5)(A); *29 U.S.C. § 186(c)(5)(A)*. These statutes require the Fund to hold Fund assets in trust for the purpose of providing benefits to participants in the trust and their beneficiaries. *See* ERISA, § 403(c)(1); *29 U.S.C. § 1101(c)(1)*. *See also* Taft-Hartley, § 302(c)(5)(A); *29 U.S.C. § 186(c)(5)(A)* (assets of union-sponsored fund for medical or hospital care must be held in trust "for the sole and exclusive benefit of the employees of such employer, and their families"). The Fund is administered by a board of trustees, typically union officers. The trustees' performance of their Fund-related duties is governed by statutory standards of fiduciary responsibility. *See* ERISA, §§ 404-412; *29 U.S.C. §§ 1104-1112*.

If the Fund recovers in this lawsuit, it would not reimburse contributing employers for their overpayments because it is statutorily prohibited from doing so. *See 29 U.S.C. § 1103(c)(1)(1997)*. The Fund could not unilaterally reduce the employers' contributions because these contributions are determined in a collective bargaining agreement to which the Fund is not a party. The Fund does not allege that its current participants actually suffered **[*7]** the injuries alleged.

3. The Motions to Dismiss

The defendants move to dismiss for failure to state a claim and, in the alternative, for failure to join necessary parties. The Court will not consider the alternative motion to dismiss because it finds that the arguments raised in the motion to dismiss for failure to state a claim are dispositive. In their motion to dismiss, defendants argue that all of plaintiff's claims fail because of the Florida Supreme Court case *Agency for Health Care v. Associated Industries, 678 So. 2d 1239 (Fla. 1996)*, *cert. denied*, *117 S. Ct. 1245, 137 L. Ed. 2d 327 (1997)*, and because the claims are too remote. Defendants further attack each of plaintiff's claims on claim-specific grounds.

II. DISCUSSION

A. Standard of Review

HN2[] *Rule 8(a)(2) of the Federal Rules of Civil Procedure* provides that a complaint need only be "a short and plain statement of the claim." As long as the pleadings "give the defendant fair notice of what the plaintiffs claim is and the grounds up which it rests," notice pleading has been satisfied. *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)*. A complaint should not be dismissed **[*8]** for failure to state a claim upon which

[4] Plaintiff has abandoned its claims for violation of the Florida Unfair and Deceptive Trade Practices Act (Count VIII), strict liability (Count X), negligence (Count XI), and breach of express and implied warranties (Count XII). (*See* Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss at 1 n.3.)

relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley, 355 U.S. at 45-46, 78 S. Ct. at 102*. When considering a motion to dismiss, the Court must construe the allegations of the complaint favorably to the pleader. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974)*. As the Eleventh Circuit has noted, "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Quality Foods v. Latin Am. Agribusiness Devel., 711 F.2d 989, 995 (11th Cir. 1983)*.

HN3[] If a court grants a motion to dismiss, it must determine whether the complaint should be dismissed with or without prejudice. "Dismissal of a claim . . . on the basis of the barebone pleadings is a precarious one with a high mortality rate." *Barber v. Motor Vessel "Blue Cat"*, *372 F.2d 626 (5th Cir. 1967)*. However, where the allegations are well plead and amendment would be futile, a court may properly prohibit amendment. *See* *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct.* ***[*9]*** *227, 230, 9 L. Ed. 2d 222 (1962)* (futility is basis for denying amendment under Rule 15).

B. Common Law Claims

1. *Associated Industries* and Remoteness -- Fraud and Breach of Special Duty

The defendants argue that *Associated Industries* mandates dismissal of the Fund's common law tort claims. The Court agrees. In *Associated Industries, supra*, the Florida Supreme Court held that ***HN4***[] the State could not pursue common law claims directly against third-party tortfeasors prior to enactment of the Medicaid Third-Party Liability Act, F.S.A. *§ 409.901* (1995). The Court stated, "it was the [1994 amendments] that gave the State an independent cause of action." *678 So. 2d at 1248*. Prior to the 1994 amendments, the State could only recover by suing under the traditional method of subrogation. *Id. at 1249*. The only Florida case interpreting *Associated Industries* acknowledges that *Associated Industries* held that "prior to the 1994 law there was no *independent* cause of action permitting the State to go forward in seeking Medicaid reimbursement." *State of Florida v. The American Tobacco Co.*, Case No. CL 95-1466 AH, at 2 (Fla. Cir. Ct. Sept. 16, 1996), **[*10]** *cert. denied*, *697 So. 2d 1249 (Fla. 4th DCA 1997)*.

The defendants assert *Associated Industries* stands for the proposition that everyone who sues a third-party tortfeasor to recover medical costs expended may recover only by bringing a subrogation claim and cannot sue a third-party tortfeasor directly. The Fund responds that *Associated Industries* has no bearing on the instant case because it concerned only the State's ability to bring a claim against third-party tortfeasors and did not rule on private litigants' rights to sue for damages. The Court agrees that the common law principles upon which *Associated Industries* is based mandate dismissal of the Fund's common law tort claims.

Prior to 1978, the State of Florida could not recover Medicaid reimbursements, either directly or indirectly, from a third-party tortfeasor. In 1978, the Florida legislature passed F.S.A. § 409.266(3) (1978) which "gave the State the authority to pursue third-party resources. However, the method of pursuit was limited to traditional subrogation means." *Associated Industries, 678 So. 2d at 1249*. In 1991, F.S.A. § 409.266(3) was repealed and, in 1994, the current Medicaid Third-Party **[*11]** Liability Act was passed. The 1994 Act permits the State to recover directly from third-party tortfeasors.

For the Fund to prevail, it must show that its claims take higher priority than those of the State. It must demonstrate why, although the State could not bring any type of suit against a third-party tortfeasor without statutory authorization, the Fund may bring similar common law claims without statutory authorization. This the Fund cannot do. The Fund is subject to the same common law principles which would apply to the State if there had been no statutory change in the common law.

HN5[] Florida common law does not permit a plaintiff to recover in its own name from defendants for injuries which defendants allegedly caused to individual third party health care recipients. *See Holyoke Mut. Ins. Co. in Salem v. Concrete Equipment, Inc., 394 So. 2d 193, 197* (Fla. 3d DCA) (insurer which has paid insured's loss is a subrogee of insured's cause of action against tortfeasor), *rev. denied*, *402 So. 2d 609 (Fla. 1981)*. *See also*

Travelers Ins. Co. v. Warren, 678 So. 2d 324 (Fla. 1996) (when insurer pays insurance claim, it typically receives subrogation rights from its insured against **[*12]** the tortfeasor).

Florida's common law follows **HN6**[] the well-established common law rule regarding proximate cause. The general rule is that:

> where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in . . . increasing the plaintiffs expense or labor of fulfilling such contract, unless the wrongful act is willful for that purpose.

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 533 n.25, 103 S. Ct. 897, 906 n.25, 74 L. Ed. 2d 723 (1983) (quoting 1 J. Sutherland, *A Treatise on the Law of Damages* 55-56 (1882)); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1499 (11th Cir. 1985), *cert. denied*, *475 U.S. 1107, 106 S. Ct. 1513, 89 L. Ed. 2d 912 (1986)*. This rule applies to negligent as well as intentional torts. *See* Anthony v. Slaid, 52 Mass. (11 Met.) 290 (1846) (plaintiff could recover only by bringing subrogation claim against third party tortfeasor who intentionally assaulted individual **[*13]** to whom plaintiff owed a duty to provide medical care). *See generally State of Maryland v. Philip Morris*, No. 96122017, CL 211487, 1997 WL 540913, at *9-14 (Md. Cir. Ct. May 21, 1997) (extensive discussion of common law right and plaintiff's inability to recover from third-party tortfeasor); *State of Iowa v. R.J. Reynolds*, No. CL 71048, at 7-8 (Iowa Dist. Ct. Aug. 26, 1997) (injuries too remote to give plaintiff claim against third-party tortfeasor); *State of Washington v. American Tobacco Co.*, No. 96-2-15056-8, at 11-13 (Wash Super. Ct. Nov. 19, 1996) (dismissing special duty claim because no physical harm and no proximate cause).

To escape Florida's common law rule, the Fund argues that it is unlike an insurer and that its injuries are not purely derivative of the injuries of its participants. The Court is unconvinced. The Fund asserts that the insurance cases do not "take into account the special relationship between the Funds and their participants." (Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss at 12.) This "special relationship" apparently consists of the fact that the Fund does not sell insurance at public rates to ensure profitability and that the Fund could have **[*14]** taken action to reduce the cost burdens from tobacco-related disease. This "special relationship" fails to show that the Fund has suffered direct harm. As the Minnesota Supreme Court noted, the fact "that [the plaintiff] occupies a different niche in the complex web of health care institutions . . . do[es] not . . . overcome the need for a closer connection between the injury and the tort." State of Minnesota v. Philip Morris, Inc., 551 N.W.2d 490, 495 (Minn. 1996). The Fund cannot escape the fact that any economic injuries which it incurred are purely-derivative of the physical injuries which its participants suffered. The Fund cannot, as a matter of law, sustain a claim against the defendants without a closer connection to the defendants.

2. Unjust Enrichment

The Fund also alleges that the defendants have been unjustly enriched. The Fund's claim is as follows: the defendants owe a duty to the public not to deceive them regarding smoking, (Compl. P 335), the defendants have breached their duty, (Id. P 336), because of this breach, the defendants owe the plaintiff a duty to compensate Fund participants for the medical costs expended, (Id. P 337), the defendants' **[*15]** retention of the Fund's medical expenditures would be unjust, (Id. P 340).

HN7[] To maintain a claim for unjust enrichment, a plaintiff must make clear from the face of their complaint that no adequate legal remedy exists. Martinez v. Weyerhaeuser Mort. Co., 959 F. Supp. 1511, 1518 (S.D. Fla. 1996) (citing Bowleg v. Bowe, 502 So. 2d 71, 72 (Fla. 3d DCA 1987)). The defendants have not alleged that an adequate legal remedy does exist. However, the Court will decline to dismiss this count with leave to amend because amendment would be futile. Instead, the Court will treat the count as properly pled and will dismiss it on substantive grounds.

HN8[] To survive a motion to dismiss on an unjust enrichment claim, the plaintiff must allege that the plaintiff conferred a benefit upon the defendant. *Florida Power & Light Co. v. Allis-Chalmers Corp., 752 F. Supp. 434, 438 (S.D. Fla. 1990)* (citing *Challenge Air Transport, Inc. v. Transportes Aereos Nacionales, S.A., 520 So. 2d 323, 324 (Fla. 3d DCA 1988)*. The Fund has not cited, nor has the Court located, any Florida case employing an unjust enrichment theory to obligate a defendant to provide medical care to smokers where the plaintiff **[*16]** is legally obligated to do so. "Courts of equity have no power to overrule established law." *Orr v. Trask, 464 So. 2d 131, 135 (Fla. 1985)*. Because the Court declines to invent a new cause of action, the plaintiff cannot, as a matter of law, state a claim of unjust enrichment. *See State of Iowa, supra*, at 14 (no unjust enrichment claim where defendants owed no duty to individual smokers that plaintiff satisfied by paying health care costs, plaintiff has independent duty to pay medical costs, and any benefit to defendants was incidental to plaintiff's fulfillment of its duty); *State of Maryland, supra*, at *16 (no unjust enrichment claim where plaintiff's claim is purely speculative); *State of Texas v. American Tobacco Co., 1997 U.S. Dist. LEXIS 22580*, No. 5-96CV-91, at 26 (E.D. Tex. Sept. 8, 1997) (unjust enrichment claim too attenuated and indirect to find support under theory of unjust enrichment).

C. Statutory Claims

1. RICO

HN9[] *Section 1962* of RICO provides that "any person injured in his business or property by reason of a violation of *section 1962* . . . may sue therefor." The Supreme Court has interpreted this language as limiting standing to plaintiffs whose injuries were proximately **[*17]** caused by the RICO predicate acts. *Holmes, 503 U.S. 258 at 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 at 1318*. A central element of proximate cause is a showing of some "direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover" *Id.* The *Holmes* Court raised three considerations to guide its proximate cause inquiry: the difficulty of ascertaining damages, the need to avoid multiple recoveries, and the fact that the law will be vindicated. *Id.* "Causation principles generally applicable to tort liability must be considered applicable" in RICO cases." *Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1399*, *modified on other grounds*, *30 F.3d 1347 (11th Cir. 1994)*, *cert. denied*, *513 U.S. 1110, 115 S. Ct. 900, 130 L. Ed. 2d 784 (1995)*.

Inspection of the Fund's claims reveals that the alleged harm does not affect the Fund directly, but only affects the Fund's participants. Furthermore, the three considerations relied upon in *Holmes* demonstrate that the Court should avoid **[*18]** finding that proximate cause exists here. The Fund is not suing to recover damages which the defendants caused to it directly, but is attempting to recover economic damages which it incurred by virtue of its contractual relationship with third parties who were allegedly harmed by the defendants. The "direct relation" between the Fund's alleged injury and the defendants' conduct is absent.

Analysis of the *Holmes* factors reveals that this conclusion is the correct one. First, if the Court permitted this claim to go forward, it would open a Pandora's box of damage calculations. The Court would be required to determine how much of the damages should be paid to the Fund's participants, the smokers, and how much should be paid to the Fund. Second, the risk of multiple recoveries is real. A certified class action of allegedly injured Florida smokers is currently pending in Dade County Circuit Court. The plaintiff class includes the Fund's participants and seeks to recover the same medical expenses which the Fund seeks in the instant case. *See Engle v. R.J. Reynolds Tobacco Co., et al.*, No. 94-08273-CA-20 (Dade County Ct., filed May 5, 1994). Third, pendency of the *Engle* action **[*19]** and the State's recent tobacco settlement demonstrates that there are ample "private attorneys general" who will vindicate the alleged wrongs. [5] The Fund's RICO claims are dismissed.

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[5] Judge Cohen's decision not to dismiss the State's RICO claim in *State of Florida v. American Tobacco Co.*, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996), *rev. denied*, ***697 So. 2d 1249 (Fla. 4th DCA 1997)*** does not affect this Court's ruling. Judge Cohen's decision was based upon Florida's RICO act and upon the fact that the State did not have to meet the proximate cause requirements of a private litigant.

2. Antitrust Claims

HN10[] Section 4 of the Clayton Act states that "any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue." *15 U.S.C. § 15(a)*. "The federal courts . . . have not interpreted section 4 as expansively as its literal language suggests." *Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1448 (11th Cir. 1991)*. [6] These limitations include common-law tort concepts **[*20]** such as proximate cause, directness of injury, and certainty of damages. "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General Contractors, 459 U.S. at 534, 103 S. Ct. at 906*. Accordingly, a court must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id. at 535, 103 S. Ct. at 907*. The first inquiry which the Court must undertake is whether the plaintiff has suffered "an antitrust injury." *921 F.2d 1438 at 1449*. Antitrust injury is defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*.

[*21] The Fund has not and cannot ***HN11***[] allege antitrust injury. It is "neither a consumer nor a competitor in the market in which trade was restrained," as required by *Associated General Contractors, 459 U.S. at 539, 103 S. Ct. at 909*. *See* *Florida Seed Co. v. Monsanto Co., 105 F.3d 1372, 1374* (11th Cir.) (dismissing antitrust claim where plaintiff not customer or competitor in relevant antitrust market), *cert. denied*, *118 S. Ct. 296, 139 L. Ed. 2d 228 (1997)*. Even if the Fund were in the proper market, it still could not state an antitrust claim. The gravamen of the Fund's complaint is that health care prices soared as a result of the defendants' concealment of information. Because many of the Fund's participants were addicted to cigarettes, the Fund's health care costs increased. This injury is simply not the type of injury that the antitrust laws were intended to prevent. *See* *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (antitrust injury consists of injury caused by higher prices, reduced output, or damage to a competitor's business). Furthermore, the claim is wholly derivative and thus not cognizable as an antitrust **[*22]** injury. *See* *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710-11 (11th Cir. 1984)* (dismissing antitrust claim for derivative injuries by officer, employer, and shareholder). [7]

III. CONCLUSION

The tobacco industry has, as of late, become the whipping-boy of American political discourse. The fact that the tobacco industry has recently become very unpopular, however, is insufficient ground for this Court to overturn well-established common law rules and well-settled methods of statutory interpretation to permit recovery where recovery would otherwise be barred. If courts were **[*23]** to ignore the law and permit recovery as a matter of course against an unpopular defendant for the sole reason that the defendant is unpopular, courts would have abandoned their constitutionally-mandated role of interpreting the law and would have assumed the role of political institutions.

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[6] The Florida legislature and courts have "adopted as the law of Florida the body of ***antitrust law*** developed by the federal courts under the Sherman Act [because] statutory interpretation is of little help in ascertaining Sherman Act violations. Reliance must be upon the case law which over the years has, however broadly and sometimes inconsistently, laid out the parameters of conduct proscribed by those antitrust laws." *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028, 1032 (Fla. 2d DCA 1984)*

[7] Plaintiff's reliance on *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* is misplaced. Contrary to plaintiff's assertions, *Blue Shield* did not involve a derivative claim. On the contrary, it involved a purchaser's claim against an antitrust offender. In this case, the Fund has not purchased any products from the defendants. Thus, its claim is wholly derivative.

Having considered the motions and the pertinent portions of the record, it is

ORDERED AND ADJUDGED that the defendant's motion to dismiss for failure to state a claim [**DE-8**] is GRANTED in its entirety.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 13 day of April, 1998.

KENNETH L. RYSKAMP

UNITED STATES DISTRICT JUDGE

Law v. NCAA

United States District Court for the District of Kansas

April 20, 1998, Decided ; April 20, 1998, Filed, Entered on the Docket

CIVIL ACTIONS No. 94-2053-KHV, No. 94-2392-KHV, No. 95-2026-KHV

Reporter
5 F. Supp. 2d 921 *; 1998 U.S. Dist. LEXIS 6641 **; 1999-2 Trade Cas. (CCH) P72,629

NORMAN LAW, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant. WILLIAM HALL, Plaintiff, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant. DOUG SCHREIBER, et al., Plaintiffs, v. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

Subsequent History: Counsel Amended, June 12, 1998

Core Terms

coaches, damages, class member, antitrust, conspiracy, earnings, plaintiffs', summary judgment, anticompetitive, salaries, prices, partial summary judgment, methodology, defense motion, antitrust violation, effects, conspirator, withdrawal, rescinded, amount of damages, circumstances, causation, Consumer, entitled to summary judgment, injunctive relief, Clayton Act, Sherman Act, calculation, parties, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN1[] **Clayton Act, Claims**

Proof that an entity has committed an antitrust violation does not afford plaintiffs an automatic right to damages under 15 U.S.C.S. § 15. Such proof establishes only that injury may result and does not mean that any plaintiff has been actually injured within the meaning of § 15. In order to recover under § 15, plaintiffs must establish that their injuries were caused by reason of defendant's anticompetitive activity. 15 U.S.C.S. § 15. The "by reason of" language is the starting point for analyzing causation and damages.

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

Causation evidence under *15 U.S.C.S. § 15* must establish that the injuries which plaintiffs claim are attributable to the antitrust conspiracy, and not to other factors. Plaintiffs seeking damages under *15 U.S.C.S. § 15* must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. In order to establish causation under *§ 15*, plaintiffs must demonstrate that the anticompetitive activity was a material cause of their injury. If there is sufficient evidence in the record to support an inference of causation between the antitrust violation and the injury suffered, the ultimate conclusion as to what that evidence proves is for the jury. Once plaintiffs establish that defendant's anticompetitive activity was a material cause of "some" of their injury, however, the remainder of the damage inquiry is judged under the amount of damage standard. While the evidence which links the alleged antitrust violation to plaintiffs' injuries must be more precise than the evidence establishing the amount of injury which they have suffered, plaintiffs' burden in proving fact of injury may be discharged by reasonable inferences from circumstantial evidence. Any evidence which is logically probative of a loss attributable to the violation will advance plaintiffs' case.

Antitrust & Trade Law > Clayton Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

In the class action context the inference of antitrust injury is predicated on the establishment of certain facts: (1) an antitrust violation, typically a conspiracy to fix prices or allocate markets; (2) an ability on the part of defendant-conspirators to effectuate the conspiracy; (3) generalized price increases or damages in the industry involved; and (4) purchase or, as here, rental by plaintiffs during the period of anti-competitive activity. In such circumstances, unless it is clear that no plaintiff was injured, the fact that defendant may be able to defeat a showing of causation as to a few individual class members would not defeat the inference of antitrust injury; the exact amount of injury to each class member should be treated as an issue at the damage phase of the trial.

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Antitrust & Trade Law, Clayton Act**

An antitrust plaintiff who is injured in his person or property by anticompetitive activity is entitled to recover damages. In economic terms, the amount of damages is the difference between what plaintiff could have made in a hypothetical free economic market and what plaintiff actually made in spite of defendant's anticompetitive activities. Once an antitrust violation has been established, however, the burden of proving damages is to some extent lightened.

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

To establish the amount of injury for antitrust violations, plaintiffs need not establish their damages with mathematical precision. Plaintiffs need only provide such evidence that the jury is not left to speculation or guesswork in determining the amount of damages to award.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

HN6[] **Class Members, Absent Members**

The claims of absent class members in opt-out class actions cannot properly be dismissed for failure to return a questionnaire. To require them to complete and return a questionnaire, on the condition that failure to do so would result in dismissal from the lawsuit, would have the prohibited effect of requiring them to opt into the class and violate the opt-out policy of *Fed. R. Civ. P. 23*.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

A conspirator is liable for damages which flow from its conspiracy, and such liability does not automatically cease when the conspirator ceases its anti-competitive conduct. A conspirator is liable for the damages caused by its unlawful conduct, even if they are sustained after the unlawful conduct ceases.

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Judges: Kathryn H. VRATIL, United States District Judge.

Opinion by: Kathryn H. VRATIL

Opinion

[*924] MEMORANDUM AND ORDER

These class action price-fixing cases come before the Court on defendant's Motion For Partial Summary Judgment (Doc. # 613) in Law, et al. v. National Collegiate Athletics Association, Case No. 94-2053; defendant's Motion For Partial Summary Judgment (Doc. # 91) in Hall, et al. v. National Collegiate Athletics Association, Case No. 94-2392; and defendant's Motion For Partial Summary Judgment (Doc. # 41) in Schreiber, et al. v. National Collegiate Athletics Association, Case No. 94-2026. In all three cases, the National Collegiate Athletic Association [NCAA] seeks partial summary judgment with respect to groups of coaches "for whom plaintiffs do not have and will not have **[**3]** evidence of impact" because their final expert report contains no analysis or individualized finding of damage. It also seeks summary judgment as to (1) claims of any individual class member who failed to return a timely and accurate "Restricted Earnings Coach Information Sheet"; (2) claims of individuals who are not class members; (3) damages incurred after May 25, 1995, when the NCAA rescinded the salary cap which violated *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (4) damages which represent a Consumer Price Index adjustment to plaintiff's base damage calculation; and (5) plaintiffs' claim for injunctive relief. At a status conference on April 2, 1998, the Court advised the parties of its intended ruling on these motions. This **[*925]** memorandum will briefly articulate the basis for its ruling.

I. HISTORY OF THE CASE

On January 23, 1998, the Tenth Circuit affirmed this court's order which permanently enjoined the NCAA from re-enacting compensation limits such as those contained in the restricted earnings rule [the Rule] because, as a matter of law, the Rule violated *Section 1* of the Sherman Act, *15 U.S.C. § 1*. *Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1024* ***[**4]*** *(10th Cir. 1998)*. In determining that the Rule constituted an unreasonable restraint of trade under *Section 1*, the Tenth Circuit inquired whether the challenged restraint had a substantially adverse effect upon competition, and whether the pro-competitive virtues of the alleged wrongful conduct justified the otherwise anticompetitive effects. *134 F.3d at 1016-17, 1019*. The Court of Appeals answered the first question in the affirmative, holding that anticompetitive effect was established as a matter of law on the undisputed record. *134 F.3d at 1020*. It noted that "under a quick look rule of reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces." Id. It reasoned that the undisputed facts in this case supported a finding of anticompetitive effect, as follows:

> The NCAA adopted the REC Rule to reduce the high cost of part-time coaches' salaries, over $ 60,000 annually **[**5]** in some cases, by limiting compensation to entry-level coaches to $ 16,000 per year. The NCAA does not dispute that the cost-reduction has effectively reduced restricted-earnings coaches' salaries. Because the REC Rule was successful in artificially lowering the price of coaching services, no further evidence or analysis is required to find market power to set prices.

Id. Having concluded that the Rule had a substantially adverse effect upon competition, the Tenth Circuit inquired whether the pro-competitive benefits of the restriction -- retaining entry level jobs, reducing costs, and maintaining competitive equity -- justified the anticompetitive effects. *134 F.3d at 1021-24*. The Court of Appeals resolved this question in the negative, noting that the NCAA had failed to present evidence that the Rule would be effective over time in creating entry-level positions, reducing deficits, enhancing competition, leveling an uneven playing field, or reducing coaching inequities. Id. It also noted that cost-cutting by itself is not a valid pro-competitive justification. As a result, the Tenth Circuit concluded that the NCAA had not demonstrated a genuine issue of fact whether **[**6]** it had violated *Section 1* of the Sherman Act.

HN1[] Proof that the NCAA committed an antitrust violation does not afford plaintiffs an automatic right to damages, however, under Section 4 of the Clayton Act, *15 U.S.C. § 15*; such proof establishes only that injury may result and does not mean that any plaintiff has been actually injured within the meaning of Section 4. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*. In order to recover under Section 4 of the Clayton Act, plaintiffs must establish that their injuries were caused "by reason of" defendant's anticompetitive activity. *15 U.S.C. § 15*. The "by reason of" language is the starting point for analyzing causation and damages, the two aspects of plaintiffs' case which are at issue here.

II. ISSUES TO BE RESOLVED

The parties have sharply divergent views on two issues which pervade the motions for partial summary judgment: (1) whether the fact of antitrust injury has already been established as a matter of law, so that plaintiffs are relieved of any burden of further proof on that issue, or whether the matter remains to be determined at trial; and (2) whether **[**7]** plaintiffs are entitled to prove the fact of antitrust injury on a class wide basis or whether they must do so on a coach-by-coach basis for more than 3,000 class members. Plaintiffs maintain that the fact of damage was conclusively resolved in the order which granted plaintiffs' motion for summary judgment **[*926]** on August 2, 1995, and the Tenth Circuit affirmance on January 23, 1998. Defendant disagrees, contending that the Tenth Circuit said noting about whether any particular plaintiff sustained injury and did not mention Section 4 of Clayton Act. The NCAA further notes that a finding of anticompetitive effect under *Section 1* of Sherman Act does not mean that every class member sustained antitrust injury and that in fact plaintiffs' expert, Dr. Robert D. Tollison, found that many coaches (some 60% of the class members) sustained no damages whatsoever.

The Court agrees with the NCAA that the fact of antitrust injury remains an issue for trial. [1] It disagrees with the NCAA's ancillary arguments that Dr. Tollison seeks to prove antitrust injury by estimating the amount of damages which plaintiffs incurred; that aside from Dr. Tollison's statistical analysis, plaintiffs have no evidence **[**8]** of antitrust injury; and that fact of injury cannot be established on a class wide basis.

A. Causation

HN2[] Causation evidence under Section 4 must establish that the injuries which plaintiffs claim are attributable to the antitrust conspiracy, and not to other factors. *See, e.g.*, *Van Dyk Research Corp. v. Xerox Corp., 631 F.2d 251, 254-56 (3d Cir. 1980)*, *cert. denied*, *452 U.S. 905, 69 L. Ed. 2d 405, 101 S. Ct. 3029 (1981)* (plaintiff not entitled to recovery where injury caused by cash flow problems, inability to raise money through new stock offerings, and failure of marketing arrangement); *R. S. E., Inc. v. Pennsy Supply, Inc., 523 F. Supp. 954, 964 (M.D. Pa. 1981)*. The purpose of the antitrust injury requirement is to ensure that the harm claimed by plaintiff corresponds to the rationale for finding a violation of **[**9]** the antitrust laws in the first place. *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*. The Supreme Court's observation in Atlantic Richfield underscores the salience of the fact of injury inquiry, as follows:

> Conduct in violation of the antitrust laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

495 U.S. at 344. In this regard, the Supreme Court reaffirmed *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, which held that plaintiffs seeking damages under Section 4 of the Clayton Act must prove "antitrust injury, which is to say injury of the type the antitrust laws were intended to

[1] This ruling disposes of Plaintiffs' Motion In Limine To Preclude Evidence Or Argument Concerning Impact Or Fact Of Damage To The Class (Doc. # 661) filed February 4, 1998.

prevent and that flows from that which makes defendants' acts unlawful. [2] *See also*, Cargill, Inc. v. Monfort of Colorado, Inc., 479 **[**10]** U.S. 104, 122, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986). [3]

[11]** In order to establish causation under Section 4, plaintiffs must demonstrate that the anticompetitive activity was "a material **[*927]** cause" of their injury. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 & n. 9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969). [4] They need not rule out "all possible alternative sources of injury." Id.; *see also* Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073, 1075 n. 3 (9th Cir. 1970), *cert. denied*, *402 U.S. 923, 28 L. Ed. 2d 662, 91 S. Ct. 1377 (1971)* (antitrust violation need not be "sole" or the "controlling" cause of injury). If there is sufficient evidence in the record to support an inference of causation between the antitrust violation and the injury suffered, the ultimate conclusion as to what that evidence proves is for the jury. Perkins v. Standard Oil Co., 395 U.S. 642, 648, 23 L. Ed. 2d 599, 89 S. Ct. 1871 (1969). Once plaintiffs establish that defendant's anticompetitive activity was a material cause of "some" of their injury, however, the remainder of the damage inquiry is judged under the amount of damage standard. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. at 114 n. 9.

[12]** While the evidence which links the alleged antitrust violation to plaintiffs' injuries must be more precise than the evidence establishing the amount of injury which they have suffered, see Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-63, 75 L. Ed. 544, 51 S. Ct. 248 (1931); Van Dyk Research Corp. v. Xerox Corp., supra, 631 F.2d at 255; Flintkote Co. v. Lysfjord, 246 F.2d 368, 391-92, 394 (9th Cir.), *cert. denied*, *355 U.S. 835, 2 L. Ed. 2d 46, 78 S. Ct. 54 (1957)*, plaintiffs' burden in proving fact of injury may be discharged by reasonable inferences from circumstantial evidence. World Of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1478 (10th Cir.), *cert. denied*, *474 U.S. 823, 88 L. Ed. 2d 63, 106 S. Ct. 77 (1985)*; Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1525 (10th Cir. 1984), *aff'd* 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). Any evidence which is logically probative of a loss attributable to the violation will advance plaintiffs' case. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977) (absolutely no requirement that loss be personal or unique to individual plaintiff, **[**13]** so long as plaintiff has suffered loss in his business or property; thus, when violation impacts class of persons, no reason why proof of causation cannot be made on common basis so long as common proof adequately demonstrates some damage to each individual).

As a practical matter, in a class action context, proof of an effective conspiracy to fix prices will include facts which tend to establish -- perhaps circumstantially -- that each class member was injured. Presidio Golf Club v. National Linen Supply Corp., 1976 U.S. Dist. LEXIS 11577, 1976 WL 1359, *5 (N.D. Cal. 1976). The district court in Presidio Golf noted that an inference of antitrust injury is justified in certain circumstances, as follows:

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[2] In Brunswick, the Supreme Court noted that the injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation" and that "it should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" 429 U.S. at 489 (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)).

[3] In Cargill, the Supreme Court emphasized the necessity for scrutinizing the Brunswick antitrust injury factor and extended this requirement to cases such where plaintiffs sought an injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26. The Court held that in such a case, a private plaintiff is required to show threatened antitrust injury just as a plaintiff seeking damages under Section 4 of the Clayton Act is required to show actual antitrust injury. 479 U.S. at 113. The Court reaffirmed that an injury, although causally related to an antitrust violation, nevertheless does not qualify as "antitrust injury" unless it can be attributed to an anticompetitive aspect of the practice under scrutiny. The Court added that "a showing of loss or damage due merely to increased competition does not constitute such injury." 479 U.S. at 122.

[4] As noted above, plaintiffs have already proven that the NCAA violated the antitrust laws. Under Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S. at 114 n. 9, their burden of proving fact of damage under Section 4 of the Clayton Act is satisfied by proof of "some damage" flowing from the unlawful conspiracy.

> HN3[] In the class action context the inference is predicated on the establishment of certain facts: (1) an antitrust violation, typically a conspiracy to fix prices or allocate markets; (2) an ability on the part of defendant-conspirators to effectuate the conspiracy; (3) generalized price increases or damages in the industry involved; and (4) purchase or, as here, rental by plaintiffs during the period of anti-competitive activity.

Id. (citations omitted). In such circumstances, unless **[**14]** it is clear that no plaintiff was injured, the fact that defendant may be able to defeat a showing of causation as to a few individual class members would not defeat the inference of antitrust injury; the exact amount of injury to each class member should be treated as an issue at the damage phase of the trial. Id. at *5-6. *See also* *In re Master Key Antitrust Litigation, 528 F.2d 5, 12 n. 11 (2d Cir. 1975)* (if plaintiffs establish that defendants engaged in unlawful national conspiracy which had effect of stabilizing prices at noncompetitive levels and that plaintiffs were consumers of that product, jury could reasonably conclude that defendants' conduct caused injury to each plaintiff), **[*928]** citing *In re Ampicillin Antitrust Litigation, 55 F.R.D. 269, 275-76 (D.D.C. 1972)*.

The Third Circuit Court of Appeals took a similar view in *Bogosian v. Gulf Oil Corp., supra, 561 F.2d at 455*, when it directed the district court to reconsider its refusal to allow proof of antitrust injury on a class wide basis, as follows:

> If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would **[**15]** obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price. If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage. "(The) burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by . . . proof of some damage flowing from the unlawful conspiracy . . . ." *Zenith Radio, supra, 395 U.S. at 114, 89 S. Ct. at 1571 n. 9*. Under these circumstances, proof on a common basis would be appropriate.

Accord, *Hedges Enterprises, Inc. v. Continental Group, Inc., 81 F.R.D. 461, 475 (E.D. Pa. 1979)* (proof of conspiracy to establish "base" price for negotiations with individual plaintiffs, together **[**16]** with proof that price was higher than would prevail under competitive conditions, would be common to class and "would establish at least the fact of damage, even if the extent of the actual damages suffered by the plaintiffs" would vary); *In re Wirebound Boxes Antitrust Litigation, 128 F.R.D. 268, 272 (D. Minn. 1989)* (common proof of impact possible even where prices individually negotiated, because proof of impact typically follows from proof of price-fixing conspiracy where defendants have sufficient market power); *In re Folding Carton Antitrust Litigation, 75 F.R.D. 727, 734 (N.D. Ill. 1977)* ("Courts have consistently held that an illegal price fixing scheme presumptively impacts upon all purchasers of a price fixed product in a conspiratorially affected market.").

B. Damages

HN4[] An antitrust plaintiff who is injured in his person or property by anticompetitive activity is entitled to recover damages. In economic terms, the amount of damages is the difference between what plaintiff could have made in a hypothetical free economic market and what plaintiff actually made in spite of defendant's anticompetitive activities. [5] *Bigelow v. RKO Radio Pictures, **[*929]** Inc., 327 **[**17]** U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946)*

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[5] Methods by which an antitrust plaintiff can establish lost profits include (1) comparing plaintiff's profits before or after the alleged anticompetitive activity with the profits made while plaintiff was subjected to the anticompetitive activity; (2) examining the profits of a business comparable to plaintiff's business which was not affected by the anticompetitive activity; and (3) projecting the market share which plaintiff would have attained absent the anticompetitive activity, and then projecting plaintiff's profits accordingly. ABA Antitrust Section, ***Antitrust Law*** Developments (3d ed. 1992) at 411-13, 669-673, and cases cited

(antitrust damages measured by "comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions."). See generally, II Areeda & Turner, ***Antitrust Law*** 231-34 (1978.

[18]** Once an antitrust violation has been established, however, the burden of proving damages is "to some extent lightened." *J. Truett Payne Co. v. Chrysler Motors Corp., supra, 451 U.S. at 568*. Our willingness to accept a degree of uncertainty in fixing the amount of damages rests in part on the difficulty of ascertaining business damages, in that "the vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *Id. at 566*. Our willingness also rests on the principle that "it does not come with very good grace" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted. Id.

In *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, the Supreme Court accepted the proposition that damages could be awarded under relaxed rules, on the basis of plaintiff's damage estimate. In doing so, it repeated that "in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of **[**19]** the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." In *Bigelow v. RKO Radio Pictures, Inc., supra*, the Supreme Court explained that "any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim" and that "failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." *327 U.S. at 264-65*.

Therefore, ***HN5***[] to establish the amount of injury, plaintiffs need not establish their damages with "mathematical precision." *Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242, 246 (10th Cir. 1976)*, *cert. denied*, *429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977)*. Plaintiffs need only provide such evidence that the jury is not left to "speculation or guesswork" in determining the amount of damages to award. *Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. at 263-65*; *see also* *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. at 123-24*; *Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 836 (9th Cir. 1982)* (study of cases in this area readily dispels any impression **[**20]** that question of damages is governed by application of common law rule of reasonable certainty; cases have long since departed from this rule in antitrust litigation); *Graphic Products Distributors, Inc. v. ITEK Corp., 717 F.2d 1560, 1579-80 (11th Cir. 1983)* (once antitrust violation and its causal relation to plaintiff's injury have been established, burden of proving amount of damages is much less severe). Once the existence of injury is established by direct evidence or inference from the character of a sustained conspiracy, the proof necessary to set the amount of damages need not be exact.

III. ANALYSIS

As noted above, in all three cases, the NCAA seeks partial summary judgment regarding (1) groups of individual coaches "for whom plaintiffs do not have and will not have evidence of impact"; (2) claims of any individual class

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therein. In this case, plaintiffs have combined the "before-and-after" and "yardstick" approaches to project the compensation they would have attained absent the NCAA's anticompetitive activity.

Methodologies of this kind have been cited with approval by numerous courts. *See, e.g.*, *In re South Central States Bakery Products Antitrust Litigation, 86 F.R.D. 407, 422 (M.D. La. 1980)* (certifying class based on representations that impact of defendants' conspiracy could be shown by using at least one of four accepted methods, or a combination of these methods: comparing prices in different geographical regions, comparing prices and profits of conspirators versus non-conspirators, comparing prices in comparable markets, and comparing prices or profits before and after termination of the conspiracy); ***In re Domestic Air Transportation Antitrust Litigation, 137 F.R.D. 677, 689-90, 692 (N.D. Ga. 1991)*** (certifying 12.5 million member class where plaintiffs presented potential statistical methodologies for proving injury); *In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244, 251-52 (S.D. Tex. 1978)* (class certified based on prediction that injury could be determined to a "reasonable degree of certainty" by "either of two generally accepted methodologies"); *In re Potash Antitrust Litigation, 159 F.R.D. 682, 697-98 (D. Minn. 1995)*.

member who failed to return a timely and accurate "Restricted Earnings Coach Information Sheet"; (3) claims of individuals who are not class members; (4) damages incurred after May 25, 1995, when the NCAA rescinded the salary cap which violated *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (5) damages representing a Consumer Price Index adjustment **[**21]** to plaintiff's base damage calculation; and (6) plaintiffs' claim for injunctive relief. We address each argument in turn.

A. Groups of individual coaches "for whom plaintiffs do not have and will not have evidence of impact"

The NCAA asserts that plaintiffs' expert methodology is "the only basis on which **[*930]** plaintiffs claim they can demonstrate the essential element of fact of injury for each class member"; that Dr. Tollison's report contains no individualized finding of damages for certain coaches; and that as to such coaches, defendant is entitled to summary judgment. According to the NCAA, coaches in this category include coaches for whom Dr. Tollison's final report contains no analysis or individualized finding of damages; coaches for whom Dr. Tollison's methodology finds "negative damages"; coaches whose academic year compensation was always less than $ 12,000; graduate assistant coaches whose pay was determined by the amount of graduate tuition at a particular institution; and coaches who did became restricted earnings coaches after the NCAA rescinded the Rule and who received more than $ 12,000 academic year compensation. According to the NCAA, plaintiffs do not have and **[**22]** will not have evidence of impact as to such coaches.

Dr. Tollison is the Duncan Black Professor of Economics and General Director of the Center for Study of Public Choice at George Mason University in Fairfax, Virginia. He earned his Ph.D. in Economics from the University of Virginia in 1969. His background and credentials are impressive, and his qualifications as an expert are undisputed. Plaintiffs claim that he has developed a methodology which is a scientifically valid way of demonstrating that the Rule had an impact on all three classes. More specifically, plaintiffs argue that Dr. Tollison's testimony will demonstrate "in the aggregate, that the REC Rule was a material or substantial factor causing injury to class members." Consistent with *Fed.R.Civ.P. Rule 26(a)(2)(B)*, Dr. Tollison afforded defendant a complete statement of the opinions which he intends to express and the reasons therefore, the data and other information which he considered in forming his opinions, and other necessary information.

Because of scheduling issues peculiar to this case, Dr. Tollison's compliance with *Rule 26(a)(2)(B)* was evidenced not by a single written report but by a series of reports which, **[**23]** read together, reveal the scope of his research and intended testimony. See Amended Preliminary Damage Report (February 20, 1997) [6]; Interim Damage Report (November 21, 1997); and Damage Report (January 19, 1998). [7] **[**25]** Dr. Tollison's opinion, as revealed in these reports, has two components. First, based on economic theory and common sense, Dr. Tollison first explains that the NCAA engaged in the exercise of monopsony power; that it singled out a class of specific coaches from whom to extract salary concessions; and that in doing so the NCAA injured members of the plaintiff class by reducing to $ 12,000 the compensation of restricted earnings coaches who had been earning more than $ 12,000 and exerting downward pressure on salaries of coaches below the $ 12,000 cap. See Declaration (April 3, 1997). Dr. Tollison then uses a statistical damage model to determine: (1) whether statistical data confirm his theoretical conclusions concerning the NCAA's cartel behavior and the injuries flowing therefrom; and (2) if so, the

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[6] Dr. Tollison's original Damage Report was dated February 3, 1997. He amended it on February 5 and February 20, 1997.

[7] The NCAA's expert, John R. Umbeck, Ph.D., likewise authored a series of reports which reveal the scope of his research and intended testimony under ***Rule 26(a)(2)(B)***. See Expert Report (March 14, 1997), which critiqued the methodology proposed by Dr. Tollison's report of February 20, 1997; Affidavit of Dr. John R. Umbeck (February 2, 1998), which critiqued the methodology proposed by Dr. Tollison's report of January 19, 1998; and Expert Report (February 9, 1998).

On March 4, Dr. Tollison responded to Dr. Umbeck's critiques. See Declaration of Robert D. Tollison (April 3, 1997). The battle of the experts raged on as Dr. Umbeck countered with a critique of Dr. Tollison's critique. See Supplemental Affidavit of Dr. John R. Umbeck (April 16, 1997). Dr. Tollison also filed an affidavit in opposition to the instant motions for summary judgment. See Declaration of Robert D. Tollison (January 19, 1998).

amount of resulting damages which plaintiffs sustained. Based on that analysis, Dr. Tollison concludes that the damage model "work[s] well" and that it **[**24]** offers "a robust explanation of coaches' compensation, a statistically reliable estimate of the effect of coaches' age on compensation, and a sound basis for estimating what RECs would have been compensated but for the REC rule." Damage Report (January 19, **[*931]** 1998), at 7. According to Dr. Tollison, the analysis reveals that restricted earnings coaches on a classwide basis sustained actual damages in the amount of $ 32,764,579. This figure represents the sum of all damages sustained by coaches for whom plaintiffs' methodology predicts damages. For other coaches - those for whom Dr. Tollison's methodology predicts no damages - plaintiffs make no claim for compensation. [8]

In seeking summary judgment, the NCAA argues that plaintiffs' methodology is the only evidence on which they rely to demonstrate antitrust injury. In so arguing, the NCAA misreads or ignores the broader import of Dr. Tollison's testimony - and this fact is fatal to its argument. Dr. Tollison does not seek to prove the fact of antitrust injury "only" through statistical methodology; he uses the methodology to test his theoretical opinions about the manner in which the Rule depressed salaries for restricted earnings coaches, and also to calculate damages. Dr. Tollison's methodology is by no means the "only" basis for plaintiffs' claim of antitrust injury. Plaintiffs rely upon Dr. Tollison's economic expertise concerning the **[**26]** operation of cartels and price restraints, among other things, and established evidence concerning the formation, duration and operation of this conspiracy in particular. To the extent that plaintiffs rely on such evidence, independent of their expert methodology, the NCAA's motion misses the mark.

The NCAA's motion is also doomed by a plethora of disputed facts. It is perhaps true that class members sustained no injury if they always earned less than $ 12,000, before, during, and after the Rule went into effect. The NCAA makes a superficially appealing if simplistic argument that they did not. But Dr. Tollison's view is that the Rule exerted a downward ripple effect on salaries below the $ 12,000 cap, thus depressing the salaries of all coaches who were subject to the Rule. According to Dr. Tollison:

> Both economic theory and common sense suggest that plaintiff coaches were in a radically different bargaining environment after the imposition of the restrictions so that there is every reason to predict that RECs earning less than $ 12,000 were impacted by these restrictions. My damage methodology provides a way to assess the fact and amount of these damages.

Declaration **[**27]** of Dr. Robert D. Tollison (January 19, 1998), P8. As to class members who did became restricted earnings coaches after May 25, 1995, and who received more than $ 12,000 academic year compensation, the NCAA's position is similarly subject to dispute. While the NCAA's position may again have superficial appeal, Dr. Tollison's testimony is that the price-fixing conspiracy continued to depress salaries even after the NCAA's enforcement mechanism (the challenged bylaw) was rescinded. His opinion is as follows:

> The defendant . . . continues to argue that there were no damages to coaches after the National Collegiate Athletic Association ("NCAA") moved to "rescind" the REC compensation limitations on May 25, 1995. As I have discussed in my reports and prior declaration in more detail, I strongly disagree with this analysis. Cartels, especially cartels against labor, do not easily or quickly dissolve. Moreover, the NCAA's actions during this period do not suggest the dissolution of the REC cartel. These points are discussed in detail in my Amended Preliminary Damage Report cited above. For this reason, I think it is appropriate to calculate damages through 1996-97. My damage methodology **[**28]** will assign damages in this period if a coach's predicted pay exceeds his or her actual pay. Hence, it is entirely possible that coaches in the analogous REC position who were hired after May 25, 1995, and who were paid more than $ 12,000 were injured by the REC compensation limitations.

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[8] Although the NCAA's seeks summary judgment regarding coaches for whom Dr. Tollison has prepared no analysis or individualized finding of damages, the ready answer is that plaintiffs do not seek damages for such coaches. The same is true for coaches for whom Dr. Tollison finds "negative damages." As to both categories, the NCAA's motion for partial summary judgment is moot.

[*932] Declaration of Dr. Robert D. Tollison (January 19, 1998), P9. These issues are not ones which can be resolved as a matter of law on this record. [9] As to such coaches, plaintiffs will indeed have evidence of impact, and the NCAA's motion for summary judgment on these issues must be overruled.

[29]** In Hall and Schreiber, the NCAA also seeks summary judgment concerning all class members who held positions that were created after August 1, 1992. This argument springs from Dr. Tollison's Amended Preliminary Damage Report of February 20, 1997. This aspect of defendant's motion is rendered moot by Dr. Tollison's final Damage Report dated January 19, 1998, and it is therefore overruled.

B. Claims of any individual class member who failed to return a "Restricted Earnings Coach Information Sheet"

In its order approving the form of notice to the class on June 11, 1997, the Court informed each class member that "if you remain a member of the Class and wish to have your claim for monetary damages considered, you must complete the enclosed Restricted Earnings Coach Information Sheet" [RECIS] no later than August 1, 1997. The NCAA argues that class members who failed to heed this directive by submitting timely and complete RECIS forms should be barred from relief: first, for disobeying the court's order, and second, because plaintiffs have no independent evidence of antitrust injury and damages for such individuals.

The NCAA's first argument is without merit. In **[**30]** circumstances such as these, ***HN6***[] the claims of absent class members in opt-out class actions cannot properly be dismissed for failure to return a questionnaire. To require them to complete and return a questionnaire, on the condition that failure to do so would result in dismissal from the lawsuit, would have the prohibited effect of requiring them to opt into the class and violate the opt-out policy of *Rule 23, Fed. R. Civ. P.* E.g., *Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1556-57* (11th Cir.), *cert. denied*, *479 U.S. 883, 93 L. Ed. 2d 250, 107 S. Ct. 274 (1986)*; *Kline v. First Western Gov't Securities, Inc., 1996 U.S. Dist. LEXIS 3329*, *6, 1996 WL 122717, *2 (E.D. Pa. 1996); *McCarthy v. Paine Webber Group, 164 F.R.D. 309, 313 (D. Conn. 1995)*; *Abulaban v. R. W. Pressprich & Co., 51 F.R.D. 496, 497 (S.D.N.Y. 1971)*.

The NCAA's second argument is equally non-persuasive. Dr. Tollison provides independent evidence of antitrust injury and damages for such individuals by extrapolating damages from the vast universe of data from other sources, including the class members, NCAA member institutions and the NCAA itself. The NCAA disagrees with the extrapolations. But the points of disagreement merely **[**31]** identify factual issues which are for the jury - not the Court - to resolve.

C. Claims of individuals who are not class members

The NCAA claims that certain individuals who returned RECIS forms are outside any relevant class, and that it is entitled to summary judgment concerning their claims. Plaintiffs agree that the Court may properly enter summary judgment on the question of class membership, and the Court concurs. [11]

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[9] Likewise, the NCAA's argument with respect to coaches whose pay was determined by graduate tuition must fail. While the NCAA's argument on this issue is not clear, it apparently insists that for graduate assistant coaches, their compensation was determined not by the Rule, but by the amount of graduate tuition at their respective institutions. This is the proverbial distinction without a difference. The Rule set alternative caps for the academic year: $ 12,000 or the cost of graduate tuition at the institution in question. The graduate tuition cap did not exist independently of the Rule; it merely placed the salary cap at a different level. The NCAA's argument that "there is no causal connection between the REC Rule and compensation to graduate assistant coaches" cannot be intelligently followed.

[11] By separate order, to which all parties have agreed, the Court determined that except for Doug Leichner, Greg Paradine and Brian Madeira, all individuals who were the subject of the NCAA's argument on summary judgment fall outside any relevant class. See Order Granting Partial Summary Judgment (Doc. # 813) entered April 16, 1998.

In Law, the NCAA seeks summary judgment on the claims of Doug Leichner. Leichner claims that he was a restricted **[*933]** earnings coach in mens' basketball at Central Connecticut State University. The University initially agreed, but later retracted its **[**32]** statement, insisting that "Doug Leichner was listed as a restricted earnings coach through error." In Hall, the NCAA seeks summary judgment on the claims of Brian Madeira - whose circumstances are similar to those of Leichner, except that Madeira worked in the women's basketball program at Syracuse University. Like Central Connecticut State University, Syracuse initially vouched that Madeira was a restricted earnings coach but later claimed that he was so listed "due to administrative error." The jury is entitled to judge for itself whether the universities got it right the first time or the second time. Both plaintiffs are entitled to the benefit of all favorable inferences, and defendant's motion for summary judgment on their claims must be overruled.

The NCAA also argues that it is entitled to summary judgment on the claims of Greg Paradine. Paradine was a restricted earnings coach at Ohio State University in 1993-94 and 1994-95, and the parties agree that he is a proper class member to that extent. Paradine later served as a coach at the University of North Carolina and - although he was not a *restricted earnings* coach at that school - he submitted a RECIS form for that **[**33]** school. Plaintiffs do not dispute the fact that Paradine was not a restricted earnings coach at UNC and the NCAA's motion for partial summary judgment on the issue of class membership should be sustained.

In Schreiber, the NCAA also seeks summary judgment on the claims of John Leudtke, a restricted earnings baseball coach at the University of Arkansas who received a special bonus of $ 10,356 from the Razorback Foundation -- just before the Rule went into effect. It also seeks summary judgment as to Robin Dreizler, a restricted earnings baseball coach at the University of California-Los Angeles who - for three years after the Rule went into effect - received $ 10,000 to $ 15,000 in annual compensation from Easton Sports Corporation. Defendant claims that Dreizler performed no services for Easton and that Dreizler -- like Leudtke -- suffered no financial loss on account of the Rule. As to Leudtke, the record reveals a genuine issue of material fact whether the Razorback payment was disguised compensation for coaching services or whether it was what it was purported to be -- a "career achievement bonus" for "extraordinary services" during his career as an assistant coach. As to Dreizler, **[**34]** the record reveals a genuine issue of material fact whether his agreement to perform services was a sham -- a conduit for disguised compensation for coaching services. Because both plaintiffs are entitled to the benefit of all favorable inferences, defendant's motion for summary judgment on their claims must be overruled.

D. Damages incurred after May 25, 1995, when the NCAA rescinded the salary cap which violated *Section 1* of the Sherman Act, *15 U.S.C. § 1*

The NCAA claims that it is entitled to summary judgment on all claims for damages which occurred after May 25, 1995, when the NCAA rescinded the Rule, because "the law is clear that an alleged co-conspirator (in this case, the NCAA) cannot be liable for damages occurring after it withdraws from a conspiracy." The NCAA reasons that any damage which occurred after May 25, 1995 was caused solely by the "unilateral decisions" of NCAA member institutions for which it cannot properly be held accountable. Plaintiffs respond that the NCAA's half-hearted announcement that it had rescinded the Rule was "a far cry from a cessation of the NCAA's anti-competitive conduct," and that it was legally insufficient to immunize the NCAA from **[**35]** liability for the full extent of its unlawful activity.

Plaintiffs correctly identify genuine issues of material fact which preclude summary judgment on this issue: whether the NCAA's action on May 25, 1995, constituted an effective "withdrawal" from the conspiracy and whether the NCAA's withdrawal (if it occurred) brought the price-fixing conspiracy to an end. Plaintiffs are entitled to the benefit of all favorable inferences on this subject, and on this record a jury might reasonably conclude that the effects of the Rule survived the Rule itself -- either because the NCAA and its members informally conspired after May 25, 1995 to maintain restricted earning coach salaries at noncompetitive **[*934]** levels, or because budget constraints, contractual commitments and other factors prevented salaries from promptly rebounding to competitive levels on May 26, 1995.

In addition, as to the law, the NCAA has it wrong. ***HN7***[] A conspirator is liable for damages which flow from its conspiracy, and such liability does not automatically cease when the conspirator ceases its anti-competitive conduct. A conspirator is liable for the damages caused by its unlawful conduct, even if they are sustained after the **[**36]** unlawful conduct ceases. See *In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 616 (7th Cir. 1997)*, *cert. denied*, *__ U.S. __, 118 S. Ct. 1178 (1998)* (where conspirator withdraws from conspiracy by announcing withdrawal or reporting conspiracy to authorities, liability for *continuing illegal acts of other conspirators* ceases); *United States v. Andrus, 775 F.2d 825, 850 (7th Cir. 1985)* (once conspirator withdraws from conspiracy, his liability ceases as to *acts committed after his withdrawal by other conspirators*); *Pope v. Bond, 641 F. Supp. 489, 496 (D.D.C. 1986)* (under conspiracy law, co-conspirator may avoid liability for *subsequent conspiratorial acts* by withdrawing from conspiracy). Accordingly the NCAA is not entitled to summary judgment on this theory. [12]

E. Damages which represent a [37] Consumer Price Index adjustment to plaintiff's base damage calculation**

Citing *Locklin v. Day-Glo Color Corp., 429 F.2d 873, 876 (7th Cir. 1970)*, *cert. denied*, *400 U.S. 1020 (1971)*, the NCAA argues that Dr. Tollison cannot use the Consumer Price Index to adjust plaintiffs' damage figures to 1997 dollars, because "the automatic trebling of damages under § 4 of the Clayton Act more than compensates antitrust plaintiffs for the time value of [their] money." See also, *State of Colorado v. Goodell Brothers, Inc., 1987 U.S. Dist. LEXIS 14549, 1987 WL 6771*, *4 (D. Col. 1987) (holding without discussion, based on Locklin, that adjustment for inflation should not be allowed in antitrust action because damages trebled).

Citing *Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 996 (5th Cir. 1983)*, *cert. denied*, *465 U.S. 1100, 80 L. Ed. 2d 126, 104 S. Ct. 1594 (1984)*, and *H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1549 (8th Cir. 1989)*, plaintiffs disagree. Plaintiffs contend that they are entitled to adjust their damage calculations to create a net present value for damages which they sustained in the past. In the Court's view, plaintiffs would have the better end of **[**38]** this argument [13] -- were it not for *15 U.S.C. § 15 (a)*, which none of the parties addressed in their summary judgment briefs. *Section 15* provides in pertinent part as follows:

> *§ 15*. Suits by persons injured
> (a) Amount of recovery; prejudgment interest
> . . . The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--
> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, **[**39]** violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
>
> (3) whether such person or the opposing party, or either party's representative, engaged **[*935]** in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

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[12] This holding disposes of the NCAA Motion In Limine Objecting To Evidence Of Damages Incurred After May 25, 1995 (Doc. # 655) filed February 4, 1998.

[13] The Court is in substantial agreement with the criticisms of Locklin that are articulated by Judge Easterbrook, dissenting in *Fishman v. Estate of Wirtz, 807 F.2d 520, 582-84 (7th Cir. 1986)*.

Dr. Tollison has estimated damages by taking the predicted pay of each restricted earnings coach, and deducting his or her actual pay (adjusted to the age of the coach and further adjusted for inflation). Nominal damages are adjusted to 1997 dollars using the October 1997 Consumer Price Index (CPI).

On the summary judgment record, the Court cannot discern whether Dr. Tollison's CPI adjustment is different from an award of interest and if so, in what respect and to what **[**40]** extent. If the CPI adjustment is the economic equivalent of interest, plaintiffs' right to prejudgment interest would appear to be governed by *15 U.S.C. § 15(a)* - rather than the rationale articulated in Locklin or State of Colorado. Because the nature of Dr. Tollison's CPI adjustment remains unclear and because plaintiffs as non-moving parties are entitled to the benefit of all reasonable inferences in their favor, the NCAA's motion for summary judgment on this score must be denied. [14]

[41] F. Plaintiffs' claim for injunctive relief**

The NCAA argues that it is entitled to summary judgment on the question of injunctive relief because plaintiffs have "not one shred of evidence "that they or any class members are presently threatened with loss or damage from any action that the NCAA has taken or might take against them or that they or any class members are "threatened in a real and immediate sense with any injury by the NCAA's actions." Plaintiffs disagree, citing *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 697, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)* for the proposition that the Court is not limited to enjoining future threats, but is "empowered to fashion appropriate restraints on the [] future activities both to avoid a recurrence of the violation and to eliminate its consequences."

On this record, while the prospect of a further antitrust violation does not appear to be real and immediate, it also cannot be said with clear conviction that the NCAA has abandoned its unlawful activity. Protestations of repentance and reform are conspicuously absent and plaintiffs may well receive an inadequate remedy if injunctive relief is not **[**42]** afforded. The relevant facts remain in dispute, however, and any determination on the summary judgment record would be premature. The parties have agreed that all issues which relate solely to injunctive relief may be reserved for trial to the Court at a later date, that resolution of this issue shall await that stage of the proceeding. See Order To Show Cause (Doc. # 707) filed March 13, 1998; Defendant's Response To The Court's Order To Show Cause Regarding A Separate Trial Of Plaintiffs' Motion For A Permanent Injunction (Doc. # 743) filed March 23, 1998.

IT IS THEREFORE ORDERED that except to the extent otherwise ordered in the Court's Order Granting Partial Summary Judgment (Doc. # 816) entered April 16, 1998, and except with respect to Greg Paradine in Hall, et al. v. National Collegiate Athletic Association, Case No. 94-2392, defendant's Motion For Partial Summary Judgment (Doc. # 613) in Law, et al, v. National Collegiate Athletics Association, Case No. 94-2053, be and hereby is overruled; defendant's Motion For Partial Summary Judgment (Doc. # 91) in Hall, et al. v. National Collegiate Athletics Association, Case No. 94-2392, be and hereby **[**43]** is overruled; and defendant's Motion For Partial Summary Judgment (Doc. # 41) in Schreiber, et al. v. National Collegiate Athletics **[*936]** Association, Case No. 95-2026, be and hereby is overruled.

IT IS HEREBY FURTHER ORDERED that defendant's Motion For Partial Summary Judgment (Doc. # 91) in Hall, et al. v. National Collegiate Athletics Association, Case No. 94-2392, be and hereby is sustained to the limited

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[14] In itself, this ruling does not dispose of the NCAA Motion In Limine Objecting To Evidence Of Consumer Price Index Adjustment (Doc. # 655) filed February 4, 1998. On April 14, 1998, however, the Court conducted a brief evidentiary hearing outside the presence of the jury. At that time Dr. Tollison explained his calculations with respect to the CPI and how his CPI adjustment differs from interest. At the hearing, the parties agreed that plaintiffs' right to a CPI adjustment is an issue which is properly bifurcated and tried to the Court at an appropriate time after the jury trial on the issues of damages. Consequently, the Court will later determine whether the CPI adjustment is the functional equivalent of pre-judgment interest and is thus governed by *15 U.S.C. § 15(a)*. See *Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 986 n. 20 (5th Cir. 1977)*. The NCAA's motion in limine is rendered moot by the parties' agreement to proceed in this manner.

extent that the Court finds as a matter of law that Greg Paradine is not a member of the plaintiff class for periods when he served as a coach at the University of North Carolina in 1995-96 and 1996-97.

IT IS HEREBY FURTHER ORDERED that Plaintiffs' Motion In Limine To preclude Evidence Or Argument Concerning Impact Or Fact Or Damage To The Class (Doc. # 661) filed February 4, 1998, be and hereby is overruled.

IT IS HEREBY FURTHER ORDERED that the NCAA Motion In Limine Objecting To Evidence Of Damages Incurred After May 25, 1995 (Doc. # 655) filed February 4, 1998, be and hereby is overruled.

IT IS HEREBY FURTHER ORDERED that the NCAA Motion In Limine Objecting To Evidence Of Consumer Price Index Adjustment (Doc. # 655), be and **[**44]** hereby is overruled as moot.

Dated this 20th day of April, 1998, at Kansas City, Kansas.

Kathryn H. VRATIL

United States District Judge

Earles v. State Bd. of Certified Pub. Accountants

United States Court of Appeals for the Fifth Circuit

April 24, 1998, Decided

No. 97-30159

Reporter

139 F.3d 1033 *; 1998 U.S. App. LEXIS 8178 **; 1998-1 Trade Cas. (CCH) P72,135

KENNETH DON EARLES; ALBERT R. LEGER; JOSEPH MICHAEL SLEDGE, Plaintiffs-Appellees, v. STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA; MILDRED W. MCGAHA, CPA; L. PAUL HOOD, CPA; LEON K. POCHE, CPA; LAWRENCE W. STOULIG, JR., CPA; DONALD L. MOORE, CPA; W. THERON ROBERTS, CPA; MICHAEL A. THAM, CPA; SUSAN C. COCHRAN, CPA; J. GORDON REISCHE, Defendants-Appellants.

Subsequent History: **[**1]** As Revised May 15, 1998. Rehearing and Suggestion for Rehearing En Banc Denied June 3, 1998, Reported at: *1998 U.S. App. LEXIS 13680*. Certiorari Denied November 9, 1998, Reported at: *1998 U.S. LEXIS 7123*.

Prior History: Appeal from the United States District Court For the Eastern District of Louisiana. 91-CV-3212-S. Mary Ann Vial Lemmon, US District Judge.

Disposition: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

Core Terms

immunity, state-action, entity, accounting, exemption, state agency, articulation, regulation, profession, funding, parte, member of the board, anticompetitive, municipalities, supervision, public accountant, antitrust, lawsuit, individual member, federal court, incompatible, commissions, practiced, licensed, rules and regulations, anti trust law, state policy, displace, prong

LexisNexis® Headnotes

Governments > State & Territorial Governments > Licenses

HN1[] **State & Territorial Governments, Licenses**

See La. Admin. Code tit. 46, § XIX.501(E) (1997).

Governments > State & Territorial Governments > Licenses

HN2[] **State & Territorial Governments, Licenses**

See La. Admin. Code tit. 46, § XIX.501(C) (1997).

Constitutional Law > State Sovereign Immunity > General Overview

HN3[ ] Constitutional Law, State Sovereign Immunity

See U.S. Const. amend. XI.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Federal Judicial Limitations

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Civil Procedure > Parties > Real Party in Interest > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

HN4[ ] State Sovereign Immunity, Federal Judicial Limitations

U.S. Const. amend. XI thus negates federal jurisdiction over covered suits, including federal suits against a state brought by the citizens of that state. The scope of U.S. Const. amend. XI, however, is not limited to suits that name a state as a defendant. U.S. Const. amend. XI bars any suit in which a state is the real, substantial party in interest.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > General Overview

HN5[ ] State Sovereign Immunity, State Immunity

State agencies are immunized by U.S. Const. amend. XI in certain circumstances. Simply being a political subdivision of a state, however, is not enough. The court must look to see whether the entity in effect, stands in the shoes of the state itself. The matter is determined by reasoned judgment about whether the lawsuit is one which, despite the presence of a state agency as the nominal defendant, is effectively against the sovereign state. In determining whether a given state agency operates as an arm of the state, the court takes many factors into account, including: (1) whether the state, through statutes or case law, views the entity as an arm of the state; (2) the source of the entity's funding; (3) whether the entity is concerned with local or statewide problems; (4) the entity's degree of authority independent from the state; (5) whether the entity can sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Governments > Local Governments > Claims By & Against

Constitutional Law > State Sovereign Immunity > General Overview

Governments > Local Governments > Finance

Governments > State & Territorial Governments > Claims By & Against

HN6[] State Sovereign Immunity, State Immunity

Louisiana treats all executive departments the same, *La. Rev. Stat. Ann. § 36:4(A)*, and provides that no suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court. *La. Rev. Stat. Ann. § 13:5106(A)*. If the office is created by the legislature, or is established in the first instance by the constitution, it is a state office.

Constitutional Law > State Sovereign Immunity > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN7[] Constitutional Law, State Sovereign Immunity

A federal court is not barred by *U.S. Const. amend. XI* from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land.

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN8[] Antitrust & Trade Law, Regulated Industries

The state-action doctrine has been construed to exempt both state agencies and private individuals from liability for activities that might otherwise violate federal ***antitrust law***. When the exemption is invoked by a defendant other than the state, however, the allegedly anticompetitive activity is subjected to greater scrutiny before state-action immunity is granted. In most cases, two criteria must generally be satisfied: (1) the alleged anticompetitive conduct must have been taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with state regulation; and, (2) the state must actively supervise the implementation of its policy. Some defendants are not subject to both prongs of review. Municipalities are exempted from the active-supervision prong of the test.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN9[] Exemptions & Immunities, Parker State Action Doctrine

In order to take advantage of the state-action exemption, the defendants must simply demonstrate that they acted pursuant to state policy to displace competition with regulation or monopoly public service that was clearly articulated and affirmatively expressed. Courts have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition. It is enough if suppression of competition is the "foreseeable result" of what the statute authorizes.

Governments > State & Territorial Governments > Licenses

HN10[] State & Territorial Governments, Licenses

See *La. Rev. Stat. Ann. § 37:75(A)*.

Governments > State & Territorial Governments > Licenses

HN11[] State & Territorial Governments, Licenses

See *La. Rev. Stat. Ann. § 37:75(B)*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN12[] Exemptions & Immunities, Parker State Action Doctrine

As long as the state clearly articulates its intent to adopt a permissive policy, the first prong of the test for the Parker state-action doctrine is satisfied.

Counsel: For KENNETH DON EARLES, Plaintiff - Appellee: Glennon P Everett, Crowley, LA. Donald B. Verrilli, Jr, Washington, DC. Sharon Cormack Mize, Sessions & Fishman, New Orleans, LA. Steven Nathan Berk, Jenner & Block, Washington, DC.

For ALBERT R LEGER, JOSEPH MICHAEL SLEDGE, Plaintiffs - Appellees: Donald B. Verrilli, Jr, Washington, DC. Sharon Cormack Mize, Sessions & Fishman, New Orleans, LA. Steven Nathan Berk, Jenner & Block, Washington, DC.

For STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA, MILDRED M MCGAHA, L PAUL HOOD, LEON K POCHE, LAWRENCE W STOULIG, JR, DONALD L MOORE, W THERON ROBERTS, MICHAEL A THAM, SUSAN C COCHRAN, J GORDON REISCHE, Defendants - Appellants: Mark Raymond Beebe, New Orleans, LA. Robert J Conrad, Jr, Adams & Reese, New Orleans, LA. Ralph H Wall, Adams & Reese, New Orleans, LA.

Judges: Before GARWOOD, DUHE, and DEMOSS, Circuit Judges.

Opinion by: DEMOSS

Opinion

[*1034] DEMOSS, Circuit Judge:

Rules promulgated by **[**2]** the State Board of Certified Public Accountants of Louisiana prohibit CPAs from accepting commissions and engaging in the practice of so-called "incompatible professions." These rules apply to

Louisiana's CPAs and have been used to prevent the three plaintiffs in this lawsuit from carrying out their accounting practices while simultaneously selling securities. The plaintiffs sued the Board and its individual members, seeking to block the enforcement of these rules.

The defendants filed a motion to dismiss the lawsuit, claiming immunity from suit (1) under the *Eleventh Amendment* and (2) under the state-action exemption doctrine of federal antitrust laws. The motion was denied, and the defendants now seek interlocutory review. The Board is entitled to *Eleventh Amendment* immunity; however, the federal claims against the Board's individual members may proceed under the doctrine of ***Ex parte Young**, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)*. Finally, the state-action doctrine does block scrutiny of the Board's rules under federal antitrust laws. Accordingly, we affirm in part, reverse in part, and remand the matter with instructions for further proceedings in the district **[**3]** court.

I. Factual and Procedural Background

A. *The Plaintiffs*

Kenneth Don Earles, a CPA, has practiced as an accountant in Crowley, Louisiana since 1969. Beginning in 1987, he obtained the licenses necessary to become a securities **[*1035]** broker and began practicing as a broker-dealer licensed with H.D. Vest Investment Securities, Inc. Mr. Earles earns commissions from his sales of securities. His securities business is kept separate from his accounting business, with separate books, records, and bank accounts.

In October 1988, the Board of Certified Public Accountants of Louisiana notified Mr. Earles that it considered his practice of concurrently acting as a CPA and a securities broker to be a violation of the Board's rules pertaining to "incompatible occupations" [1] **[**4]** and "receipt of commissions." [2] A series of communications ensued between the Board and Mr. Earles, culminating in a March 1990 administrative hearing on the Board's complaint.

In August 1990, the Board issued its decision finding Mr. Earles in violation of the rule proscribing the practice of incompatible occupations. Mr. Earles's future certification and licensure as a CPA were expressly conditioned upon cessation of his securities business. Mr. Earles responded by filing this lawsuit against the Board and its individual members in federal court. He also sought judicial review of the Board's decision in state court. The federal suit was stayed pending state-court review. [3] In state court, the Board's ruling was initially overturned but later reinstated on

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[1] ***HN1***[] The incompatible occupations rule provides:

> A licensee shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs his independence or objectivity in rendering professional services, or which is conducted so as to augment or benefit the accounting practice, unless these rules are observed in the conduct thereof.

LA. ADMIN. CODE tit. 46, § XIX.501(E) (Sept. 1997) <*www.state.la.us/osr/lac/lac.htm>*.

[2] ***HN2***[] The rule against receiving commissions provides:

> A licensee shall not pay a commission to obtain a client or accept a commission for a referral to a client of products or services of others. This rule does not prohibit payments for the purchase of all, or a part, of an accounting practice, or retirement payments to persons formerly engaged in the practice of public accountancy, or payments to the heirs or estates of such persons.

LA. ADMIN. CODE tit. 46, § XIX.501(C) (Sept. 1997) <*www.state.la.us/osr/lac/lac.htm>*.

[3] *See* ***Earles v. State Bd. of Certified Pub. Accountants**, 1992 U.S. Dist. LEXIS 693, 1992 WL 10329* (E.D. La. Jan. 16, 1992) (abstaining from further proceedings pursuant to the doctrine of ***Railroad Comm'n v. Pullman Co.**, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941))*.

appeal. *See* ***Earles v. State Bd. of Certified Pub. [**5] Accountants**, 665 So. 2d 1288 (La. Ct. App. 1995)*, *writ denied*, *669 So. 2d 397 (La. 1996)*.

In August 1996, after Mr. Earles had exhausted his remedies in state court, the federal suit was reactivated. Soon thereafter, two additional plaintiffs joined the suit -- Albert R. Leger, who had practiced as a CPA in Marksville, Louisiana since 1975, and Joseph Michael Sledge, who had practiced as a CPA in Shreveport, Louisiana since 1975. Like Mr. Earles, both Mr. Leger and Mr. Sledge are licensed securities brokers affiliated with H.D. Vest. Each also keeps his securities-related business separate from his accounting practice. In January 1997, Mr. Leger and Mr. Sledge were found by the Board to be guilty of violating the rules against practicing incompatible **[**6]** professions and receiving commissions. They were each fined, and their accounting licenses were revoked.

B. *The Defendants*

The defendants in this lawsuit are the Board of Certified Public Accountants of Louisiana and its individual members in their official capacities. The Board was created by the State of Louisiana for the purpose of licensing public accountants and regulating the profession of public accounting within the state. *See* *LA. REV. STAT. ANN. §§ 37:73*, *37:75* (West 1988 & Supp. 1998). The Board's seven members are chosen by the governor from a slate of candidates proposed by the Society of Louisiana Certified Public Accountants, and they must be confirmed by the state senate. *See* ***id*.** *§ 37:73* (West 1988).

Among the powers of the Board is the ability to "adopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana." ***Id*.** **[*1036]** *§ 37:75(B)(2)*. Pursuant to this power, the Board adopted the incompatible-occupations and receipt-of-commissions rules which gave rise to this lawsuit. [4]

[7] II. Appellate Jurisdiction**

Pursuant to our precedent applying *28 U.S.C. § 1291* and the collateral order doctrine, [5] **[**8]** we have appellate jurisdiction to consider an interlocutory appeal from the denial of a motion to dismiss based upon immunities bestowed by the *Eleventh Amendment* and the state-action antitrust exemption. *See* ***Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.**, 506 U.S. 139, 147, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993)* (denial of *Eleventh Amendment* immunity is subject to interlocutory review); ***Martin v. Memorial Hosp.**, 86 F.3d 1391 (5th Cir. 1996)* (denial of the state-action exemption is subject to interlocutory review). [6]

III. *Eleventh Amendment* Immunity

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[4] The purported justification for these rules is the preservation of the independence of CPAs. The Supreme Court has acknowledged that a state's interest in "maintaining CPA independence and ensuring against conflicts of interest" is a substantial one. ***Edenfield v. Fane**, 507 U.S. 761, 770, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993)*.

[5] *See* ***Coopers & Lybrand v. Livesay**, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978)* ("To come within the 'small class' of decisions excepted from the final-judgment rule by ***Cohen*** [***v.*** ***Beneficial Indus. Loan Corp.**, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949)]*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.").

[6] At oral argument, the plaintiffs conceded that ***Martin*** controls the question of appellate jurisdiction over the state-action element of this case. They urged our panel to overrule ***Martin***, but this is not an option available to us. It has been well established in this circuit that one panel may not ignore the holding of a previous panel absent intervening authority from the Supreme Court, an en banc decision of our Court, or Congress. *See, e.g.*, ***Okoro v. INS**, 125 F.3d 920, 925 (5th Cir. 1997)*.

HN3[] The United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *U.S. CONST. amend. XI*. **HN4**[] The *Eleventh Amendment* thus negates federal jurisdiction over covered suits, including federal suits against a state brought by the citizens of that state. *See* ***Hans v. Louisiana**, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct.* ***[**9]*** *504 (1890)*.

Of course, the Board and its members are not the state itself. The scope of the *Eleventh Amendment*, however, is not limited to suits that name a state as a defendant. *See, e.g.*, ***Regents of the Univ. of Cal. v. Doe**, 519 U.S. 425, 117 S. Ct. 900, 903, 137 L. Ed. 2d 55 (1997)*. The *Eleventh Amendment* bars any suit in which a state is the "real, substantial party in interest." ***Pennhurst State Sch. & Hosp. v. Halderman**, 465 U.S. 89, 101, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984)*; *see also* ***Ford Motor Co. v. Department of Treasury**, 323 U.S. 459, 464, 89 L. Ed. 389, 65 S. Ct. 347 (1945)*. We must thus decide whether the Board and its members satisfy this standard and thereby avoid suit.

A. *The Board*

The Board claims that because it is a "state agency," LA. STAT. REV. ANN. *§ 37:73(A)* (West Supp. 1998), it is entitled to *Eleventh Amendment* immunity. Federal law controls the Board's eligibility for *Eleventh Amendment* immunity. *See* ***Doe**, 117 S. Ct. at 904 n.5*. **HN5**[] State agencies are immunized by the *Eleventh Amendment* in certain circumstances. *See, e.g.*, ***Pennhurst**, 465 U.S. at 100*; ***Papasan v. United States**,* ***[**10]*** *756 F.2d 1087, 1092 (5th Cir. 1985)*, *aff'd in part, vacated in part sub nom.* ***Papasan v. Allain**, 478 U.S. 265, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986)*. Simply being a political subdivision of a state, however, is not enough. *See* ***Edelman v. Jordan**, 415 U.S. 651, 667 n.12, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)*. We must look to see whether the entity "in effect, stands in the shoes of the state itself." ***Hander v. San Jacinto Junior College**, 519 F.2d 273, 278* (5th Cir.), *modified on other* **[*1037]** *grounds*, *522 F.2d 204 (5th Cir. 1975)*; *see also* ***Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle**, 429 U.S. 274, 280, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977)* (entity must be an "arm of the state"); ***Voisin's Oyster House, Inc. v. Guidry**, 799 F.2d 183, 186 (5th Cir. 1986)* (entity must be an "alter ego" of the state). Our analysis must consider the particular nature of the entity, including its powers and duties, the nuances of its organizational structure, and its interrelationship with other organs of the state. *See, e.g.*, ***Mt. Healthy**, 429 U.S. at 280*; ***Jacintoport Corp. v. Greater Baton Rouge Port Comm'n**, 762 F.2d* ***[**11]*** *435, 438 (5th Cir. 1985)*, *cert. denied*, *474 U.S. 1057, 88 L. Ed. 2d 774, 106 S. Ct. 797 (1986)*; ***Laje v. R.E. Thomason Gen. Hosp.**, 665 F.2d 724 (5th Cir. 1982)*; ***United Carolina Bank v. Board of Regents of Stephen F. Austin State Univ.**, 665 F.2d 553, 557 (5th Cir. Unit A 1982)*.

There is no simple litmus test that determines whether a state agency is an "arm of the state" for the purposes of *Eleventh Amendment* immunity. Rather, the matter is determined by reasoned judgment about whether the lawsuit is one which, despite the presence of a state agency as the nominal defendant, is effectively against the sovereign state. In determining whether a given state agency operates as an "arm of the state," our Court has taken many factors into account, including: (1) whether the state, through statutes or case law, views the entity as an arm of the state; (2) the source of the entity's funding; (3) whether the entity is concerned with local or statewide problems; (4) the entity's degree of authority independent from the state; (5) whether the entity can sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *See, e.g.*, **[**12]** ***Voisin's Oyster House**, 799 F.2d at 186-87*; ***Clark v. Tarrant County**, 798 F.2d 736, 744-45 (5th Cir. 1986)*; ***Jacintoport**, 762 F.2d at 438-40*; ***United Carolina Bank**, 665 F.2d at 557-58*; ***Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.**, 625 F.2d 22, 24-25 (5th Cir. 1980)*. Considering these factors, we conclude that a suit against the Board is, in effect, a suit against the State of Louisiana.

1. *The state's view.* -- First, we consider the Board's place in the overall scheme of Louisiana government. The Board is "a state agency within the Department of Economic Development." LA. STAT. REV. ANN. *§ 37:73(A)* (West Supp. 1998). The Department of Economic Development is a department of the executive branch of the government of Louisiana. *See* ***id.*** §§ 36:3, 36:4 (West 1985 & Supp. 1998). In this situation, it appears that Louisiana would regard the Board as part of the state. We are compelled to draw this conclusion by our disposition in ***Voisin's Oyster House, Inc. v. Guidry**, 799 F.2d 183 (5th Cir. 1986)*. There, as here, the entity in question was a subdivision of a department of the executive branch. Our Court **[**13]** reasoned:

> According to Louisiana statutes, the Department is a part of the executive branch of the state government, *LA. REV. STAT. ANN. § 36:4* (West 1985), and the Commission is part of the Department. *LA. REV. STAT. ANN. § 36:610* (West 1985). In its statutes, ***HN6***[] Louisiana treats all executive departments the same, *LA. REV. STAT. ANN. § 36:4(A)*, and provides that "no suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court." *LA. REV. STAT. ANN. § 13:5106(A)* (West Supp. 1986). *See* ***Fireman's Fund Insurance Co. v. Department of Transportation and Development**, 792 F.2d 1373 (5th Cir.1986)* (holding that a similar executive department had *Eleventh Amendment* immunity and implying that all Louisiana executive departments have such immunity). The Louisiana Supreme Court has held "if the office is created by the legislature, or is established in the first instance by the constitution, it is a state office." ***Mullins v. Louisiana**, 387 So. 2d 1151, 1152 (La. 1980)*. The Department was created by the state legislature, *LA. REV. STAT. ANN. § 36:601*, and, therefore, the Louisiana courts would **[**14]** view the Department as part of the state.

Voisin's Oyster House**, 799 F.2d at 186* (alterations in original). The circumstances encountered in ***Voisin's Oyster House pertaining to that entity's place in Louisiana government are substantially identical to the present case, and we therefore conclude that **[*1038]** this factor weighs in favor of *Eleventh Amendment* immunity.

2. *Source of the entity's funding.* -- Next, we consider the source of the Board's funding. In this case, the Board is financially independent from the state. The Board is funded solely by fees collected from accountants. *See* *LA. REV. STAT. ANN. §§ 37:80*, *37:82* (West 1988 & Supp. 1998); LA. ADMIN. CODE tit. 46, §§ XIX.1911, .2101, .2501 (Sept. 1997) <*www.state.la.us/osr/lac/lac.htm>*. Moreover, statutes and regulations prohibit the Board from resorting to state coffers for funding. *See* *LA. REV. STAT. ANN. § 37:76* (West 1988) ("No expenses incurred by the board shall ever be charged to or against the funds of the state of Louisiana."); ***id.*** *§ 37:75(B)(8)* ("The Board may . . . employ legal counsel to carry out the provisions of this Chapter, provided that the fees of such counsel **[**15]** and the costs of all proceedings, except criminal prosecutions, are paid by the board from its own funds . . . ."); LA. ADMIN. CODE tit. 46, § XIX.903 (Sept. 1997) <*www.state.la.us/osr/lac/lac.htm>* ("The compensation of board members and all other necessary expense incurred by the board . . . shall be paid out of the treasury of the board."). Thus, the Board is financially independent, and there is no threat that Louisiana will pay money damages to a citizen pursuant to a judgment obtained in federal court. Our examination of this factor weighs against a finding of *Eleventh Amendment* immunity for the Board.

3. *Scope of the entity's responsibilities.* -- The Board is concerned with regulating the practice of public accounting on a statewide, rather than local, scale. *See* *LA. REV. STAT. ANN. § 37:75* (West 1988 & Supp. 1998). This factor favors *Eleventh Amendment* immunity for the Board.

4. *Independence from the state.* -- The Board exercises considerable authority independent from the state. The Board has the power to "adopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate **[**16]** the practice of public accounting in Louisiana, to provide for the efficient operation of the board, and to otherwise discharge its duties and powers." *LA. REV. STAT. ANN. § 37:75(B)(2)* (West 1988). The legislature may review proposed rule changes. *See* ***id.*** *§ 49:968* (West 1987 & Supp. 1998). In the usual case (such as the adoption of the rules at the heart of this lawsuit), however, the Board's proposed rule changes simply take effect without any legislative consideration or action whatsoever. *See* ***id.*** *§ 49:968(H)(1)* (if the legislature fails to act on proposed rule changes, the rule may be adopted ninety days after notice is published in the State Register). This factor cuts against *Eleventh Amendment* immunity.

5. *Capacity to sue and be sued.* -- The Board has a limited capacity to sue and be sued. *See, e.g.*, *LA. REV. STAT. ANN. §§ 49:963-:965* (West 1987 & Supp. 1998) (authorizing judicial review of Board actions). The Board's power to sue and be sued is not established as plainly as for other similarly situated state agencies in Louisiana. *See, e.g.*, ***id.*** § 37:1393(A) (West Supp. 1998) (State Licensing Board for Locksmiths "may sue **[**17]** and be sued"); ***id.*** § 37:3273(A) (West 1988) (Louisiana State Board of Private Security Examiners "may sue and be sued"). The Board does, however, have some power to "sue and be sued" insofar as it has the power to litigate as an independent party. *See, e.g.*, ***State Bd. of Certified Pub. Accountants v. Donnelly**, 688 So. 2d 127* (La. Ct. App.), *writ denied*, *694 So. 2d 247 (La. 1997)*. Ultimately, this is not a case in which the state has granted "express authority to 'sue and be sued, plead and be impleaded'" in the entity's own name, ***Huber, Hunt & Nichols**, 625 F.2d at 25* (quoting ***Hopkins v. Clemson Agric. College**, 221 U.S. 636, 646, 55 L. Ed. 890, 31 S. Ct. 654 (1911))*, so this factor lends slight guidance to our *Eleventh Amendment* immunity inquiry.

6. *Right to hold and use property.* -- The parties have presented conflicting views as to whether the Board has the right to hold and use property. There is no express statutory grant of such power to the board. But on the other hand, the powers that are granted to the Board are so broad that they arguably encompass the right to hold and use property. *See, e.g.*, *LA. REV. STAT. ANN.* ***[**18]*** *§ 37:75(B)(9)* (West 1988) ("The board may . . . incur all necessary and proper expenses . . . ."). Because **[*1039]** of this statutory ambiguity, this factor again has little effect on our analysis.

In sum, when we evaluate the mixed indications given by the various factors discussed above, we are led to the conclusion that the Board is entitled to immunity. The question is a close one, but ultimately we are persuaded by the legislature's broad grant of power to a state agency (composed of members who are appointed by serve at the pleasure of the governor) charged with carrying out the governmental function of regulating the practice of public accounting on a statewide basis. We therefore conclude that the Board is entitled to *Eleventh Amendment* immunity.

B. *Individual Members of the Board*

Though the Board itself is eligible for *Eleventh Amendment* immunity, it does not follow that the members of the Board may claim immunity for their official actions. The doctrine of ***Ex parte Young**, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)*, precludes the individual Board members' claims of *Eleventh Amendment* immunity.

The rule of ***Ex parte Young*** has been traditionally **[**19]** viewed as establishing that ***HN7***[] a "federal court is not barred by the *Eleventh Amendment* from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land." 17 CHARLES ALAN WRIGHT, ET. AL, FEDERAL PRACTICE AND PROCEDURE, § 4232 (2d ed. 1988). Since the filing of the briefs in this case, the Supreme Court has handed down its decision in ***Idaho v. Coeur d' Alene Tribe**, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997)*. That decision, despite its disclaimer of intent to "question the continuing validity of the ***Ex parte Young*** doctrine," ***Coeur d' Alene**, 117 S. Ct. at 2034*, casts some doubt upon previous conventional wisdom in this area.

The Fifth Circuit has not yet had the opportunity to consider the effect of ***Coeur d'Alene***, though several other circuits have. *See* ***Doe v. Lawrence Livermore Nat'l Lab.**, 131 F.3d 836, 839 (9th Cir. 1997)*; ***Marie O. v. Edgar**, 131 F.3d 610, 616 n.10, 617 n.13 (7th Cir. 1997)*; ***Strahan v. Coxe**, 127 F.3d 155, 166-67 (1st Cir. 1997)*, *petition for cert. filed*, **[**20]** *66 U.S.L.W. 3605* (U.S. Mar 6, 1998) (No. 97-1485); ***Sofamor Danek Group, Inc. v. Brown**, 124 F.3d 1179, 1183-85 (9th Cir. 1997)*; ***Mille Lacs Band of Chippewa Indians v. State of Minn.**, 124 F.3d 904, 913-14 (8th Cir. 1997)*, *petition for cert. filed*, *141 L. Ed. 2d 156, 1998 U.S. LEXIS 3866 (U.S. 1998)* (No. 97-1337). We concur with the consensus among other courts that although the principal opinion in ***Coeur d'Alene*** suggests a case-by-case (rather than rule-based) approach to the application of ***Ex parte Young***, *see* ***Coeur d' Alene**, 117 S. Ct. at 2038-40* (opinion of Kennedy, J.), this part of the opinion did not muster a majority, and a majority of the Court would continue to apply the rule of ***Ex parte Young*** as it has been traditionally understood, *see* ***id** at 2047* (O'Connor, J., concurring in part and concurring in the judgment (joined by Scalia and Thomas, JJ.)); ***id**. at 2048* (Souter, J., dissenting (joined by Stevens, Ginsburg, and Breyer, JJ.)).

The rule of ***Ex parte Young*** empowers the federal courts to grant the prospective injunctive relief sought by the plaintiffs if the rules challenged in this case do indeed **[**21]** violate federal law. The plaintiffs' state-law claims, however, are not cognizable in a proceeding under ***Ex parte Young*** because state officials continue to be immunized from suit in federal court on alleged violations of state law brought under the federal courts' supplemental jurisdiction. *See* ***Pennhurst**, 465 U.S. at 103-21*; *see also* ***Papasan v. Allain**, 478 U.S. 265, 277, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986)*; ***Oneida County v. Oneida Indian Nation**, 470 U.S. 226, 251, 84 L. Ed. 2d 169, 105 S. Ct. 1245 (1985)*; ***Hays County Guardian v. Supple**, 969 F.2d 111, 125 (5th Cir. 1992)*, *cert. denied*, *506 U.S. 1087, 122 L. Ed. 2d 371, 113 S. Ct. 1067 (1993)*. The ***Ex parte Young*** doctrine promotes federal sovereignty, but is limited by the constitutional immunity granted to the states by the *Eleventh Amendment*. *See* ***Pennhurst**, 465 U.S. at 105-06*. It therefore does not serve to subject state officials to suit in federal court over alleged violations of state law, as that result does not advance the **[*1040]** concerns of ***Ex parte Young*** and also "conflicts directly with the principles of federalism that underlie the *Eleventh Amendment*." **[**22]** ***Id.** at 106*. The availability of the supplemental jurisdiction statute does not change this result because that rule arises merely from "a judge-made doctrine of expediency and efficiency derived from the general Art. III language conferring power to hear all 'cases' arising under federal law or between diverse parties." ***Id.** at 120* (citing ***United Mine Workers v. Gibbs**, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966))*.

Thus, the plaintiffs' suit may proceed against the individual members of the Board under the doctrine of ***Ex parte Young***, but the limitations of the doctrine require that the plaintiffs' state-law claims be dismissed upon remand.

IV. State Action Exemption

We now turn to the defendants' state-action defense. The state-action exemption from federal antitrust liability was first recognized in the case of ***Parker v. Brown**, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. State action is properly treated as an immunity from suit, [7] and therefore our review of the district court's pretrial rejection of a state-action exemption is appropriate. [8] We begin, as do all of the Supreme Court's opinions on **[**23]** state action, [9] with a look back to ***Parker***'s first principles.

[24]** In ***Parker***, the Court considered the legal effect of the California Agricultural Prorate Act. The California statute permitted regulations -- or as they were called, a "marketing program" -- designed to protect the raisin industry. One effect of this program was that the freedom of raisin producers to sell their crops in interstate commerce was seriously restricted. *See* ***Parker**, 317 U.S. at 344-49*. The program was challenged under the Sherman Act. The Supreme Court decided that Congress, in enacting federal antitrust legislation, had not intended to preempt economic regulation by the states. The central holding of ***Parker*** was that the Sherman Act does not "restrain a state or its officers or agents from activities directed by its legislature." ***Id.** at 350-51*. The Court expressly rested its analysis on federalism principles:

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[7] *See* ***Martin**, 86 F.3d at 1395-96*; 3 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 47.01[2] (1997).

[8] *See, e.g.*, ***Hoover v. Ronwin**, 466 U.S. 558, 565-67, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984)* (reversing the lower court's determination that state-action immunity should not be decided on a Rule 12(b)(6) motion to dismiss).

[9] *See* ***FTC v. Ticor Title Ins.**, 504 U.S. 621, 632-33, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)*; ***City of Columbia v. Omni Outdoor Adver., Inc.**, 499 U.S. 365, 370, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*; ***Patrick v. Burget**, 486 U.S. 94, 99, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)*; ***324*** ***Liquor Corp. v. Duffy**, 479 U.S. 335, 344, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987)*; ***Southern Motor Carriers Rate Conference, Inc. v. United States**, 471 U.S. 48, 55-57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*; ***Town of Hallie v. City of Eau Claire**, 471 U.S. 34, 38, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*; ***Hoover**, 466 U.S. at 567-68*; ***Community Communications Co. v. City of Boulder**, 455 U.S. 40, 48-49, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*; ***California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.**, 445 U.S. 97, 103-04, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*; ***City of Lafayette v. Louisiana Power & Light Co.**, 435 U.S. 389, 408-09, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*; ***Bates v. State Bar**, 433 U.S. 350, 359, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977)*; ***Cantor v. Detroit Edison Co.**, 428 U.S. 579, 585-91, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*; ***Goldfarb v. Virginia State Bar**, 421 U.S. 773, 788, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)*.

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. *at 351*. **[**25]** ***HN8***[]

The ***Parker*** state-action doctrine has been construed to exempt both state agencies and private individuals from liability for activities that might otherwise violate federal ***antitrust law***. *See, e.g.*, ***Southern Motor Carriers Rate Conference, Inc. v. United States****, 471 U.S. 48, 56-57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*. When the ***Parker*** exemption is invoked by a defendant other than the state, however, the allegedly anticompetitive **[*1041]** activity is subjected to greater scrutiny before state-action immunity will be granted. *See* ***Hoover v. Ronwin****, 466 U.S. 558, 569, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984)*. In most cases, two criteria must generally be satisfied: (1) the alleged anticompetitive conduct must have been taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with state regulation; and, (2) the state must actively supervise the implementation of its policy. *See* ***California Retail Liquor Dealers Ass'n v. Midcal Aluminum****, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*; ***DFW Metro Line Servs. v. Southwestern Bell Tel., Corp.****, 988 F.2d 601, 605* (5th Cir.), *cert.* **[**26]** *denied*, *510 U.S. 864, 126 L. Ed. 2d 142, 114 S. Ct. 183 (1993)*; PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 212.1a (Supp. 1997). This two-pronged review is commonly known as the ***Midcal*** test.

Some defendants are not subject to both prongs of ***Midcal*** review. In ***Town of Hallie v. City of Eau Claire****, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*, the Supreme Court exempted municipalities from the active-supervision prong of the ***Midcal*** test. *See* ***Town of Hallie****, 471 U.S. at 46-47*. The Court distinguished municipalities from other defendants subjected to the ***Midcal*** test:

> Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant **[**27]** to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Id. *at 47*. Fortunately for the defendants, [10] the Board is functionally similar to a municipality and is also exempted from the active-supervision prong. Despite the fact that the Board is composed entirely of CPAs who compete in the profession they regulate, the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition. So long as the Board is acting within its authority and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority. This conclusion comports with our prior precedent and that of other courts of appeals. *See* ***Benton, Benton & Benton v. Louisiana Pub. Facilities Auth.****, 897 F.2d 198, 203 (5th Cir. 1990)* (determining the defendant to be a state agency and "as such" not subject to the active state supervision prong of ***Midcal***), *cert. denied*, *499 U.S. 975, 113 L. Ed. 2d 717, 111 S.* ***[**28]*** *Ct. 1619 (1991)*; *see also* ***Porter Testing Lab. v. Board of Regents for Okla. Agric. & Mechanical Colleges****, 993 F.2d 768, 772* (10th Cir.) (where the antitrust defendants included "a constitutionally created state board, its executive secretary, and a state created and funded university . . . a showing of active supervision is unnecessary to qualify for state action antitrust immunity"), *cert. denied*, *510 U.S. 932, 126 L. Ed. 2d 309, 114 S. Ct. 344 (1993)*; ***Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.****, 790 F.2d 1032, 1047 (2d*

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[10] Exemption from the "active supervision" requirement is fortunate from the Board's perspective because its rulemaking process was not actively supervised. Despite the legislature's reservation of power to review the Board's proposals for new rules, rule changes can take effect without any active oversight by the legislature. *LA. REV. STAT. ANN. § 49:968* (West 1987 & Supp. 1998). That is in fact what happened regarding the rules challenged in this case, and the situation is indistinguishable from the "negative option system" which was determined by the Supreme Court not to constitute active state supervision. *See* ***Ticor****, 504 U.S. at 629, 638-40*.

Cir. 1986) (where the defendant was a statutorily created political subdivision of the state, defendant's "interests must be defined as public rather than private, and consequently, the active state supervision requirement is unnecessary"); *see also* AREEDA & HOVENKAMP, **[*1042]** *supra*, P 212.7a ("Dispensing with any supervision requirement for municipalities implies, a fortiori, the same for departments and agencies of the state itself."). Moreover, this development was expressly anticipated by the Supreme Court's ***Town of Hallie*** decision. *See* ***Town of Hallie****, 471 U.S. at 46 n.10* ("In cases in which the actor is **[**29]** a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

The individual Board members take advantage of the Board's privileged status for the purposes of the ***Midcal*** test. The individuals' actions in adopting and enforcing the rules involved in this case were performed in **[**30]** their official capacities as members of the Board. They were, in effect, agents of the Board for the purposes of state-action immunity. *See* ***Crosby v. Hospital Auth.****, 93 F.3d 1515, 1529-30 (11th Cir. 1996)*, *cert. denied*, *137 L. Ed. 2d 328, 117 S. Ct. 1246 (1997)*.

Thus, ***HN9***[] in order to take advantage of the state-action exemption, the defendants must simply demonstrate that they acted "pursuant to state policy to displace competition with regulation or monopoly public service" that was "clearly articulated and affirmatively expressed." ***Community Communications Co., Inc. v. City of Boulder****, 455 U.S. 40, 51, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*. The Supreme Court has further elaborated on this requirement, noting: "We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition. It is enough . . . if suppression of competition is the 'foreseeable result' of what the statute authorizes." ***City of Columbia v. Omni Outdoor Adver., Inc.****, 499 U.S. 365, 372-73, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*. [11]

[31]** The evidence of the Louisiana policy supporting the rules against the practice of incompatible professions and the acceptance of commissions consists of the following statutory language:

> ***HN10***[] The board shall:

* * *

> (3) Take appropriate administrative action to regulate the practice of public accounting in the state of Louisiana in the interest of and to preserve and protect the public health, safety and welfare;

* * *

LA. REV. STAT. ANN. § 37:75(A) (West 1988).

> ***HN11***[] The board may:

* * *

> (2) Adopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana, to provide for the efficient operation of the board, and otherwise to discharge its duties and powers under this Chapter;

* * *

> (5) Authorize any member of the Board to make any affidavit necessary to the issuance of any injunction or other legal process authorized under this Chapter or under the rules and regulations of the board;
> (6) Employ inspectors, special agents, and investigators;

* * *

[11] To the extent that ***United States v. Texas State Bd. of Pub. Accountancy****, 592 F.2d 919 (5th Cir. 1979)*, *aff'g 464 F. Supp. 400 (W.D. Tex. 1978)*, *cert. denied*, ***444 U.S. 925, 62 L. Ed. 2d 180, 100 S. Ct. 262 (1979)***, suggests that the state-action exemption may be denied because the state statute authorizing the challenged conduct was cast in permissive language rather than mandatory language, the opinion has been overruled by numerous subsequent Supreme Court cases disavowing that reasoning. *See, e.g.*, ***Southern Motor Carriers****, 471 U.S. at 59-60*.

(8) **[**32]** Employ legal counsel to carry out the provisions of this Chapter, provided that the fees of such counsel and the costs of all proceedings, except criminal prosecutions, are paid by the board from its own funds;

* * *

(10) Issue subpoenas under its seal to require attendance and testimony and the production of documents and things for the purpose of enforcing the laws relative to **[*1043]** the practice of public accounting and securing evidence of violations thereof;

* * *

(12) Adopt and enforce rules and regulations providing for the board's regular, periodic review of the form of audit, review, and compilation reports issued by individuals and firms registered with the board for compliance with applicable, generally accepted standards. * * *

* * *

Id. *§ 37:75(B)* (West 1988 & Supp. 1998). These statutes grant the Board broad power to regulate the profession of accounting. We must determine whether the rules challenged by the plaintiffs are a "foreseeable result" of the state's enabling legislation and therefore promote the state's public policy for the purposes of the state-action doctrine.

The plaintiffs contend that "clear articulation" **[**33]** is not present on these facts. They argue that the state-action doctrine is to be applied narrowly, and the Board members' actions simply do not merit the exemption. Particularly, the plaintiffs object that (1) any "policy" evidenced by the above-quoted statutory language is not "clearly articulated" and (2) the rules enacted by the Board are not the "foreseeable result" of the statues enacted by the state. The plaintiffs assert that their view is supported by Supreme Court precedent which holds that merely neutral statutory language is inadequate to meet the standards of clear articulation and affirmative expression. *See, e.g.*, ***Community Communications****, 455 U.S. at 55-56* ("The requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive.").

That argument cannot be accepted. With respect to a regulated entity such as the Board, the Supreme Court has dictated a standard that accords appropriate deference to state sovereignty: ***HN12***[] "As long as the State clearly articulates its intent to adopt a permissive policy, the first prong of the **[**34]** ***Midcal*** test is satisfied." ***Southern Motor Carriers****, 471 U.S. at 60*. Thus, we cannot deny the state-action exemption based merely upon the failure of the Louisiana legislature to expressly state an intention to displace competition in the accounting profession by restricting the practice of "incompatible professions" and the acceptance of commissions. As the Supreme Court has noted in a analogous context, such an approach would take an "unrealistic view of how legislatures work and of how statutes are written." ***Town of Hallie****, 471 U.S. at 43*; *see also* AREEDA & HOVENKAMP, *supra*, P 212.3a ("Unfortunately, state statutes seldom speak with clarity on [the elements of the 'clear articulation' requirement], for the federal antitrust consequences of state legislation -- especially of state delegations to subordinate units -- was hardly significant in the legislators' minds.").

Objectively, the Louisiana legislature "intended" that the Board, through its members, exercise any power which the legislature authorized. Here, the Board was authorized to "adopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem **[**35]** necessary and proper to regulate the practice of public accounting in the state of Louisiana." *LA. REV. STAT. ANN. § 37:75(B)(2)* (West 1988). This is a broad grant of authority which includes the power to adopt rules that may have anticompetitive effects. [12] It is thus the

[12] For example, the Board uses its state-granted monopoly power over the practice of public accounting to determine who may compete in the profession. *See* LA. REV. STAT. ANN. § 75(A) (West 1988) (the Board shall administer the licensing of CPAs)***; id.*** § 77(B) (West Supp. 1998) (CPA license required to practice public accounting in Louisiana); LA. ADMIN. CODE tit. 46, §§ XIX.1101-.2701 (Sept. 1997) <*www.state.la.us/osr/lac/lac.htm>* (regulations pertaining to examination, certification, and licensing). This has the effect of artificially limiting supply and therefore raising prices.

"foreseeable result" of enacting such a statute that the Board may actually promulgate a rule that has anticompetitive effects.

Whether or not the **[**36]** rules challenged by the plaintiffs would violate the Sherman Act in the absence of a state-action exemption, it is **[*1044]** plain that Louisiana has established a permissive policy with respect to the Board's regulation of CPAs. In doing so the state rejected pure competition among public accountants in favor of establishing a regulatory regime that inevitably has anticompetitive effects.

Our analysis is faithful to the principles of federalism that gird the state-action doctrine. As the Supreme Court has noted:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.

Southern Motor Carriers*, 471 U.S. at 64*. We thus conclude that the "clear articulation" requirement is satisfied by the Louisiana statutes which bless the Board with broad rulemaking **[**37]** authority over the profession of public accounting within the state. The members of the Board are therefore entitled to state-action immunity from federal antitrust laws.

V. Conclusion

For the aforementioned reasons, the judgment of the district court denying defendants' motion to dismiss based on the *Eleventh Amendment* is reversed to the extent that it denies immunity to the Board itself and to individual Board members on claims grounded in state law. In all other respects, the ruling is affirmed. The denial of the motion to dismiss based on the state-action doctrine is also reversed. We remand the case for further proceedings. On remand, the district court shall dismiss all claims against the State Board of Certified Public Accountants of Louisiana and all federal antitrust and state-law claims against its Board members.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

[Schimpf v. Gerald, Inc.](#)

United States District Court for the Eastern District of Wisconsin

April 24, 1998, Decided ; April 24, 1998, Filed

Case No. 97-C-545

Reporter

2 F. Supp. 2d 1150 *; 1998 U.S. Dist. LEXIS 5830 **

NICK SCHIMPF, HELEN SCHIMPF, FRANK SCHIMPF, BONNIE SCHIMPF, ALFRED SCHIMPF, EDITH SCHIMPF, ERNEST SCHIMPF, CHRISTINE SCHIMPF, HELGA SCHIMPF-HEIZMANN, JOHN HEIZMANN, S & R EGG FARM, INC., FRANK SCHWARZMANN and EVE SCHWARZMANN, Plaintiffs, v. GERALD, INC. and EDWARD KEISER, Defendants.

Disposition: [1]** Motion for reconsideration GRANTED and motion for substitution GRANTED IN PART and DENIED IN PART. Count two of the Amended Complaint DISMISSED as to Keiser. Estate administrator's motion to dismiss or transfer DENIED.

Core Terms

survive, solicitation, cause of action, personal jurisdiction, damages, plaintiffs', treble-damages, antitrust, insured, substitution, deposition, purposes, punitive, treble damages, common law, invested, long-arm, abated, courts, punitive damages, compensatory, parties, motion for substitution, double damages, reconsideration, lawsuit, respondeat superior, survival statute, anti trust law, civil claim

LexisNexis® Headnotes

Civil Procedure > Parties > Substitution > Death of Party

Civil Procedure > Parties > Substitution > General Overview

Civil Procedure > Parties > Substitution > Motions for Substitution

HN1[] **Substitution, Death of Party**

Fed. R. Civ. P. 25(a)(1) states that if a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.

Civil Procedure > Preliminary Considerations > Justiciability > Abatement Upon Death

Torts > Wrongful Death & Survival Actions > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN2[] **Justiciability, Abatement Upon Death**

Whether an action survives the death of a party must be determined by looking to the law, state or federal, under which the cause of action arose. In the absence of a legal ruling directly on point by the state courts, a federal court should rule as the state supreme court would, if squarely presented with the issue.

Torts > Wrongful Death & Survival Actions > General Overview

HN3[] **Torts, Wrongful Death & Survival Actions**

Survivability of a claim under the Wisconsin Organized Crime Control Act (WOCCA) is governed first and foremost by Wisconsin's omnibus survival statute, *Wis. Stat. § 895.01(1)*, which provides that all causes of action that survive at common law survive in Wisconsin, as do certain other specified causes of action, including claims for all damage done to the property rights or interest of another. The list of causes enumerated in *§ 895.01(1)* is exclusive, and a WOCCA claim is not among them.

Torts > Wrongful Death & Survival Actions > General Overview

HN4[] **Torts, Wrongful Death & Survival Actions**

A Wisconsin Organized Crime Control Act claim does not survive at common law.

Civil Procedure > Preliminary Considerations > Justiciability > Abatement Upon Death

Torts > ... > Commencement & Prosecution > Survival of Actions > General Overview

Torts > Wrongful Death & Survival Actions > General Overview

HN5[] **Justiciability, Abatement Upon Death**

The original version of Wisconsin's survival statute was enacted in 1849, *Wis. Stat. § 895.01* note, and the causes of action that survive at common law were fixed at that time.

Governments > Courts > Common Law

Governments > Legislation > Interpretation

HN6[] **Courts, Common Law**

Statutes are not to be construed as changing the common law unless the purpose to effect such change is clearly expressed therein.

Torts > Remedies > Damages > General Overview

Torts > Vicarious Liability > Employers > Indemnity

HN7[] **Remedies, Damages**

"Damage" in general means a loss, injury, or deterioration that produces a right in them who have suffered any damage to demand reparation of such damage from the authors of the injury. A person who has suffered loss, detriment, or injury then may be able to recover "damages," meaning a pecuniary compensation or indemnity.

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > General Overview

Torts > ... > Commencement & Prosecution > Survival of Actions > Death of Defendants

HN8[] **Accusatory Instruments, Dismissal**

Criminal actions are abated upon the death of the defendant.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Governments > Legislation > Interpretation

HN9[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Wisconsin courts have held federal case law interpreting the Racketeer Influenced and Corrupt Organizations Act to be persuasive authority in interpreting the Wisconsin Organized Crime Control Act.

Torts > Wrongful Death & Survival Actions > General Overview

HN10[] **Torts, Wrongful Death & Survival Actions**

Survivability is determined by looking to the law of the jurisdiction under which the cause of action arose.Analysis begins with the language of the statute itself.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

HN11[] **Costs & Attorney Fees, Costs**

Wis. Stat. § 946.87(4) states that any person who is injured by reason of a Wisconsin Organized Crime Control Act violation has a cause of action for two times the actual damages sustained and, when appropriate, punitive damages. The person shall also recover attorney fees and costs of the investigation and litigation reasonably incurred.

Civil Procedure > Remedies > Damages > General Overview

Governments > Legislation > Interpretation

HN12[] **Remedies, Damages**

When determining whether a particular statutory provision is punitive, courts generally look in the first instance to whether the purpose of the statute as a whole primarily redresses individual wrongs or more general wrongs to the public.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Governments > Legislation > Interpretation

Torts > Wrongful Death & Survival Actions > General Overview

HN13[] **Racketeer Influenced & Corrupt Organizations, Remedies**

The United States Court of Appeals for the Seventh Circuit sets forth a three-part test for determining whether an action is penal for survival purposes: (1) whether the purpose of the action is to redress individual wrongs or wrongs to the public; (2) whether recovery runs to the individual or to the public; and (3) whether the authorized recovery is wholly disproportionate to the harm suffered.

Torts > Vicarious Liability > Agency Relationships > General Overview

HN14[] **Vicarious Liability, Agency Relationships**

Where an employee is acquitted of a libel, presumably on the grounds that he has committed none, his corporation cannot be liable. But the situation is quite different where by death or by operation of law an action against the corporation's agent has abated. This is not the same as a judgment on the merits and should not bar the plaintiff from getting such a judgment against the corporation. Once the employee has acted, if he has acted in the corporation's behalf, any stigma which arises due to his act immediately attaches to the corporation. The subsequent death of the agent tortfeasor does not alter this.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Administrative Proceedings > Fraud

Torts > Intentional Torts > False Imprisonment > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Workers' Compensation & SSDI > Coverage > Employment Status > Dual Employees

HN15[] **Workers' Compensation, Fraud**

Where there is joint and several liability the injured person may sue all defendants jointly, or either separately.

Business & Corporate Law > Agency Relationships > Types > Employees & Employers

Torts > Negligence > Defenses > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Liability of Principals

Torts > Vicarious Liability > Agency Relationships > General Overview

Torts > Vicarious Liability > Employers > General Overview

HN16[ ] **Types, Employees & Employers**

An agent's immunity from civil liability for an act does not translate into a defense for the principal. A finding of no civil liability on the part of an employee because of an immunity doctrine does not shield the employer, since the servant's negligence or wrongful act, and not the servant's own civil liability, establishes the employer's liability under respondeat superior. Immunities are not delegable and are available only to persons who have them.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN17[ ] **In Rem & Personal Jurisdiction, In Personam Actions**

Plaintiffs have the burden of proving personal jurisdiction exists, although the burden is not a heavy one.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN18[ ] **In Rem & Personal Jurisdiction, In Personam Actions**

In support of jurisdiction, the court may receive and weigh the allegations in the plaintiffs' complaint as well as deposition testimony and affidavits to assist it in determining the jurisdictional facts. The plaintiffs need only make a prima facie showing that personal jurisdiction exists, and the court will take as true the plaintiffs' allegations and resolve all factual disputes in their favor.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

HN19[ ] **In Rem & Personal Jurisdiction, In Personam Actions**

A federal court sitting in diversity analyzes personal jurisdiction by first determining whether the forum state's long-arm statute confers personal jurisdiction and then deciding whether personal jurisdiction would comport with due process requirements.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN20[ ] **In Rem & Personal Jurisdiction, In Personam Actions**

In Wisconsin, compliance with the long-arm statute is presumed to be compliance with due process requirements; defendants have the burden of overcoming the presumption.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN21[] In Personam Actions, Minimum Contacts

Wis. Stat. § 801.05(4)(a) provides for personal jurisdiction in any action claiming injury to person or property within Wisconsin arising out of an act or omission outside Wisconsin by the defendant, provided in addition that at the time of the injury solicitation or service activities were carried on within Wisconsin by or on behalf of the defendant.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN22[] In Rem & Personal Jurisdiction, In Personam Actions

The Wisconsin long-arm statute is to be liberally construed in favor of exercising jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

HN23[] In Rem & Personal Jurisdiction, In Personam Actions

All credibility determinations must be made in plaintiffs' favor when determining whether personal jurisdiction exists. Plaintiffs need only establish personal jurisdiction with prima facie evidence.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN24[] In Rem & Personal Jurisdiction, In Personam Actions

In order for a solicitation to trigger personal jurisdiction the person soliciting must anticipate a direct or indirect financial benefit and thereby subject himself to the jurisdiction of the courts of the state where the solicitation occurs.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Elements

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Conduct of Parties

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Reliance

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Knowledge & Notice > General Overview

Business & Corporate Law > ... > Establishment > Elements > General Overview

HN25[] **Apparent Authority, Elements**

An agency exists if there has been a manifestation by the principal to the agent that the agent may act on the principal's behalf. Apparent agency is created by conduct of the principal that, reasonably interpreted, causes a third person to believe that the principal consents to have an act done on his behalf by the person purporting to act for him. For agency by apparent authority to exist, three elements must be present: (1) acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the principal sought to be held bound; and (3) reliance thereon by the plaintiffs, consistent with ordinary care and prudence.

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN26[] **Venue, Individual Defendants**

A diversity case may be brought in a judicial district where any defendant resides, if all defendants reside in the same state, or a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. *28 U.S.C.S. § 1391(a)(1)*, *(2)*.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

HN27[] **Federal Venue Transfers, Convenience Transfers**

28 U.S.C.S. § 1404(a) allows a transfer for the convenience of parties and witnesses, in the interest of justice.

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For Gerald Inc., Defendant: Attorney Scott W. Hansen, Attorney Patrick J. Hodan, Reinhart, Boerner, Van Deuren, Norris & Rieselbach, Milwaukee, WI.

For Ed Keiser & Charles Marino, Defendant: Attorney Janice A. Rhodes, Kravit & Gass, Milwaukee, WI.

Judges: LYNN ADELMAN, District Judge.

Opinion by: LYNN ADELMAN

Opinion

[*1151] ***DECISION AND ORDER***

Currently pending before me are two motions: (1) the plaintiffs' motion for reconsideration of an order substituting the administrator of defendant Edward Keiser's estate for Keiser, and (2) Keiser's (or his representative's) motion to dismiss the case for lack of personal jurisdiction or to transfer it to the Northern District of Illinois. For the reasons set forth below, the motion for reconsideration will be granted and upon reconsideration the motion for substitution will be granted in part and denied in part, and the **[**2]** motion to dismiss or transfer the case will be denied.

I. Factual and Procedural Background

The following facts derive from the Amended Complaint. The twelve individual plaintiffs in this case are relatives, all living in Wisconsin. Plaintiff S&R Egg Farms, Inc., their family business, is a Wisconsin **[*1152]** corporation; its principal place of business is in Wisconsin. Defendant Gerald, Inc. is a New York corporation; its principal place of business is in New York. At all times material to this lawsuit, Gerald had an office in Chicago, Illinois, and was in the business of buying and selling commodities for customers through the Chicago Board of Trade. Defendant Edward Keiser lived in Illinois at the time this case was filed; Keiser was Gerald's vice president of accounts in its Chicago office.

Although not a party to this lawsuit, Michael Schwarzmann ("Michael") played a large role in causing it. Michael is a close relative of the individual plaintiffs. Working through his company, M.S.I Capital Management, Michael held himself out as an expert and investor in the commodities futures market. He solicited funds from the plaintiffs, who gave him substantial amounts of money to invest **[**3]** on their behalf, based on Michael's representation that the money would be invested with defendants Keiser and Gerald in Chicago. Michael's parents, Eve and Frank Schwarzmann, for instance, gave him $ 332,000, aunt and uncle Helen and Nick Schimpf gave Michael $ 881,200, and S&R put in $ 578,000, all of which was supposed to be invested with Gerald.

But rather than investing the money, Michael and Keiser allegedly were defrauding plaintiffs. Michael invested little, if any, of his relatives' money with Gerald. Instead, by making small "interest" payments and by providing plaintiffs with falsified statements, Michael was able to keep them satisfied and unconcerned, while he used the money for his own purposes. In 1995 Michael pled guilty to wire fraud in connection with the scam. According to plaintiffs, Keiser used his position at Gerald to assist Michael in various ways.

Plaintiffs allege they are still short approximately $ 1,265,000. On March 31, 1997, they filed this lawsuit against Keiser and Gerald in an attempt to recover that money. Plaintiffs brought the case in Walworth County Circuit Court, but defendants removed it to this district on May 8, 1997, because diversity jurisdiction **[**4]** exists under *28 U.S.C. § 1332*. Plaintiffs allege three causes of action: (1) civil conspiracy to defraud, (2) violation of the Wisconsin Organized Crime Control Act (WOCCA), *Wis. Stat. §§ 946.80 - 946.88*, and *(3)* negligent misrepresentation. According to plaintiffs, Gerald is liable because at all times material, Keiser was acting within the scope of his employment and was Gerald's agent.

In 1997, Keiser died. Plaintiffs filed a suggestion of death and moved to substitute Charles F. Marino, administrator of Keiser's estate, for Keiser. At the time of the motion, this case was assigned to District Judge Rudolph T. Randa. Judge Randa granted the motion for substitution on December 2, 1997, but he inaccurately calculated the deadline for responses and incorrectly assumed the defendants and the estate had no objection, as none had been filed. On December 8, Gerald filed a motion for reconsideration, indicating it indeed planned to object. The next day Judge Randa acknowledged the mistake, indicated he would accept responses to the motion for substitution, and ordered his prior ruling on the substitution matter held in abeyance pending further review of the merits of the issue. The case **[**5]** was transferred to me when I became a district judge. The parties have since fully briefed the motion for substitution and agree that reconsideration is appropriate. As the objection to substitution of the estate for Keiser concerns only the second count of the Amended Complaint, Judge Randa's order granting the substitution will be reinstated as to counts one and three.

On January 6, 1998, the estate (assuming it would be substituted for at least part of the case) filed a motion to dismiss the claims against it for lack of personal jurisdiction or, alternatively, for transfer of the case to the Northern District of Illinois. That motion has been fully briefed as well. Plaintiffs have since filed an Amended Complaint. The motion to dismiss or transfer has been renewed as to the Amended Complaint and is ready for decision.

II. Survival of WOCCA Claim Against Keiser

A. Survival is an Issue of Wisconsin Law

HN1[] *Federal Rule of Civil Procedure 25(a)(1)* (emphasis added) states that "if a party **[*1153]** dies *and the claim is not thereby extinguished*, the court may order substitution of the proper parties." In their motion for substitution plaintiffs asserted that the WOCCA claim was **[**6]** not extinguished by Keiser's death and thus Marino and the estate should be substituted as defendants for all claims. Notice of Motion and Motion for Substitution (Nov. 17, 1997) at 2. Keiser's estate and Gerald object to the substitution because they believe the WOCCA count of the Amended Complaint expired along with Keiser. According to Gerald, because its liability would be derivative of Keiser's the WOCCA count evaporates against it as well as the estate.

HN2[] Whether an action survives the death of a party must be determined by looking to the law, state or federal, under which the cause of action arose. *Continental Assurance Co. v. American Bankshares Corp., 483 F. Supp. 175, 177 (E.D. Wis. 1980)*. Wisconsin case law does not address whether a WOCCA civil claim survives death. In the absence of a legal ruling directly on point by the state courts, a federal court should rule as the state supreme court would, if squarely presented with the issue. *L.S. Heath & Son v. AT&T Info. Sys., 9 F.3d 561, 574 (7th Cir. 1993)*.

HN3[] Survivability of plaintiffs' WOCCA claim is governed first and foremost by Wisconsin's omnibus survival statute, *Wis. Stat. § 895.01(1)*, which provides that all **[**7]** "causes of action that survive at common law" survive in Wisconsin, as do certain other specified causes of action, including claims "for all damage done to the property rights or interest of another." The list of causes enumerated in *section 895.01(1)* is exclusive, *Pettygrove by Scholl v. Pettygrove (In re Marriage of Pettygrove), 132 Wis. 2d 456, 463, 393 N.W.2d 116 (Ct. App. 1986)*, and a WOCCA claim is not among them. WOCCA itself fails to address the survivability of a civil lawsuit brought under its terms. Therefore, unless a WOCCA cause of action can be considered a "cause[] of action that survive[s] at common law" in Wisconsin, or a statutory action for "damage done" to property rights, it evaporated when Keiser died.

Plaintiffs' ***HN4***[] WOCCA claim does not "survive at common law." ***HN5***[] The original version of Wisconsin's survival statute was enacted in 1849, *see* *Wis. Stat. § 895.01* note (Historical and Statutory Notes); *Prunty v. Schwantes, 40 Wis. 2d 418, 422 n.3, 162 N.W.2d 34 (1968)*, and the "causes of action that survive at common law" appear to have been fixed at that time, *see* *Prunty, 40 Wis. 2d at 424* (because personal injury cause of action did not survive **[**8]** death of injured party until legislature acted in 1887, "it is quite obvious that the common law of Wisconsin will not support an award of damages to the deceased's estate" under version of survival statute in effect in 1968). WOCCA became effective in 1982. *See* *Wis. Stat. §§ 946.80-946.88* notes (Historical and Statutory Notes). Thus a WOCCA claim is not part of the "common law" as contemplated in *section 895.01(1)*. And even if "causes of action that survive at common law" as stated in *section 895.01(1)* is a developing concept, the Wisconsin Supreme Court recognizes as "an accepted axiom of law in Wisconsin" that ***HN6***[] "statutes are not to be construed as changing the common law unless the purpose to effect such change is clearly expressed therein." *Kranzush v. Badger State Mutual Cas. Co., 103 Wis. 2d 56, 74, 307 N.W.2d 256 (1981)*. WOCCA is silent in regard to any intent to change the common law. *See* *Wis. Stat. §§ 946.80-946.88*.

Therefore, in order to survive, a WOCCA civil suit would have to be deemed a claim "for all damage done to the property rights or interest of another." ***HN7***[] "Damage" is undefined by the statue, but, in general, it means a "loss, injury, or deterioration", **[**9]** that produces "a right in them who have suffered any damage . . . to demand reparation of such damage from the authors of the injury." Black's Law Dictionary 389 (6th ed. 1990). A person who has suffered "loss, detriment, or injury" then may be able to recover "damages", meaning "a pecuniary compensation or indemnity." *Id.; see also* *Employers Mut. Liab. Ins. Co. v. De Bruin, 271 Wis. 412, 414, 73 N.W.2d 479 (1955)* (defining "damages" as "a compensation, recompense, or satisfaction in money for a loss or injury sustained"). The key question, then, as all parties recognize, is whether the WOCCA civil cause of action is deemed compensatory or remedial, **[*1154]** in which case it survives, versus penal, in which case it has been extinguished.[1]

[10] B. Is the WOCCA Claim Penal or Compensatory?**

1. Case Law With Respect to RICO Claims

The Seventh Circuit has a test for determining whether a cause of action is penal or remedial in nature. *See* *Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407, 414 (7th Cir. 1980)*, *overruled on other grounds by* *Pridegon v. Gates Credit Union, 683 F.2d 182, 194 (7th Cir. 1982)*. Wisconsin does not appear to have a similar test. While the *Smith* test does not necessarily apply to a state statute, with no state test *Smith* nevertheless is helpful.

In addition, WOCCA is patterned on the federal Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961-1968*, *State v. Evers, 163 Wis. 2d 725, 730, 472 N.W.2d 828 (Ct. App. 1991)*, and ***HN9***[] Wisconsin courts have held federal case law interpreting RICO to be persuasive authority in interpreting WOCCA, *State v. Mueller, 201 Wis. 2d 121, 144, 549 N.W.2d 455 (Ct. App. 1996)*; *Evers, 163 Wis. 2d at 732*.

Numerous decisions regarding the survivability of RICO treble-damages citizen suits indicate a split of authority. Several courts, almost all of them located in the Northern District of Illinois, have determined **[**11]** such lawsuits to be penal and have found they do not survive the passing of a party. *See, e.g.,* *Confederation Life Ins. Co. v. Goodman, 842 F. Supp. 836, 837-38 (E.D. Pa. 1994)*; *Ball v. Field, 1993 U.S. Dist. LEXIS 4273, 1993 WL 101485*, *9 (N.D. Ill. 1993); *Lincoln Nat'l Life Ins. Co. v. Silver, 1990 U.S. Dist. LEXIS 13669, 1990 WL 160037*, *6 (N.D. Ill. 1990); *Washburn v. Brown, 1988 U.S. Dist. LEXIS 13474, 1988 WL 130021*, *3 (N.D. Ill. 1988); *Eliasen v. Hamilton, 1987 U.S. Dist. LEXIS 1826, 1987 WL 7815*, *10-*11 (N.D. Ill. 1987); *First Interstate Bank of Nevada, N.A. v. National Republic Bank,1985 U.S. Dist. LEXIS 21944, 1985 WL 1118*, *3-*4 (N.D. Ill. 1985).

Other courts, notably the Fourth Circuit and a judge in the Northern District of Indiana, have decided that the RICO treble-damages provision is remedial and thus survives death. *See, e.g.,* *Faircloth v. Finesod, 938 F.2d 513, 518 (4th Cir. 1991)*; *Epstein v. Epstein, 966 F. Supp. 260, 262-63 (S.D.N.Y. 1997)*; *Holford USA Ltd. v. Harvey, 169 F.R.D. 41, 43 (S.D.N.Y. 1996)*; *First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1122 (D.D.C. 1996)*; *County of Oakland by Kuhn v. City of Detroit, 784 F. Supp. 1275, 1285 (E.D. Mich. 1992)*; *State Farm Fire and Cas. Co. v. Estate of Caton, 540 F. Supp. 673, 681-82 (N.D. Ind. 1982)*, **[**12]** *overruled on other grounds by* *Ashland Oil, Inc. v. Arnett, 656 F. Supp. 950, 953 (N.D. Ind. 1987)*. Moreover, RICO's treble-damages civil suit provision in turn is patterned on that found in section 4 of the Clayton Act, *15 U.S.C. § 15*, and several cases have held that antitrust treble-damage claims are compensatory or survive the death of a party. *See, e.g.,* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* (recognizing § 4's dual nature but concluding that "it nevertheless is true that the treble-damages provision, which makes awards available only to

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[1] Even if WOCCA existed at the time Wisconsin codified the survival of common law claims, if the double-damages provision is penal in nature it nevertheless would abate. At common law, actions on penal statutes did not survive death, *Ex parte Schreiber, 110 U.S. 76, 80, 28 L. Ed. 65, 3 S. Ct. 423 (1884)*, because a deceased criminal could no longer be punished, *Canino v. New York News, Inc., 96 N.J. 189, 475 A.2d 528, 529 (N.J. 1984)*. "Death pays all when the criminal has gone. 'The party cannot be punished when he is dead.'" Winfield, *Death as Affecting Liability in Tort*, 29 Colum. L. Rev. 239, 249 (1920) (quoting Pollock, *Law of Torts* 578 (12 ed. 1923)), *quoted in* *Canino, 475 A.2d at 529*. ***HN8***[] Abatement of criminal actions upon death of the defendant continues today. *See* *United States v. Zizzo, 120 F.3d 1338, 1346 (7th Cir. 1997)*.

injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy"); *Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)* (holding that antitrust treble damage claims do not abate with death of defendant); *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)* ("Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act, *15 U.S.C. § 15*, . . . seeks **[**13]** primarily to enable an injured **[*1155]** competitor to gain compensation for that injury.").

2. Damages and Costs Under WOCCA Exceed Compensation

Because ***HN10***[] survivability is determined by looking to the law of the jurisdiction under which the cause of action arose, *Continental, 483 F. Supp. at 177*, analysis begins with the language of WOCCA itself. ***HN11***[] *Wisconsin Statute § 946.87(4)* states that "any person who is injured by reason of [a WOCCA violation] has a cause of action for 2 times the actual damages sustained and, when appropriate, punitive damages. The person shall also recover attorney fees and costs of the investigation and litigation reasonably incurred.. . ."

Plaintiffs first point out that subsection 946.87(4) speaks of "damages" and "recovery"; they contend that these terms mean the section is compensatory. I am not convinced. The statute imposes a mandatory doubling of actual damages, plus payment of the victim's attorney fees and litigation expenses, plus cost of the pre-lawsuit investigation. The double-damages provision alone exceeds what can be deemed mere compensation and remedy for harm done. To the extent they exceed actual damages, multiple damages by their nature **[**14]** are "exemplary" -- they do not compensate for the individual harm suffered as much as they serve as a deterrent. *Eliasen, 1987 WL 7815* at *11.

Plaintiffs next argue that because the Wisconsin legislature included in subsection 946.87(4) both double damages *and*, when appropriate, punitive damages, the legislature must have considered the double damages simply to be compensatory -- in other words, plaintiffs say, double damages must be "something other than punitive," Brief in Response (Dec. 22, 1997) at 3, or else the legislature would not have included both. I again disagree. In *John Mohr & Sons, Inc. v. Jahnke, 55 Wis. 2d 402, 412, 198 N.W.2d 363 (1972)*, which involved a jury's finding of an illegal conspiracy in restraint of trade and its award of both statutory treble damages and common-law punitive damages to the plaintiff, the Supreme Court of Wisconsin struck the punitive damages award because the statutory remedy was exclusive. The WOCCA legislature appears simply to have enacted statutory punitive damages to get around the problem of common-law punitive damages being excluded under *John Mohr*. An award of punitive damages is not identical to or truly duplicative **[**15]** of automatic multiplied damages. *See* *Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc., 190 Wis. 2d 651, 660 n.9, 529 N.W.2d 905 (1995)* (noting, for example, that willful, wanton or reckless behavior generally must be proven to recover punitive damages but not treble damages, and the wealth of a defendant bears on the calculation of punitive damages while statutory multiple damages are based on an automatic multiplier of actual damages). The legislature's inclusion of both types of damages merely provides for an automatic type of fine as well as a variable component within the jury's discretion for egregious situations. It does not mean that the legislature treated double damages solely as compensation for injury.

3. Purpose of WOCCA is to Fight Crime

Plaintiffs next point to the Wisconsin legislature's expression of intent for WOCCA, which is set forth in *Wisconsin Statute § 946.81*: "The legislature declares that the intent of the Wisconsin Organized Crime Control Act is to impose sanctions against this subversion of the economy by organized criminal elements and to provide compensation to private persons thereby.. . ." According to plaintiffs, the "sanctions" discussed in *section **[**16]** 946.81* must be WOCCA's criminal penalties and fines and the "compensation" is the legislature's recognition of remedial subsection 946.87(4). Plaintiffs have left out the immediately preceding sentence, though, which gives better insight into the overall nature of WOCCA. Read together, the two sentences state:

> The legislature finds that a severe problem is posed in this state by the increasing organization among certain criminal elements and the increasing extent to which criminal activities and funds acquired as a result of criminal activity are being directed to and against the legitimate economy of the state. The legislature declares that the intent of the Wisconsin Organized Crime Control Act is to impose sanctions against this subversion of the economy by organized criminal elements and to provide **[*1156]** compensation to private persons injured thereby.. . .

The additional language shows the real focus of WOCCA to be a response to crime. Nothing in the language of the statute suggests that the Wisconsin legislature intended to exclude subsection 946.87(4) when it stated that its goal was to address criminal activities and "impose sanctions against this subversion of the economy."

[17]** The WOCCA title and *section 946.87*'s placement within the Wisconsin statutes further suggest that the double-damages provision is penal in nature. *Section 946.87* is part of the Wisconsin Organized *Crime Control* Act, which addresses the problem of criminal behavior and creates criminal sanctions triggered by such conduct. ***HN12***[] When determining whether a particular statutory provision is punitive, courts generally look in the first instance to whether the purpose of the statute *as a whole* primarily redresses individual wrongs or more general wrongs to the public. *Genty v. Resolution Trust Corp., 937 F.2d 899, 912 (3d Cir. 1991)*. *Section 946.87* is just one small part of a predominantly penal act and is merely one piece of the puzzle in trying to solve the problem of crime. Moreover, *section 946.87* also is part of the Chapter of the Wisconsin Statutes entitled "Crimes Against Government and Its Administration." Other portions of Chapter 946 address, for instance, treason, bribery, perjury, interference with law enforcement, and obstruction of justice. *See* Wis. Stat., ch. 946. The placement of *section 946.87* with all of these criminal statutes involving injury to government **[**18]** (and thus the public) buttresses the view that Wisconsin's legislature intended the double damages provision to be penal.

4. Wisconsin Statute Indicates Double Damages Not Compensatory

The statute immediately following Wisconsin's omnibus survival statute expressly prohibits the recovery of "vindictive or exemplary damages" against the executor or administrator of an estate and limits recovery to damages actually sustained. *Wis. Stat. § 895.02*. *Section 895.02* thus treats claims for amounts in excess of actual damages as if they cannot survive against an estate. Because a WOCCA civil claim mandates double damages, permitting a WOCCA claim to be brought against an estate would be inconsistent with *§ 895.02*.

5. No Wisconsin Case Law Directly On Point

Having analyzed the statutory language, I next look to Wisconsin case law. In *Carlson, supra*, the defendants argued that antitrust treble damages were considered punitive in nature and thus claims for such damages required the same "middle" (i.e. clear and convincing) burden of proof as used for common-law punitive claims. The court rejected the argument and held that the lower preponderance of the evidence standard **[**19]** applied, but stated: "Nor are treble damages in Wisconsin private, civil antitrust actions solely or predominantly punitive, as the defendants assert. A more accurate portrayal of the case law is that the state "antitrust laws are remedial in nature as well as penal. . .." *Carlson, 190 Wis. 2d at 667*. *Carlson* thus does not solve the penal/remedial dichotomy.

6. *Smith* and RICO Cases From N.D. Ill. Suggest WOCCA Claim Penal

The Seventh Circuit's *Smith* test and the RICO cases from the Northern District of Illinois and the Eastern District of Pennsylvania, however, solidify the conclusion that a WOCCA civil claim is penal in nature. *Smith* ***HN13***[] sets forth a three-part test for determining whether an action is penal for survival purposes: (1) whether the purpose of the action is to redress individual wrongs or wrongs to the public, (2) whether recovery runs to the individual or to the public, and (3) whether the authorized recovery is wholly disproportionate to the harm suffered. *Smith, 615 F.2d at 414*. As *Washburn, supra*, and *First Interstate, supra*, similarly concluded in regard to RICO civil suits, the *Smith* test indicates WOCCA civil suits are penal. **[**20]** Only the second factor of the test suggests a remedial nature, because recovery does run to the individual. The other two factors point toward WOCCA's penal nature.

In regard to the first factor, although *section 946.87(4)* itself may redress individual wrongs, its broader purpose and that of WOCCA overall is to redress wrongs to the public, based upon the same reasoning set forth above regarding legislative intent and **[*1157]** WOCCA's placement within the Wisconsin code. *See also* *Genty, 937 F.2d at 910* ("The criminal and civil penalties in [RICO] thus comprise sharply-cutting edges of a double-edged sword to strike more completely the insidious influences plaguing our nation's enterprises.. . . There is convincing authority that Congress authorized civil RICO's powerful treble damages provision to serve a punitive purpose.").

And in regard to the third factor, the authorized recovery is wholly disproportionate to the harm suffered. Because the amount of damages under WOCCA are unlimited, so is the potential penalty. Unlike *Smith*, where the Seventh Circuit determined that a fine pursuant to the Truth in Lending Act, *15 U.S.C. § 1640*, was not penal because it was limited to modest **[**21]** amounts of not more than $ 1,000, *see* *Smith, 615 F.2d at 414-15*, the penalty under WOCCA can be extraordinary. A $ 100,000 penalty added to damages of $ 100,000, for example, is wholly disproportionate, especially because it is unrelated to any degree of willfulness or intent to injure.

7. Arguments That WOCCA Claims Are Civil Are Less Persuasive

The courts finding that RICO civil claims survive death rely mainly on Congress's statement that RICO provisions "shall be liberally construed to effectuate its *remedial* purpose," Pub. Law No. 91-452 § 904(a), 84 Stat. 947, *reprinted* following *18 U.S.C. § 1961* note (emphasis added), the fact that recovery runs to a private individual, the parallels in ***antitrust law***, and certain Supreme Court comments in *Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987)*. *See, e.g.,* *First American, 948 F. Supp. at 1122*; *County of Oakland, 784 F. Supp. at 1285*; *Epstein, 966 F. Supp. at 262*. None of these reasons changes my view that the WOCCA civil cause of action is penal in nature.

The first two reasons are easily dismissed. The "liberal construction" phrase from Congress **[**22]** can be read to encourage active use of both RICO's criminal and civil provisions to combat and "remedy" crime. And the fact that recovery runs to the individual is only one factor among at least three, as *Smith* recognizes.

While courts generally have found the treble damages provision of the antitrust laws to be remedial in nature, and RICO (and one step further down the line, WOCCA) is patterned on the antitrust provision, those decisions do not mandate any decision here. In *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)*, the Supreme Court cautioned against leaning heavily on antitrust case law for interpreting RICO; by making RICO a separate statute, Congress hoped to avoid strangling RICO with antitrust precedent. Embedding federal antitrust precedent into RICO survivability issues would create the problem that Congress expressly sought to avoid with RICO. Even statements of members of Congress involved in enacting RICO suggest that the RICO treble damages provision was not simply a rubber-stamp of the antitrust provision. *See* *Sedima, 473 U.S. at 487-88* (discussing comments by legislators indicating that treble-damages provision **[**23]** was "another example of the antitrust remedy being *adapted* for use against organized criminality," 116 Cong. Rec. 35295 (1970) (emphasis added)).

Most significantly, there is little correspondence between the types of conduct the antitrust laws and RICO and WOCCA prohibit; the former is concerned with regulating competition, the latter with defeating and deterring crime. RICO and WOCCA, each taken as a whole, are more penal in nature -- i.e. aimed directly at the public's common notions of crime -- than the antitrust laws, and can be deemed so even though similar language regarding remedies may exist in both. And while *Fishman* is precedent for this court, the Seventh Circuit spent little time analyzing the remedial/punitive issue and itself based the *Fishman* decision on the "precise circumstances" of the case. *Fishman, 807 F.2d at 561*. In spite of the parallel language between RICO and the antitrust acts, and in spite of *Fishman*, the judges of the Northern District of Illinois have found it inappropriate simply to adopt ***antitrust law*** interpretation for RICO civil claims. I similarly decline to find that antitrust case law rules control WOCCA civil claims.

[*1158] In **[**24]** *Shearson* the United States Supreme Court opined that the emphasis placed on the civil treble damage award of section 1964(c) by Congress is remedial first and only secondarily penal. *Shearson, 482 U.S. at*

240-42. In *Shearson* the Court determined that parties could agree to arbitrate RICO treble-damages claims. Id. at 238-42. The Supreme Court first found no hint that Congress intended for RICO treble-damages claims to be exempt from the provisions of the Federal Arbitration Act, *9 U.S.C. § 1 et seq.*, and then found no public interest in the enforcement of RICO precluding submission of such claims to arbitration. *Id. at 238-42*. Regarding the latter issue, the Court analyzed statements of various legislators and concluded that the RICO treble-damages provision focused on the remedial rather than the deterrent function. According to the Court, "the legislative history of § 1964(c) reveals the . . . emphasis on the remedial role of the treble-damages provision.. . . The policing function of § 1964(c), although important, was a secondary concern." *Id. at 240-41*.

The Court's comment was dicta, however, and this statement in the context of arbitrability does **[**25]** not govern survivability as well. As is clear by now, the multiple damages provisions of RICO and WOCCA can be considered compensatory for some purposes and penal for others. The *Shearson* Court itself, while emphasizing the remedial function for purposes of the arbitrability issue, nevertheless also recognized that "RICO's drafters likewise sought to provide vigorous incentives for plaintiffs to pursue RICO claims that would advance society's fight against organized crime." *Id. at 241*. A multiple-damages provision's dual nature can result in it being considered more like a compensatory remedy for purposes of arbitration, which involves looking only at the nature of the treble-damages provision itself, while being considered more like a penalty for purposes of survivability, which, as the *Smith* test indicates, involves a broader look at the provision's overall purpose and placement in the statutory scheme. *See Lincoln Nat'l*, 1990 WL 160037 at *4"(It is clear that both RICO and the Clayton Act contain elements that are both penal and remedial; thus, depending on the context, a claim may be characterized one way or the other."); *see also Genty, 937 F.2d at 913-14* (discussing **[**26]** *Shearson* but finding the RICO treble-damages cause of action penal for its purposes); *compare Shearson, supra, with Sedima 473 U.S. at 498* ("RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime.. . . it is in this spirit that all of the Act's provisions should be read.").

Shearson and antitrust precedent do not overcome the essential nature of the WOCCA statute itself and the persuasive reasoning of *Washburn, Ball, Lincoln National*, and *Confederation Life* regarding RICO civil suits, all of which were decided after *Shearson* and yet concluded that the RICO claims were extinguished by death, and the comments in *Genty*, also written after *Shearson* yet finding it not to control.

For all of the foregoing reasons, I believe the Supreme Court of Wisconsin would hold plaintiffs' WOCCA double-damages civil cause of action to be penal in nature. The claim died when Keiser died, and thus the estate cannot be substituted for Keiser on that count.

III. Survival of WOCCA Claim Against Gerald

Gerald, however, is another matter. Gerald argues that because the claim against Keiser no longer exists and its **[**27]** liability is secondary to Keiser's, the plaintiffs' WOCCA claim against it must abate as well. Gerald cites *Wiechmann v. Huber, 211 Wis. 333, 248 N.W. 112 (1933)*, for support. In *Wiechmann*, the plaintiff sued an insured and his insurance carrier for damages arising from the death of her husband, who was killed in an automobile accident while riding with the insured. The insured died shortly after the collision and plaintiff conceded that any action against him abated with his death under the survival statute existing at that time. *Id. at 334*. She nevertheless asserted a claim against the insurance company pursuant to the insured's policy. The Supreme Court of Wisconsin found that no action against the insurer could lie either. *Id. at 334-36*.

[*1159] *Wiechmann* is distinguishable from the present situation, as it was not based upon reasons of respondeat superior at all. The court instead based its decision on the language of the policy, which insured against "loss and/or expense arising or resulting *from claims upon the assured . . .*.", *id. at 335* (emphasis added), and the terms of state statutes, which indicated that in a motor vehicle case any insurer could be held **[**28]** directly liable and made a proper defendant "in any action brought by plaintiff *on account of any claim against the insured," id.* As the court stated,

> It is quite impossible to read into the statutes an intent to create a liability on the part of the insurance carrier completely dissociated from the liability of the insured. The terms of this policy are as positive as may be to the effect that the liability of the insurer depends upon the liability of the insured.
> ***
> …Nothing in [other] statues affects the terms of the policy here considered, which requires as a substantive matter a valid existing claim against the insured before a liability against the insurer in favor of a third party beneficiary can exist.

Id. at 336.

Plaintiffs, however, offer a case directly on point: *Soraghan v. Henlopen Acres, Inc., 236 F. Supp. 489 (D. Del. 1964)*. In *Soraghan* defendant Corkran died after commencement of the lawsuit, and it was plain that the defamation cause of action against Corkran abated with his death under the Delaware survival statute. *Id. at 489-90*. The district court found the plaintiff's respondeat superior claim against Corkran's former **[**29]** employer did *not* abate, even in the face of an argument virtually identical to Gerald's here. *Id. at 490-91*. The court found that while Corkran's death forestalled any judgment of liability against him personally or against his estate, it was not as if the plaintiff's claim had been adjudged to be without merit.

> Certainly the court would not dispute the argument that ***HN14***[] where Corkran was acquitted of a libel, presumably on the grounds that he had committed none, his corporation could not be liable.. . . But the situation is quite different where by death or by operation of law an action against the corporation's agent has abated. This is not the same as a judgment on the merits and should not bar the plaintiff from getting such a judgment against the corporation.
> ***
> . . . Once [the employee] has acted, if he has acted in the corporation's behalf, any stigma which arises due to his act immediately attaches to the corporation. The subsequent death of the agent tortfeasor does not alter this.

Id. at 490-91.

The court has found extremely little case law on the subject, but what there is comports with *Soraghan*. In *Manson v. Wabash R.R. Co., 338* ***[**30]*** *S.W.2d 54 (Mo. 1960)* (en banc), the Supreme Court of Missouri considered whether a respondeat superior case against employer Wabash abated when the two employees charged with assault and false imprisonment died while the case was pending. The court found that the causes of action against Wabash did not die with the employees because the master and servant "were jointly and severally liable for assault and false imprisonment committed by the servant in the scope and course of his employment.. . . ***HN15***[] Where there is joint and several liability the injured person may sue all defendants jointly, or either separately." *Id. at 57*.

In *Biel, Inc. v. Kirsch, 240 Ind. 69, 161 N.E.2d 617 (Ind. 1959)*, the Supreme Court of Indiana expressly disapproved of an appellate court's holding that a cause of action against a corporate defendant based solely upon the theory of respondeat superior abated for any amount in excess of what the law would have permitted against the estate of the corporate defendant's deceased driver. *Id. 161 N.E.2d at 618*. The higher court concurred, however, in the result based upon other grounds and therefore did not itself address the issue. Comments of two judges of the Supreme **[**31]** Court of Indiana in regard to the transfer of the case to that court for review are instructive, though:

> The fact that upon the death of an agent the liability in a negligence case is limited or extinguished against his estate, should **[*1160]** not accrue to the benefit of the principal and release the principal also from liability.
> There is no analogy in the instant case and one in which a jury or court finds the agent not guilty of negligence for which the principal at the same time is held liable. The negligence still exists, even though the agent may die or his liability be limited by statute in the case before us.
> . . . It was not intended a principal should get the benefit of a special privilege allowed a deceased agent's estate by limiting the amount of recovery therefrom in case of death.
> ***

> It likewise follows that a privilege personal to an agent or his estate may not be claimed or taken advantage of by a principal to avoid liability.

Biel, Inc. v. Kirsch, 159 N.E.2d 575, 575-76 (Ind. 1959).

In *Parrott v. Ellis Trucking Co., 179 F. Supp. 534, 534-35 (S.D. Ind. 1960))*, a district court in Indiana, based upon *Biel* and the comments quoted above, struck an **[**32]** employer's affirmative defense to a respondeat superior claim where the defense was based upon the fact that the employee tortfeasor had died.

The reasoning of these cases is persuasive. Gerald's alleged respondeat superior liability arose at the time Keiser committed the alleged acts and those facts have not changed. Once Keiser acted, any stigma upon Gerald immediately attached and has not been proven false. The facts necessary to find Gerald liable -- such as whether Keiser acted within the scope of his employment -- can still be established.

As noted by some of the courts above, the current situation is not equivalent to one where the employee has been exonerated and therefore the employer is as well. The situation instead is like one where the employee has been given relief from civil liability because of a type of immunity. *See* *Restatement (Second) of Torts § 217 cmt. b* ("immunity" denotes the absence of civil liability for what would be a tortious act but for the actor's status). ***HN16***[] An agent's immunity from civil liability for an act does not translate into a defense for the principal. *Restatement (Second) of Torts § 217(b)(ii)*. "It has been held that a finding of no civil **[**33]** liability on the part of an employee because of an immunity doctrine does not shield the employer, since the servant's negligence or wrongful act, and not the servant's own civil liability, establishes the employer's liability under respondeat superior." 27 Am.Jur.2d § 469 (1996). Immunities are not delegable and are available only to persons who have them. *Restatement (Second) of Torts § 217 cmt. b*. Gerald provides no legal basis upon which to transfer to it the personal benefit created by Wisconsin's survival laws. The fact that Wisconsinites believe estates should not face punitive claims does not automatically convert into a public policy benefitting corporations whose employees die.

While the punitive nature of a WOCCA claim raises questions regarding the applicability of the respondeat superior doctrine at all, *see, e.g.,* *D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964 (7th Cir. 1988)*, that is a question for another day. In the meantime, the WOCCA claim abates against Keiser but not against Gerald.

IV. Motion to Dismiss or Transfer

A. Personal Jurisdiction and Dismissal

Pursuant to *Federal Rule of Civil Procedure 12(b)(2)* the administrator of Keiser's estate **[**34]** contends that this court has no personal jurisdiction over Keiser or it and the case therefore must be dismissed. ***HN17***[] Plaintiffs have the burden of proving personal jurisdiction exists, *Dietrich by Padway v. Wisconsin Patients Compensation Fund, 169 Wis. 2d 471, 478, 485 N.W.2d 614 (Ct. App. 1992)*, although the burden is not a heavy one, 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1351 (2d ed. 1990). ***HN18***[] In support of jurisdiction the plaintiffs have proffered the allegations in their complaint as well as deposition testimony and affidavits, which the court may receive and weigh to assist it in determining the jurisdictional facts. *O'Hare Int'l Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971)*.; *Cram v. Medical College of Wis., 927 F. Supp. 316, 319 (E.D. Wis. 1996)*. The plaintiff need only make a prima facie showing that personal jurisdiction exists, and the court will take as true the plaintiffs' allegations **[*1161]** and resolve all factual disputes in their favor. *O'Hare, 437 F.2d at 1176*; *Cram, 927 F. Supp. at 319*.

HN19[] A federal court sitting in diversity analyzes personal jurisdiction by first determining whether the forum state's long-arm **[**35]** statute confers personal jurisdiction and then deciding whether personal jurisdiction would comport with due process requirements. *Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co., 18 F.3d 389, 391, 394 (7th Cir. 1994)*. ***HN20***[] In Wisconsin, compliance with the long-arm statute is presumed to be compliance with due process requirements; defendants have the burden of overcoming the presumption. *Marsh v. Farm Bureau Mut. Ins. Co., 179 Wis. 2d 42, 53, 505 N.W.2d 162 (Ct. App. 1993)*.

The plaintiffs rely on only one subsection of the Wisconsin long-arm statute, the specific jurisdiction language of ***HN21***[] *Wis. Stat. § 801.05(4)(a)*, which provides for personal jurisdiction

> in any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury . . .
>
> (a) Solicitation or service activities were carried on within this state by or on behalf of the defendant[.]

While a single act causing injury may be enough to satisfy due process concerns, the long-arm provision cited requires at least one additional contact -- a solicitation or service activity **[**36]** -- to meet the test of jurisdictional sufficiency. *Dietrich, 169 Wis. 2d at 479*. ***HN22***[] The long-arm statute, though, is to be liberally construed in favor of exercising jurisdiction. *Schroeder v. Raich, 89 Wis. 2d 588, 593, 278 N.W.2d 871 (1979)*; *Dietrich, 169 Wis. 2d at 478*.

The estate argues that Keiser himself never conducted solicitation or service activities within Wisconsin at the time of the injury and that none of Michael's solicitations can be considered "on behalf of" Keiser in order to confer personal jurisdiction. I disagree for two reasons.

First, plaintiffs have presented prima facie evidence that Keiser himself conducted solicitation activities within Wisconsin during the time of plaintiffs' injuries. Michael stated at deposition that when he and Keiser discussed how they could fool Nick Schimpf and his accountant into believing that Michael's account at Gerald was large, Keiser "suggested to me that if I make a deposit with a check, a personal check that it would show as being hard funds for several days". Michael's Dep. at 16-17.

The estate urges that I disregard Michael's testimony because he is an admitted crook and therefore unreliable. While the estate **[**37]** has not proffered any affidavits of its own in regard to its motion, it points to some contradictory testimony from Keiser's deposition, which plaintiffs included with their response. ***HN23***[] All credibility determinations must be made in plaintiffs' favor at this stage, however. *O'Hare, 437 F.2d at 1176*; *Cram, 927 F. Supp. at 319*. Plaintiffs need only establish personal jurisdiction with prima facie evidence, and taking Michael's testimony as true, they have, as the above is a solicitation by Keiser for money to put in a Gerald account. Moreover, Keiser's own deposition testimony supports the exercise of jurisdiction. Although Keiser disavowed any participation in the scheme to fake the amount in the account, his own deposition indicates he did tell Michael "you can wire the money in or you can give us a check" and that in response Michael sent him a check for $ 441,000, which was deposited into Michael's Gerald account. Keiser's Dep. at 95, 98.

The estate contends that the above solicitation cannot count because it was not made to one of the plaintiffs, basing its argument on Seventh Circuit dicta in *Federated, 18 F.3d at 393* ("according to Wisconsin law, before solicitation **[**38]** triggers *§ 801.05(4)(a)* it must be made by the defendant *to the plaintiff*" (emphasis added)). The cases upon which the Seventh Circuit relied, *Pavlic v. Woodrum, 169 Wis. 2d 585, 486 N.W.2d 533 (Ct. App. 1992)*, and *Fields v. Playboy Club of Lake Geneva, Inc., 75 Wis. 2d 644, 250 N.W.2d 311 (1977)*, however, do not specify that solicitations must be "to the plaintiff" and the text of *section 801.05(4)(a)* does not so require. *Fields*, in fact, involved a situation where solicitations made by the defendant did not have any relation to the cause of action whatsoever. In *Fields*, Audi was sued for product **[*1162]** defects that allegedly caused an automobile accident in which the plaintiff was injured. Evidence showed that during the year prior to the car accident 25 advertisements for Audi appeared in magazines widely distributed in Wisconsin, inviting potential customers to phone toll-free numbers to find the nearest dealer. According to the Supreme Court of Wisconsin these advertising solicitations were sufficient to make Audi amenable to jurisdiction under 801.05(4)(a) (at that time codified as 262.05(4)(a)) for purposes of the car accident lawsuit. According to the court the evidence was "uncontroverted **[**39]** that solicitation of the Audi product was carried on in the state." *Fields, 75 Wis. 2d at 650*. *See also* *id. at 651* (noting three facts required for jurisdiction as (1) an act outside the state by the defendant, (2) injury to a person within the state related to the foreign act, and (3) "some additional contact, *not necessarily related to the injury sued on*, which links the defendant to the state (emphasis added)) (quoting Wis. Stat. § 262.05 revision notes). Wisconsin law controls this issue and it does not require the additional contact for purposes of the long-arm statute to be made to the plaintiffs themselves.

Fields and *Pavlic* do indicate, however, that ***HN24***[] in order for a solicitation to trigger personal jurisdiction the person soliciting must anticipate a direct or indirect financial benefit and thereby subject himself to the jurisdiction of the courts of the state where the solicitation occurs. *Fields, 75 Wis. 2d at 653*; *Pavlic, 169 Wis. 2d at 592*. Here, that requirement is met. The plaintiffs' Amended Complaint alleges that Keiser received commissions from all funds invested through him with Gerald. Even taking Keiser's version of events as true, he **[**40]** could anticipate either a direct or indirect financial benefit from a $ 441,000 deposit to one of his accounts. Thus, Keiser's statement telling Michael to send him a check constitutes a solicitation for purposes of long-arm jurisdiction.

Second, construing the Wisconsin long-arm statute broadly as I must, Michael's solicitations of his relatives are considered solicitations "on behalf of" Keiser, based on the theory of apparent agency. [2] In *Pavlic, 169 Wis. 2d at 591*, the Wisconsin Court of Appeals analyzed whether principles of apparent authority allowed personal jurisdiction over a defendant. While determining in that case that apparent agency did not exist, the court implicitly recognized the use of apparent authority for purposes of long-arm jurisdiction. In this case, the apparent authority doctrine sweeps Michael's actions into the category of those "on behalf of" Keiser.

[41]** ***HN25***[] An agency exists if there has been a manifestation by the principal to the agent that the agent may act on the principal's behalf. *Id.* Apparent agency is created by conduct of the principal that, reasonably interpreted, causes *a third person* to believe that the principal consents to have an act done on his behalf by the person purporting to act for him. *Id.* For agency by apparent authority to exist, three elements must be present: (1) acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the principal sought to be held bound; and (3) reliance thereon by the plaintiffs, consistent with ordinary care and prudence. *Pamperin v. Trinity Memorial Hospital, 144 Wis. 2d 188, 203, 423 N.W.2d 848 (1988)*.

In this case, the Amended Complaint alleges, and no evidence presently contradicts, that at one point in 1990 Eve Schwarzmann telephoned Keiser to inquire about her investment and Keiser "assured [her] that the funds were invested with Gerald, Inc. and that the investment was safe." Amended Complaint at P 25. At deposition Michael stated that Keiser met with Michael's parents in Chicago and "confirmed" the accuracy of forged account statements **[**42]** indicating $ 1,500,000 in the Schwarzmanns' account. Michael's Dep. at 14-15. Also, Michael's deposition testimony indicates that when he, Nick Schimpf and Nick's accountant visited Keiser at Gerald's office in Chicago **[*1163]** in 1991, Keiser told them that the account held hard funds and that a lot of trading was going on. Michael's Dep. at 16-18. Keiser stated at deposition that he "always operated with Mr. [Michael] Schwarzmann under the guise that [Michael] was going to refer large accounts to me, and a lot of business." Keiser's Dep. at 99-100. Keiser's own actions in responding to Eve Schwarzmann's telephone call, personally meeting with the Schwarzmanns, and meeting with Nick Schimpf and his accountant, constitute conduct by Keiser himself that justifies plaintiffs' reasonable belief that they were such account holders referred by Michael to Keiser. All of these acts by Keiser justified the plaintiffs' reasonable belief that Michael was soliciting money for investment with Keiser and that by giving Michael money to invest they were investing with Keiser. In his role as solicitor of money from the Schimpfs he acted as the purported agent of Keiser, with Keiser's apparent consent.

[43]** The elements of apparent authority are met by prima facie evidence. Keiser knew that his actions reasonably caused the plaintiffs to believe that he consented to and authorized Michael to solicit money from them to be turned over to Gerald for investment. And the plaintiffs' Amended Complaint asserts (and no evidence tendered by the estate contradicts) that they relied upon Keiser's comments and assurances when giving more money to Michael. Thus Michael's solicitations can be considered "on behalf of" Keiser for purposes of establishing personal jurisdiction.

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[2] The parties' briefs on the personal jurisdiction matter focused mainly on whether Michael's solicitations of his relatives could be attributed to Keiser based on a theory of conspiracy. Because personal jurisdiction exists based upon Keiser's own solicitation and the doctrine of apparent agency I do not need to reach that issue of first impression.

The estate really has not attempted to rebut the presumption that constitutional concerns are satisfied. I find in any event that Keiser had minimum contacts with the Wisconsin forum such that maintenance of the suit here does not offend traditional notions of fair play and substantial justice. *See* *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*. Keiser's conduct and connection with Wisconsin were such that he should reasonably have anticipated being haled into court in this state. *See* *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559* ***[**44]*** *(1980)*. As a result, this court has personal jurisdiction over Keiser and his estate.

B. Venue and Transfer

As an alternative to dismissal on jurisdiction grounds, the estate argues that venue is improper in this district and that the case should be transferred to the Northern District of Illinois. ***HN26***[] A diversity case may be brought in "a judicial district where any defendant resides, if all defendants reside in the same State" or "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. . .." *28 U.S.C. § 1391(a)(1)*, *(2)*.

While the estate is correct that venue would lie in the Northern District of Illinois under subsection 1391(a)(1), that does not mean that venue is improper here. According to the complaint and plaintiffs' affidavits, a substantial portion of the underlying events occurred in Wisconsin between Michael and his relatives, satisfying subsection 1391(a)(2). Therefore, a transfer pursuant to *28 U.S.C. § 1406(a)* is not appropriate.

HN27[] Title *28 U.S.C. § 1404(a)* allows a transfer "for the convenience of parties and witnesses, in the interest of justice." I find that keeping the case here is more convenient for the **[**45]** parties and witnesses and in the interest of justice. Gerald indicates that the current venue also is more convenient for it, as its attorneys are located here. All twelve individual plaintiffs, who also will be witnesses, reside in Wisconsin. Documentary evidence is mainly in the plaintiffs' hands and thus in Wisconsin. And Michael, who will be called to testify by the plaintiffs and/or Gerald, is located in Wisconsin and subject to this court's subpoena power, but would not be within the Northern District's subpoena power if the case were transferred. This district is more convenient for all involved, with the sole exception of the administrator, and the interest of justice requires that it remain here.

V. Conclusion

THEREFORE IT IS ORDERED that the motion for reconsideration is **GRANTED** and upon reconsideration the motion for substitution is **GRANTED IN PART** in that Charles F. Marino, administrator of the estate of Edward F. Keiser, is **SUBSTITUTED** for defendant Edward F. Keiser in regard to **[*1164]** counts one and three of the Amended Complaint. The motion for substitution is **DENIED** in regard to count two of the Amended Complaint.

IT FURTHER IS ORDERED [46]** that count two of the Amended Complaint is **DISMISSED** as to Keiser only.

IN ADDITION, IT IS ORDERED that the estate administrator's motion to dismiss or transfer is **DENIED**.

Dated at Milwaukee, Wisconsin, this *24* day of April, 1998.

LYNN ADELMAN

District Judge

End of Document

Schlafly v. Caro-Kann Corp.

United States Court of Appeals for the Federal Circuit

April 29, 1998, Decided

98-1005

Reporter

1998 U.S. App. LEXIS 8250 *; 1998-1 Trade Cas. (CCH) P72,138; 40 Fed. R. Serv. 3d (Callaghan) 790

ROGER SCHLAFLY, Plaintiff-Appellant, v. CARO-KANN CORPORATION, Plaintiff, v. PUBLIC KEY PARTNERS, Defendant-Appellee, and RSA DATA SECURITY, INC., Defendant-Appellee.

Notice: [*1] RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: *1998 U.S. App. LEXIS 27432*.

Prior History: United States District Court for the Northern District of California. C-94 20512 SW (PVT).

Disposition: Affirmed.

Core Terms

patent, invalid, district court, licensing, estoppel, subject matter, antitrust, protective order, unfair business practice, partnership, relevant market, asserts, summary judgment, market power, mathematical, documents, alleged infringer, CONFIDENTIAL, defendants', discovery, patentee, products, requests, recited, argues, rights, summary judgment motion, magistrate judge, infringement, misleading

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > General Overview

Governments > Courts > Judges

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > Parties > Pro Se Litigants > General Overview

Civil Procedure > Judicial Officers > Magistrates > Objections

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

HN1[] **Judicial Officers, Judges**

The appellate court reviews matters not within its exclusive jurisdiction, such as matters relating to discovery, under the applicable law of the regional circuit in which the district court sits. *Fed. R. Civ. P. 72(a)* provides that when objecting to a magistrate judge's non-dispositive order a party must serve and file objections with the district court judge within 10 days after service of the order. The Ninth Circuit has held that a party who fails to file timely objections to a magistrate judge's non-dispositive order with the district judge to whom the case is assigned forfeits its right to appellate review of that order.

Civil Procedure > Pretrial Matters > General Overview

Governments > Courts > Judges

Civil Procedure > Judicial Officers > Magistrates > Objections

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN2[] **Civil Procedure, Pretrial Matters**

Magistrate Judges; Pretrial Orders: (a) Non-dispositive Matters. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. *Fed. R. Civ. P. 72(a)*.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN3[] **Methods of Discovery, Inspection & Production Requests**

The party seeking discovery has the burden to state his discovery requests with reasonable particularity and not to make unreasonably cumulative or duplicative requests such that the burden or expense of complying with the requests outweighs their likely benefit. *Fed. R. Civ. P. 26(b)(2)*, *34(b)*.

Evidence > ... > Presumptions > Exceptions > Statutory Presumptions

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN4[] Exceptions, Statutory Presumptions

A patent is presumed valid. *35 U.S.C.S. § 282*.

Patent Law > ... > Defenses > Estoppel & Laches > Elements

Patent Law > Infringement Actions > General Overview

Patent Law > ... > Defenses > Estoppel & Laches > General Overview

HN5[] Estoppel & Laches, Elements

Under "equitable estoppel," a patentee may be estopped from asserting a claim of infringement. Equitable estoppel requires the alleged infringer to prove by a preponderance of the evidence that (1) the patent owner, through misleading conduct, led the alleged infringer to reasonably infer that the patent owner did not intend to enforce its patent against the alleged infringer; (2) the alleged infringer relied on this conduct; and (3) due to the reliance, the alleged infringer will be materially prejudiced if the patent owner is allowed to proceed on its claim. A finding that a patentee is equitably estopped from asserting a claim is committed to the sound discretion of the trial court.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Patent Law > Subject Matter > General Overview

HN6[] Standards of Review, De Novo Review

Whether a claim is directed to statutory subject matter is a question of law which the appellate court reviews de novo.

Patent Law > ... > Utility Patents > Process Patents > Computer Software & Mental Steps

HN7[] Process Patents, Computer Software & Mental Steps

The first step of the Freeman-Walter-Abele test is to determine whether a mathematical algorithm is recited directly or indirectly in the claim, and the second step is to determine whether the claimed invention as a whole is no more than the algorithm itself.

Patent Law > ... > Utility Patents > Process Patents > Computer Software & Mental Steps

Patent Law > ... > Specifications > Description Requirement > General Overview

HN8[] Process Patents, Computer Software & Mental Steps

Claims written in means-plus-function format contain statutory subject matter even if functional phrases of the means limitations recite mathematical calculations.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN9[] **Attempts to Monopolize, Elements**

In order for a plaintiff to prevail on Sherman Act claims, he must prove that a dangerous probability of the defendant achieving monopoly power exists. He therefore must define a relevant market, establish that the defendant possessed market power, and show an actual adverse effect on competition. Appellate courts apply regional circuit law in determining antitrust issues such as relevant market and market power. All circuits review a district court's grant of summary judgment de novo, applying the same standards as would a district court.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN10[] **Ownership & Transfer of Rights, Licenses**

Mere possession of a patent, or a family of patents, does not establish a presumption of antitrust market power. Furthermore, a patentee may lawfully refuse to issue licenses at all. *35 U.S.C.S. § 271(d)(4)*.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > Conveyances > General Overview

HN11[] **Intellectual Property, Misuse of Rights**

See *35 U.S.C.S. § 271(d)*.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Torts > Business Torts > Unfair Business Practices > General Overview

HN12[] **Conveyances, Licenses**

In order for a plaintiff to prevail on an unfair business practices claim, he must show that the defendant committed some predicate act that is unfair, unlawful, or fraudulent. *Cal. Bus. & Prof. Code § 17001*.

Judges: MICHEL, Circuit Judge, SKELTON, Senior Circuit Judge, and LOURIE, Circuit Judge.

Opinion by: MICHEL

Opinion

MICHEL, *Circuit Judge*.

Roger Schlafly appeals the decisions of the United States District Court for the Northern District of California (1) granting defendants Public Key Partners' ("PKP's") and RSA Data Security, Incorporated's ("RSA's") (collectively, "defendants'") motion for protective order, *Schlafly v. Public Key Partners*, C-94 20512 SW (PVT), slip op. at 4 (N.D. Cal. July 19, 1995); (2) denying Schlafly's motion to compel production of documents, Transcript of Hearing on Motion to Compel, at 11 (N.D. Cal. July 21, 1997); (3) denying Schlafly's motion for summary judgment that defendants are estopped from asserting United States Patent No. 4,405,829 (the " '829 patent") against him and that the '829 patent is invalid as not directed to statutory subject matter under *35 U.S.C. § 101 (1994)*, **[*2]** *Schlafly v. Public Key Partners*, C-94 20512 SW (PVT), slip op. at 2, 7, 11 (N.D. Cal. Aug. 22, 1997); and (4) granting defendants' motion for summary judgment on Schlafly's antitrust and state unfair business practices claims, *Schlafly v. Public Key Partners*, C-94 20512 SW (PVT), slip op. at 2 (N.D. Cal. Aug. 29, 1997). This appeal was submitted for our decision on the briefs on April 1, 1998, without oral argument.

We hold that (1) Schlafly is precluded from appealing the 1995 protective order because of his failure to object to the magistrate judge's decision within the time provided under *Fed. R. Civ. P. 72(a)*; (2) the magistrate judge did not abuse his discretion in denying Schlafly's motion to compel production of documents in 1997; (3) the district court did not err in refusing to estop RSA from enforcing the '829 patent against Schlafly and in holding that the claims of the patent had not been shown to be directed to non-statutory subject matter; and (4) the district court did not err in dismissing Schlafly's antitrust and state unfair business practices claims on summary judgment. We therefore *affirm* the decision of the district court.

BACKGROUND

In 1994, **[*3]** defendants learned that Information Security Corporation was planning to sell products developed by Schlafly to American Telephone & Telegraph Company, Inc. ("AT&T") for resale by AT&T. Defendants believed that the sale of these products violated the terms of the consent judgment between RSA and Schlafly involving the latter's alleged infringement of the '829 patent. Consequently, PKP wrote to AT&T and demanded that AT&T cease distribution and marketing of the products. Several months later, Schlafly wrote to PKP and demanded that PKP refrain from telling others that he had breached the consent judgment or had infringed the '829 patent. PKP wrote back, stating that Schlafly's letter was "defectively vague" and that he had admitted to infringing numerous patents. *Schlafly*, slip op. at 5 (Aug. 22, 1997).

Later in 1994, Schlafly, appearing *pro se*, filed a complaint in the Northern District of California alleging the invalidity of many of defendants' patents, including the '829 patent and United States Patent No. 4,995,082 (the " '082 patent"), and alleging violation of federal antitrust laws and state unfair business practices laws. In 1995, defendants successfully petitioned **[*4]** the court for a protective order to prevent the disclosure of proprietary information to Schlafly. The protective order provided a two-tiered organization of confidential information. Schlafly had access to the first tier entitled "CONFIDENTIAL BUSINESS INFORMATION PROTECTED BY COURT ORDER," but Schlafly had no access to the second tier entitled "CONFIDENTIAL -- ATTORNEY'S EYES ONLY" because of his status as a non-attorney litigant and a direct competitor of the defendants.

In granting the protective order, the magistrate judge reasoned that ordinarily, the "ATTORNEY'S EYES ONLY" limitation protects confidential information from possible misuse by the opposing party, yet allows access to opposing counsel for litigation purposes. Here, however, because Schlafly was appearing *pro se*, the court recognized that the limitation would essentially bar Schlafly from seeing certain evidence at all. The court analyzed whether such a protective order was necessary and determined that, because Schlafly and defendants were direct competitors, the protective order was warranted. The district court, however, recommended to Schlafly that he either obtain legal representation or that he retain **[*5]** an "independent expert consultant" who would be allowed to have access to the information designated "CONFIDENTIAL -- ATTORNEY'S EYES ONLY" and be able to advise Schlafly accordingly. *See Schlafly*, slip op. at 2 (July 19, 1995). Schlafly, however, obtained neither legal counsel nor an independent expert consultant.

In 1997, Schlafly filed, *inter alia*, a motion to compel defendants to produce certain documents. The magistrate judge, however, denied the motion holding that the discovery requests were overly broad and that Schlafly did not carry his burden to tailor his discovery requests with "reasonable particularity" under *Fed. R. Civ. P. 34*.

Schlafly also filed a motion for summary judgment that the '829 patent was invalid for failure to claim statutory subject matter under *35 U.S.C. § 101 (1994)*, and a motion for a declaration of noninfringement of the '082 patent. RSA opposed Schlafly's motion on the '829 patent and filed a counter-motion for summary judgment. RSA also filed a counter-motion for dismissal of Schlafly's claims relating to the '082 patent for absence of an actual case or controversy. *Schlafly*, slip op. at 5 (Aug. 22, 1997). PKP, joined by RSA, moved **[*6]** for summary judgment on Schlafly's antitrust and state unfair business practices claims for failure to produce any evidence to support his allegations. *Schlafly*, slip op. at 2 (Aug. 29, 1997). The district court denied Schlafly's motion and granted RSA's motion regarding the validity of the '829 patent, and the district court dismissed Schlafly's claim on noninfringement of the '082 patent for lack of an actual case or controversy. [1] *See Schlafly*, slip op. at 2 (Aug. 22, 1997). Subsequently, the district court granted PKP's motion for summary judgment on Schlafly's antitrust and unfair business practices claims. *See Schlafly*, slip op. at 2 (Aug. 29, 1997). Schlafly timely appealed to this court. We have subject matter jurisdiction under *28 U.S.C. § 1338 (1994)*.

DISCUSSION

I. The Discovery Orders

Schlafly asserts that one reason the court denied his summary judgment motions **[*7]** is that the earlier adverse discovery decisions prevented him from obtaining relevant documents he needed to prevail on summary judgment. Hence, we address these decisions.

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[1] Schlafly has not argued for reversal of the decision of the district court relating to the '082 patent.

A. The Protective Order

Schlafly argues that the protective order entered on August 29, 1995, is unfair because the category "CONFIDENTIAL -- ATTORNEY'S EYES ONLY" prohibited Schlafly from looking at the specified documents, even though he was acting as his own attorney. ***HN1***[] We review matters not within our exclusive jurisdiction, such as matters relating to discovery, under the applicable law of the regional circuit in which the district court sits, in this case the Ninth Circuit. *See* *Serrano v. Telular Corp., 111 F.3d 1578, 1584, 42 U.S.P.Q.2D (BNA) 1538, 1543 (Fed. Cir. 1997)*.

Fed. R. Civ. P. 72(a) [2] provides that when objecting to a magistrate judge's nondispositive order a party must serve and file objections with the district court judge within 10 days after service of the order. Schlafly did not do so. The Ninth Circuit has held that "a party who fails to file timely objections to a magistrate judge's nondispositive order with the district judge to whom the case is assigned forfeits its right to appellate **[*8]** review of that order." *Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1174 (9th Cir. 1995)*. It cannot be disputed that Schlafly did not object to the entry of the protective order within the time allotted by *Fed. R. Civ. P. 72(a)*; therefore, following *Simpson*, we hold that Schlafly has forfeited his right to appellate review of that order.

Schlafly argues, however, that his status as a *pro se* litigant entitles him to a more lenient interpretation of the rules. We cannot agree. The plaintiff in *Simpson* who forfeited his right to appellate review was acting on his own behalf as well. *Id. at 1172*.

B. The Order Denying the Motion [*9] to Compel [3]

Schlafly argues that the magistrate judge's July 21, 1997 denial of his motion to compel production of documents should be reversed. Schlafly argues that all of the requested documents, which relate to the PKP partnership and its demise, are relevant and should have been discoverable because they "concerned the PKP patents' validity, scope, licensing, and agreements between the partners to control the patent business. These are all issues that are central to my case. Almost every single document is probably relevant."

HN3[] Schlafly, however, has the burden to state his discovery requests with reasonable particularity and not to make unreasonably cumulative or duplicative requests such that the burden or expense of complying with the requests outweighs their likely benefit. *See Fed. R. Civ. P. 26(b)(2)*, *34(b)*. In denying Schlafly's motion to compel, the magistrate judge found that Schlafly was "requesting every **[*10]** single piece of paper that's been produced in four other litigations plus an arbitration, many of which -- in fact, all of which have protective orders in those cases, issued by other courts and judges." Transcript of Hearing, at 9 (July 21, 1997). The magistrate judge, therefore, denied Schlafly's motion, and Schlafly has not shown us that this denial was an abuse of discretion. We therefore affirm the decision to deny Schlafly's motion to compel.

II. The '829 Patent

Schlafly asserts that the '829 patent is unenforceable based on "partnership estoppel" and is invalid under *35 U.S.C. § 101* for claiming nonstatutory subject matter.

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[2] *Rule 72*. ***HN2***[] Magistrate Judges; Pretrial Orders

(a) Nondispositive Matters. . . . Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made.

Fed. R. Civ. P. 72(a).

[3] Schlafly was represented by counsel in the district court for this motion to compel.

A. Estoppel

Schlafly asserts that RSA should be estopped from enforcing the '829 patent because its former partner, Cylink, has challenged its validity in another lawsuit. Schlafly terms his allegation "partnership estoppel." According to Schlafly, RSA now should not be allowed to enforce its '829 patent "when it had allowed a partner to allege the patent's invalidity in court." However, when Cylink asserted the invalidity of the '829 patent in court, the partnership had dissolved. RSA, therefore, did not "allow" Cylink to assert the **[*11]** patent's invalidity; it had no say in the matter.

HN4[] A patent is presumed valid. *See* *35 U.S.C. § 282 (1994)*. No judgment has been rendered against RSA invalidating its '829 patent. Accepting Schlafly's argument would, therefore, give a binding effect to Cylink's unproven allegations and would vitiate the statutory presumption of validity. This we cannot do. Because the presumption of validity continues, the burden of proof of the elements of estoppel remains on Schlafly.

Schlafly does not cite any patent decisions dealing with "partnership estoppel." Schlafly's reliance on a 1930 California state court decision based on a failed land agreement, *Favali v. Richardson, 285 P. 1062, 1066, 104 Cal. App. 301, 308 (1930)*, is not persuasive. The state court in *Favali* held that an estoppel against one partner arose where the other partner made misleading promises to the plaintiff and the plaintiff relied to his detriment. *See id. Favali*, however, does not support Schlafly's assertion that unproven allegations of patent invalidity by a former partner can support an estoppel barring the patentee from asserting its right to exclude.

The closest doctrine in patent law to Schlafly's **[*12]** "partnership estoppel" is "***HN5***[] equitable estoppel," under which a patentee may be estopped from asserting a claim of infringement. Equitable estoppel requires the alleged infringer to prove by a preponderance of the evidence that (1) the patent owner, through misleading conduct, led the alleged infringer to reasonably infer that the patent owner did not intend to enforce its patent against the alleged infringer; (2) the alleged infringer relied on this conduct; and (3) due to the reliance, the alleged infringer will be materially prejudiced if the patent owner is allowed to proceed on its claim. *See* *A. C. Aukerman Co. v. R. L. Chaides Constr. Co., 960 F.2d 1020, 1041, 22 U.S.P.Q.2D (BNA) 1321, 1335-36 (Fed. Cir. 1992)* (*in banc*). A finding that a patentee is equitably estopped from asserting a claim is committed to the sound discretion of the trial court. *See id.* at 1041, 22 U.S.P.Q.2D (BNA) at 1335.

In order to show equitable estoppel, Schlafly must be able to prove each of the above requirements recited in *Aukerman*. However, he fails all three; he has not demonstrated that anyone made misleading representations that the patent would not be enforced against him or that he relied on any such **[*13]** misrepresentations to his detriment. *See* *Gasser Chair Co. v. Infanti Chair Mfg. Corp., 60 F.3d 770, 776, 34 U.S.P.Q.2D (BNA) 1822, 1826 (Fed. Cir. 1995)* (equitable estoppel requires misleading conduct to lead the alleged infringer to reasonably infer that the patent owner did not intend to enforce its rights). Quite the contrary, RSA had already sued Schlafly under the '829 patent and had him enjoined from infringement. He, therefore, should have been aware that RSA might later enforce its rights in the '829 patent, for it had done so before. Furthermore, the PKP partnership was dissolved in 1995, and the lawsuit filed by Cylink alleging the invalidity of the '829 patent was filed thereafter. Schlafly, however, filed his lawsuit against RSA and PKP in 1994, *prior* to the dissolution of the partnership. Therefore, Schlafly could not have relied to his detriment on any later misleading representations made by either RSA or PKP about the patent's validity. Schlafly, therefore, cannot succeed on his assertion of estoppel, and we affirm the holding of the district court in that regard.

B. Statutory Subject Matter Under *35 U.S.C. § 101*

Schlafly asserts that the '829 patent is invalid **[*14]** for failure to claim statutory subject matter under *35 U.S.C. § 101*. ***HN6***[] Whether a claim is directed to statutory subject matter is a question of law which we review *de novo*. *See* *Arrhythmia Research Tech. v. Corazonix Corp., 958 F.2d 1053, 1055, 22 U.S.P.Q.2D (BNA) 1033, 1035 (Fed. Cir. 1992)*.

Schlafly argues that the '829 patent recites only a mathematical formula, and a mathematical formula alone is not patentable. Schlafly further asserts that the claims of the '829 patent preempt all uses of the recited algorithm and hence fail to pass the *Freeman-Walter-Abele* two-step test for statutory subject matter under *section 101*. *See generally* *In re Abele, 684 F.2d 902, 214 U.S.P.Q. (BNA) 682 (CCPA 1982)*; *In re Walter, 618 F.2d 758, 205 U.S.P.Q. (BNA) 397 (CCPA 1980)*; *In re Freeman, 573 F.2d 1237, 197 U.S.P.Q. (BNA) 464 (CCPA 1978)*. ***HN7***[] The first step of this test is to determine whether a mathematical algorithm is recited directly or indirectly in the claim, and the second step is to determine whether the claimed invention as a whole is no more than the algorithm itself. *See* *In re Alappat, 33 F.3d 1526, 1559, 31 U.S.P.Q.2D (BNA) 1545, 1557 (Fed. Cir. 1994)* (*in banc*) (holding that "the proper inquiry in **[*15]** dealing with the so called mathematical subject matter exception to *§ 101* alleged herein is to see whether the claimed subject matter as a whole is a disembodied mathematical concept, . . . which in essence represents nothing more than a 'law of nature,' 'natural phenomenon,' or 'abstract idea'").

Although Schlafly does not specify what claims of the '829 patent he believes to be invalid, the basis for declaratory judgment jurisdiction rests upon the 1994 letter from PKP to AT&T demanding that AT&T cease distribution and marketing of the products developed by Schlafly. *See Schlafly*, slip op. at 4 (Aug. 22, 1997). As AT&T was not practicing the method of establishing cryptographic communications claimed by the method claims of the '829 patent because it was simply reselling the accused products, declaratory judgment jurisdiction, in the absence of other evidence, rests only on the apparatus claims of the '829 patent. *See* *Grain Processing Corp. v. American Maize-Prods. Co., 840 F.2d 902, 906, 5 U.S.P.Q.2D (BNA) 1788, 1791 (Fed. Cir. 1988)* (holding no "reasonable apprehension" of suit on process claims, but sustaining jurisdiction on product claims).

We therefore address whether the **[*16]** apparatus claims of the '829 patent recite non-statutory subject matter under *section 101*. Each of the apparatus claims of the '829 patent contains limitations drafted in means-plus-function format. Those limitations are therefore limited according to *35 U.S.C. § 112*, P 6 to structure disclosed in the specification and equivalent structures.

This court, *in banc*, has determined that ***HN8***[] claims written in means-plus-function format contain statutory subject matter even if functional phrases of the means limitations recite mathematical calculations. *See* *Alappat, 33 F.3d at 1544, 31 U.S.P.Q.2D (BNA) at 1558*. Therefore, the claims of the '829 patent do not wholly preempt the use of mathematical calculations because the claims are limited to the structure disclosed in the specification and equivalent structures for performing the claimed functions. We therefore affirm the decision of the district court denying Schlafly summary judgment that the '829 patent is invalid.

III. The Antitrust and Unfair Business Practices Claims

Schlafly contends that defendants' partnership and licensing policies violated both *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2 (1994)*, and the California **[*17]** Unfair Business Practices Act, *Cal. Bus. & Prof. Code §§ 17001*, *17046*, *17048*, *17500* (1990).

A. Antitrust Claims

HN9[] In order for Schlafly to prevail on his Sherman Act claims, he must prove that a dangerous probability of RSA or PKP achieving monopoly power exists. He therefore must define a relevant market, establish that defendants possessed market power, and show an actual adverse effect on competition. *See* *Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)* (holding that plaintiff must prove a dangerous probability of achieving monopoly power for an attempted monopolization claim under *section 2* of the Sherman Act); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1488-89 (9th Cir. 1991)* (holding failure to establish a relevant market defeats a Sherman Act, *section 1* claim).

This court applies regional circuit law in determining antitrust issues such as relevant market and market power. *See* *Nobelpharma v. Implant Innovations, Inc., 141 F.3d 1059, 1998 U.S. App. LEXIS 5564, 1998 WL 122399, *8*

(Fed. Cir. 1998) (holding, *in banc*, that "whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity **[*18]** from ***antitrust law*** is . . . a question of Federal Circuit law," but applying regional circuit law to all other aspects of an antitrust allegation). The Ninth Circuit, like all other circuits, reviews a district court's grant of summary judgment *de novo*, applying the same standards as would a district court. *See* Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 853 (9th Cir. 1995). As did the district court, we agree that Schlafly has failed to make the requisite showing of market power in a relevant market for his claim to survive summary judgment.

Schlafly claims that the relevant market is public key cryptography and cryptography software, with PKP monopolizing the former and RSA the latter. Schlafly, however, does not provide any economic analysis or other evidence to support his mere allegations of relevant market or market power. There is nothing in the record to indicate that anything was unlawful about defendants' patented inventions, licensing practices, or business partnerships. *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966) (distinguishing the willful acquisition or maintenance of monopoly power from its "growth or development **[*19]** as a consequence of a superior product, business acumen, or historic accident").

Schlafly further argues that simply because RSA "is the dominant U.S. vendor of cryptography software," it has market power in the relevant market. Schlafly, however, fails to submit any evidence to support this assertion other than the ownership and licensing of patents. ***HN10***[] Mere possession of a patent, or a family of patents, does not establish a presumption of antitrust market power. *See* Abbott Labs. v. Brennan, 952 F.2d 1346, 1354, 21 U.S.P.Q.2D (BNA) 1192, 1199 (Fed. Cir. 1991) (holding "the commercial advantage gained by new technology and its statutory protection by patent do not convert the possessor thereof into a prohibited monopolist," citing Grinnell, 384 U.S. at 570-71). Furthermore, a patentee may lawfully refuse to issue licenses at all. *See* 35 U.S.C. § 271(d)(4) (a patentee is not guilty of misuse by virtue of having "refused to . . . use any rights to the patent").

Schlafly contends further that RSA's patent licensing policy is unreasonable because RSA refuses to license "toolkits" or allow licensees to purchase "toolkit" products from another supplier. However, under 35 U.S.C. § 271(d) ***[*20]*** (1994):***HN11***[]

> No patent owner . . . shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason [that he] . . . (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.

Thus, RSA's decision to restrict its licenses and to retain its "toolkit" rights does not constitute an unlawful practice in the absence of proof that it has market power in the relevant market.

We, therefore, affirm the district court's grant of summary judgment to defendants on Schlafly's antitrust claims.

B. California Unfair Business Practices

HN12[] In order for Schlafly to prevail on his unfair business practices claim, he must show that defendants committed some predicate act that is unfair, unlawful, or fraudulent. *See* Cal. Bus. & Prof. Code § 17001.

Schlafly contends that defendants misused their patents and maintained unfair and unlawful licensing policies **[*21]** because defendants exaggerated the scope of some of their patents and licensed other patents known to be invalid. The evidence, however, even when viewed in the light most favorable to Schlafly, does not show either that statements about the scope of defendants' patents were made in bad faith or that defendants knew that any of the patents were invalid. Furthermore, we note that Schlafly has failed to establish the invalidity of any of these patents during the present litigation.

We therefore affirm the district court's grant of summary judgment in favor of defendants on Schlafly's state unfair business practices claim.

[Omega Homes v. City of Buffalo]

United States District Court for the Western District of New York

April 30, 1998, Decided

97-CV-0680C(M)

Reporter

4 F. Supp. 2d 187 *; 1998 U.S. Dist. LEXIS 6087 **; 1998-1 Trade Cas. (CCH) P72,174

OMEGA HOMES, INC., Plaintiff, -vs- CITY OF BUFFALO, NEW YORK; ANTHONY M. MASIELLO, individually and as Mayor of Defendant City of Buffalo; and ALAN DeLISLE, individually and as Commissioner, Department of Community Redevelopment of Defendant City of Buffalo; MJ PETERSON/FORBES HOUSING CO., DENNIS J. PENMAN, President of Defendant MJ PETERSON/FORBES HOUSING CO.; JAMES MANAGEMENT CORP. and JAMES ANDERSON, President of Defendant JAMES MANAGEMENT CORP., Defendants.

Disposition: [1]** Defendants' motion to dismiss (Items 11, 14, 16) granted. Plaintiff's motion for a preliminary injunction (Item 3) denied as moot. Complaint dismissed.

Core Terms

neighborhood, private sector, urban renewal, municipality, immune, funds, defendants', urban, Zone, economic development, anticompetitive, allegations, anti trust law, conspiracy, Homeownership, redevelopment, purposes, argues, sham, community development, antitrust liability, motion to dismiss, antitrust claim, state law claim, state policy, articulated, antitrust, housing, blight

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

[HN1][ ] **Higher Education & Professional Associations, Colleges & Universities**

In a motion to dismiss, all facts and allegations in the complaint must be viewed in a light most favorable to the plaintiff. A dismissal is warranted under [Fed. R. Civ. P. 12(b)(6)] only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Notably, this generous approach to pleading applies in the antitrust context.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN2[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Antitrust Act forbids every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN3[] Antitrust & Trade Law, Sherman Act

Section 2 of Sherman makes it an offense for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. 15 U.S.C.S. § 2.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN4[] Exemptions & Immunities, Parker State Action Doctrine

State economic regulation should not be preempted by federal antitrust laws without explicit evidence that such is Congress' will. When a state acts in its sovereign capacity, its actions are immune from federal antitrust scrutiny. A municipality will be immune from antitrust liability only if it acts as an instrumentality of the state, through which the state has clearly and affirmatively chosen to implement its policies. When a state agency, municipality, or other state subdivision claims a state immunity from federal law, it must first identify a "clearly expressed state policy" that authorizes its actions. So long as the resulting anticompetitive activities are a foreseeable consequence of the state delegation, the "clear articulation" standard has been met.

Governments > Public Improvements > Community Redevelopment

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Governments > Local Governments > Finance

HN5[] Public Improvements, Community Redevelopment

N.Y. Gen. Mun. Law § 503 states in part that every municipality is hereby authorized to plan and undertake one or more urban renewal projects and shall have the powers necessary or convenient to carry out and effectuate such project or projects and the purposes and provisions of this article, including but not limited to the powers to cooperate with the federal government and apply for and accept advances, loans, grants, subsidies, contributions and any other form of financial assistance from the federal government, or from the state, county or other public body, or from any sources public or private, for the purposes of this article.

Governments > Public Improvements > Community Redevelopment

Public Health & Welfare Law > Housing & Public Buildings > General Overview

HN6[] **Public Improvements, Community Redevelopment**

N.Y. Gen. Mun. Law § 507 states in part that notwithstanding anything to the contrary contained in this article and notwithstanding the provisions of any general, special or local law applicable to the sale of real property by a municipality, such real property and appurtenances thereto may be sold, leased for a term not exceeding ninety-nine years or otherwise disposed of for the effectuation of any of the purposes of the urban renewal plan in accordance with the urban renewal plan.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN7[] **US Department of Justice Actions, Civil Actions**

Noerr- Pennington's general principle is that the federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN8[] **Noerr-Pennington Doctrine, Sham Exception**

A "sham" situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN9[] **Jurisdiction, Jurisdictional Sources**

When all federal claims are eliminated in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction over remaining state law claims and dismissing them without prejudice.

Counsel: WAYNE R. GRADL, ESQ., of Counsel, GRADL POLOWITZ, Buffalo, New York, for Plaintiff.

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Judges: JOHN T. CURTIN, United States District Judge.

Opinion by: JOHN T. CURTIN

Opinion

[*188] DECISION and ORDER

CURTIN, District Judge

INTRODUCTION

Before the court are defendants' motions to dismiss plaintiff's complaint pursuant to *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil Procedure* and *28 U.S.C. § 1367* (Items 11, 14, 16). Plaintiff responded with an affidavit and a **[**2]** memorandum of law (Items 25 and 26), and defendants filed reply briefs (Items 27, 28, 29). The parties appeared before the court on December 22, 1997, for oral argument.

PROCEDURAL HISTORY

Plaintiff Omega Homes, Inc. ("Omega"), commenced this action on September 2, 1997, with the filing of a summons and complaint (Item 1). Plaintiff alleges that defendants City of Buffalo ("City"), Mayor Anthony Masiello, and Commissioner of Community Development **[*189]** Alan DeLisle (the "City defendants") violated the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2 et seq.*, the Donnelly Act, *New York General Business Law § 340*, and the *New York State Constitution, Articles 1* and *3*, when they granted exclusive development rights for the Willert Park neighborhood in the City of Buffalo to defendants M.J. Peterson/Forbes Housing Co. ("Peterson"), Dennis J. Penman (President of Peterson), James Management Corp. ("James"), and James Anderson (President of James) (the "private sector defendants") (Id.).

On October 17, 1997, plaintiff filed a motion for an Order granting a preliminary injunction pursuant to *Rule 65 of the Federal Rules of Civil Procedure* because plaintiff claims it is threatened **[**3]** with irreparable injury (Item 3). In response, defendants filed motions to disqualify plaintiff's attorney (Items 7, 8, 10). After the court denied defendants' motion to disqualify (Item 24), defendants filed motions to dismiss (Items 11, 14, 16). The parties agreed that the court should address defendants' motions to dismiss (Items 11, 14, 16) before addressing plaintiff's motion for a preliminary injunction (Item 3).

BACKGROUND

Plaintiff is in the business of developing and constructing affordable and subsidized residential housing. Since its formation in 1980, plaintiff has been involved in the development and building of approximately 1,000 residential units in Buffalo and Albany, New York. A number of these projects have been funded by the United States

Department of Housing and Urban Development ("HUD") and plaintiff has been selected as a "HUD Demonstration Developer" (Item 1, P 2).

Plaintiff claims that the City defendants created an exclusive development arrangement when they gave the private sector defendants the exclusive right to develop, build, and sell all of the 344 new residential housing units in the Willert Park Neighborhood redevelopment project. Plaintiff **[**4]** asserts that these acts are per se unlawful and constitute a restraint of trade, commerce, and competition (Item 1, P 41).

Defendants explain that this project began after HUD issued a "Notice of Funding Availability" ("NOFA") for grants under section 108(q) of the Housing and Community Development Act of 1974 on July 16, 1996, in the Federal Register. *61 Fed. Reg. 37,132*-41. HUD solicited proposals "to undertake large-scale projects that would create Homeownership Zones--proposals designed to reclaim hard-pressed neighborhoods by creating homeownership opportunities for hardworking low- and moderate-income families and serving as a catalyst for private investment, business creation and neighborhood revitalization." *Id. at 37,132*. "Homeownership Zones are intended to make a major impact in distressed neighborhoods by converting vacant, abandoned land and buildings into thriving, vibrant neighborhoods by using single-family homeownership as a catalyst for revitalization." *Id. at 37,134*. The NOFA further stated that "offering these home ownership opportunities to low- and moderate-income residents in designated neighborhoods will provide the foundation for needed commercial **[**5]** and economic development." Id.

HUD's NOFA stated that "construction should be ready to proceed promptly" and "particular attention will be paid to applications that can begin significant construction activities within 60 days of the award of the EDI grant." Id. The NOFA explained that "it is expected that applicants will donate land, commit to construct site improvements and public facilities, waive fees, expedite approvals of permits and plans, and otherwise act to remove impediments to the development of affordable housing." Id. The NOFA further stated that "it is further expected that the applicant will establish extensive partnerships with the private and nonprofit sectors, such as businesses, lending institutions, real estate professionals, builders, educational institutions, nonprofit organizations, religious entities, and other city-wide and community-based organizations." Id. Applicants initially were required to postmark their applications by September 16, 1996, *id. at 37,132*, but on September 9, 1996, this date was extended until October 8, 1996, in the Federal Register. Id. at 47, 523-24.

[*190] The City of Buffalo applied to establish a Homeownership **[**6]** Zone ("HOZO") in the Willert Park neighborhood. Willert Park is within a New York State Economic Development Zone, pursuant to New York General Municipal Law Article 18-B and City Charter § 281 (subzone 1), and is within the City's Federal Enterprise Community ("FEC"). Willert Park qualified as an Economic Development Zone under *New York General Municipal Law § 958* because it is an area of pervasive poverty, high unemployment, and economic distress. Forty-seven percent of the population in this area lives below the poverty level, the unemployment rate is twenty-seven percent, and the owner-occupancy rate is five percent, as compared to fifty-eight percent nationwide (Item 11, Exh. A. (HOZO Application)).

On September 11, 1996, there was a public hearing on the proposal before the Economic Development Committee of the Common Council of the City of Buffalo. At this meeting, Council Member at Large Beverly Gray questioned why there were only two developers, Peterson and James, to work on the project. The Buffalo News, 9/29/96. After debate, a compromise by Council President James Pitts was approved that requires community development officials to devise a plan to include other **[**7]** qualified developers if the city is awarded the federal grant. Id.

The City of Buffalo submitted its application on October 7, 1996, and proposed that a HUD Economic Development Initiative ("EDI") grant and Section 108 loan funds would be used to redevelop the Willert Park neighborhood by subsidizing low- and moderate-income housing. The City's HOZO application indicated that the redevelopment of the Willert Park neighborhood is a continuation of the City's Ellicott Urban Renewal Plan, adopted pursuant to Article 15 of the General Municipal Law. The City also noted that previous development by Peterson and James in the Pratt-Willert project was nationally recognized, and extolled by HUD as an example for HOZO development in HUD's publication "New American Neighborhoods" (Item 19, pgs. 18-19).

In formulating its HOZO application, the City put together a private/public partnership including the City, the New York State Affordable Housing Corporation, M & T Bank, the Ellicott District Community Development Corporation, the Buffalo Urban Renewal Agency, and the Buffalo Neighborhood Revitalization Corporation. The City planned to utilize $ 7,675,000 in Section 108 loan funds, $ 5,000,000 **[**8]** in EDI funds, $ 1,000,000 in New York State Affordable Housing Corporation funds, $ 400,000 in FEC funds, $ 1,200,000 from a Community Development Block Grant ("CDBG"), $ 1,000,000 in City Funds, $ 540,000 in Buffalo Enterprise Development Corporation ("BEDC") funds, $ 1,461,600 in home buyer down payment, and approximately $ 27,770,000 in permanent mortgage financing to provide for funding of land assembly, demolition, site preparation, public improvements, park improvements, and homeownership assistance (Id.).

On April 8, 1997, a press release issued by HUD announced that Buffalo was one of six cities nationwide chosen to receive HOZO EDI grants and Section 108 loan funds. On or about July 22, 1997, HUD formally approved the City's application. According to defendant DeLisle, "the City's application was the highest scoring application among the 97 reviewed by HUD and the City's application was the only one granted in full." (Item 11, P 31).

Based on the foregoing facts, the City defendants and the private sector defendants filed motions to dismiss (Items 11, 14, 16).

DISCUSSION

HN1[] In a motion to dismiss, all facts and allegations in the complaint must be viewed in **[**9]** a light most favorable to the plaintiff. *Hamilton Chapter of Alpha Delta Phi. Inc. v. Hamilton College, 128 F.3d 59, 63 (2d Cir. 1997)*. "A dismissal is warranted under *Rule 12(b)(6)* only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id. at 62-63* (quoting *Conley v. Gibson, 355 U.S. 41, 45- 46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957))*. Notably, "this generous approach to pleading applies in the antitrust context." *128 F.3d at 63* (citing *Furlong v. Long Island College Hosp., 710 F.2d 922, 927 (2d Cir. 1983))*.

[*191] I. Plaintiff's Federal Antitrust Claims

Plaintiff's first four claims against defendants arise under the Sherman Antitrust Act ("Sherman"), *15 U.S.C. §§ 1* and *2 et seq.* ***HN2***[] *Section 1* of Sherman forbids "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1 (1994)*. Plaintiff alleges that defendants violated *Section 1* of Sherman when the City, Masiello, and DeLisle (the "City defendants") granted Peterson, Penman, James, and Anderson (the "private sector defendants") an exclusive **[**10]** right to develop, build, and sell all 344 homes in the Willert Park Neighborhood. Plaintiff argues that this constitutes an unlawful restraint of trade, commerce, and competition, and that defendants conspired to unlawfully restrain competition in violation of *Section 1* of Sherman.

Plaintiff also alleges that defendants violated *Section 2* of Sherman because they attempted to monopolize and destroy competition. ***HN3***[] *Section 2* of Sherman makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states." *15 U.S.C. § 2 (1994)*. Plaintiff argues that Willert Park constitutes an "essential facility" and/or "relevant market" and that maintenance of this "monopoly" will cause plaintiff to suffer irreparable injury and thus defendants should be enjoined from maintaining a monopoly pursuant to *Section 2* of Sherman.

A. Defendants City, Masiello and DeLisle (in their official capacities)

The City defendants argue that their actions are protected from federal ***antitrust law*** under the state action immunity doctrine articulated by the Supreme Court in *Parker* ***[**11]*** *v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* and its progeny. In *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032, 1039 (2d Cir. 1986)*, the Second Circuit explained that Parker's "primary teaching is that ***HN4***[] state economic regulation should not be preempted by federal antitrust laws without explicit evidence that such is Congress' will." The Second Circuit summarized the Parker doctrine in Cine 42nd Street as:

> (1) When a state acts in its sovereign capacity, its actions are immune from federal antitrust scrutiny. *Parker, 317 U.S. at 351-52*. . . .
>
> (2) . . . A municipality will be immune from antitrust liability only if it acts as an instrumentality of the state, through which the state has clearly and affirmatively chosen to implement its policies. *Community Communications Co. v. City of Boulder, [455 U.S. 40, 52-54, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)]*; [*Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 411-13, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)]*. (3) When a state agency, municipality, or other state subdivision claims a state immunity from federal law, it must first identify a "clearly expressed **[**12]** state policy" that authorizes its actions. [*Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)]*.
>
> (4) So long as the resulting anticompetitive activities are a foreseeable consequence of the state delegation, the "clear articulation" standard has been met. Hallie, [*471 U.S. at 42-44*.] . . . (5) The second requirement--"active state supervision"--is no longer required in the case of a municipality, because a municipality, unlike a private party, has no incentive to act other than in the public interest. Hallie, [*471 U.S. at 47*].

Cine 42nd Street, 790 F.2d at 1042-43.

Based on the foregoing, defendant City argues that it is a municipality which is immune from antitrust liability because it acted pursuant to a clearly articulated state policy to combat urban blight. The City further argues that anticompetitive activities are a foreseeable consequence of this policy. In contrast, plaintiff argues that the state action immunity doctrine does not apply because no state legislation contemplates the monopoly and/or restraint of trade under attack. Plaintiff argues that none of the New York State Urban Renewal Statutes **[**13]** cited by defendants evince a clearly articulated **[*192]** state policy to replace competition in the residential and/or affordable housing markets.

Under Parker and its progeny, the City defendants do not enjoy immunity per se, because the City is a municipality and not a state. See *Cine 42nd Street, 790 F.2d at 1042*. However, the City defendants are immune since they acted as an instrumentality of the state pursuant to a clearly expressed state policy and the anticompetitive effects of their actions were foreseeable. See *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 370-73, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*. New York state law authorizes the City defendants' actions because the City acted pursuant to Article 15 of the New York General Municipal Law entitled "Urban Renewal Law" in applying for the EDI grant from HUD. Specifically, the City defendants acted pursuant to ***HN5***[] *§ 503*, "Powers of Municipalities," that states in pertinent part:

> Every municipality is hereby authorized to plan and undertake one or more urban renewal projects and shall have the powers necessary or convenient to carry out and effectuate such project or projects and the purposes and provisions **[**14]** of this article, including but not limited to the following powers:
> (a) Cooperate with the federal government and apply for and accept advances, loans, grants, subsidies, contributions and any other form of financial assistance from the federal government, or from the state, county or other public body, or from any sources public or private, for the purposes of this article; . . . .

The City defendants also acted pursuant to *§ 507*, "Disposition of Property," of Article 15 of the New York General Municipal Law and *§ 968*, "Disposition of Property," of Article 18-B of the New York General Municipal Law, when they disposed the real property in Willert Park to the private sector defendants. ***HN6***[] *Section 507* states in pertinent part:

> 2. Notwithstanding anything to the contrary contained in this article and notwithstanding the provisions of any general, special or local law applicable to the sale of real property by a municipality, such real property and appurtenances thereto may be sold, leased for a term not exceeding ninety-nine years or otherwise disposed

> of for the effectuation of any of the purposes of the urban renewal plan in accordance with the urban renewal plan: ….

[15]** *Section 968(b)* under Article 18-B, "New York State Economic Development Zones," also supports the actions taken by the City defendants and states:

> (b) Any real or personal property owned by any local governmental entity or the state and located within an economic development zone may be sold or leased to any person pursuant to this section without public bidding or public sale. . . .

(Emphasis added.)

A plain reading of the New York State statutes demonstrates a "clearly articulated" policy under *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*, to combat urban blight. One of the purposes of the Urban Renewal Statute was to combat urban decay in "slum or blighted areas." *N.Y. Gen. Mun. Law § 501*. Arguably, without this statute, private enterprise would not enter areas of urban decay and blight. See *Cine 42nd Street, 790 F.2d at 1035*.

Contrary to plaintiff's arguments, it is evident that the New York State Legislature contemplated anticompetitive effects when it passed the Urban Renewal Statutes and the laws establishing Economic Development Zones. In attempting to defeat urban blight, the Urban Renewal Statutes **[**16]** removed obstacles and barriers normally faced in a truly competitive market. Many sections of the General Municipal Law state that a public auction or public bidding is not required. See, e.g., *N.Y. Gen. Mun. Law §§ 507*, *968*. As the Second Circuit stated in Cine 42nd Street, "when the state allows for the creation of model cities and urban redevelopment zones, a reasonable consequence of such redevelopment is that decisions internal to the zones will have effects outside them." *Cine 42nd Street, 790 F.2d at 1047*.

Furthermore, contrary to plaintiff's contentions, *Oberndorf v. City and County of Denver, 653 F. Supp. 304 (D. Colo. 1986)* (Oberndorf I) supports this court's findings **[*193]** in the case at bar. In Oberndorf I, the city of Denver acted under the state urban renewal statutes and formed a redevelopment plan and condemnation scheme. In ruling, the district court did not grant defendants' motion to dismiss because plaintiffs' allegations of a "sham" created an issue of fact as to whether the officials personally gained from the activity. However, the case at bar is distinguishable from Oberndorf I because plaintiff does not allege a "sham" here.

As such, **[**17]** the case at bar is similar to *Oberndorf II, Oberndorf v. City and County of Denver, 696 F. Supp. 552 (D. Colo. 1988)*, aff'd, *900 F.2d 1434* (10th Cir.), cert. denied, *498 U.S. 845 (1990)*. Following discovery after the ruling in Oberndorf I, the District Court granted the defendants' motion for summary judgment and dismissed the complaint because the defendants' actions were consistent with Colorado state law regarding urban renewal, and discovery revealed that the evidence of conspiracy did not reach the level of a "sham." *Oberndorf II, 696 F. Supp. at 560*. In the case at bar, defendants' acting pursuant to the urban renewal statutes and the lack of allegations of a "sham" are similar to Oberndorf II. Accordingly, the federal antitrust claims against the City defendants are dismissed.

B. Defendants Masiello, and DeLisle (in their individual capacities)

Plaintiff has sued defendants Masiello and DeLisle in their individual capacities as well as their official capacities. However, plaintiffs complaint focuses on decisions taken by them in their roles as City officials. In *Fisichelli v. City Known as Town of Methuen, 956 F.2d 12, 15-16 (1st Cir. 1992)*, **[**18]** then Chief Judge Breyer explained that a plaintiff cannot "avoid the ruling of Columbia [v. *Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)]* simply by substituting, for the name of the town, the names of the town officials who approved the challenged municipal action." As such, I conclude that the actions of which plaintiff complains "are actions taken by a municipal authority, and, for antitrust purposes, they amount to 'an authorized implementation of state policy.'" *Fisichelli, 956 F.2d at 16* (citing *Columbia, 499 U.S. at 370*). Therefore, plaintiff's federal antitrust claims against defendants Masiello and DeLisle in their individual capacities are dismissed.

C. Defendants Peterson, Penman, James, and Anderson

Inasmuch as the City defendants had the authority to act in an anticompetitive manner, the private sector defendants (Peterson, Penman, James, and Anderson) acting in concert with them are also entitled to state immunity. See *Cine 42nd Street, 790 F.2d at 1048*.

Furthermore, the actions of the private sector defendants are protected from federal ***antitrust law*** under the Noerr-Pennington doctrine, which is the **[**19]** "corollary to Parker." *Columbia 499 U.S. at 379*. Noerr-Pennington is a corollary doctrine because Parker "did not purport to immunize from antitrust liability the private parties who urge them to engage in anticompetitive regulation." Id.

Noerr-Pennington is derived chiefly from three Supreme Court decisions: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523*, reh'g denied, *365 U.S. 875, 5 L. Ed. 2d 864, 81 S. Ct. 899 (1961)*; *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*; and *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*. ***HN7***[] Noerr- Pennington's general principle is that "the federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government." *499 U.S. at 379-80*.

In the case at bar, Noerr-Pennington protects the private sector defendants from federal antitrust liability. Attempts to influence governmental action are immune from antitrust liability under the doctrine even when undertaken for anticompetitive purposes. Miracle **[**20]** *Mile Associates v. City of Rochester, 617 F.2d 18, 20 (2d Cir. 1980)*. Plaintiff's complaint only alleges that the private **[*194]** sector defendants entered into an agreement with the City defendants that, at most, could be considered successful lobbying activity. While plaintiff uses the words "conspiracy," "restraint of trade," and "monopoly" in its complaint, no facts are presented other than the entering into of an agreement. No bad acts are alleged, and no fraud is alleged. "Assuming *arguendo* that the agreement between the City and the Developers restricts competition, they are immune from liability under the antitrust laws." *Juster Assocs. v. City of Rutland. Vt., 901 F.2d 266, 269 (2d Cir. 1990)*.

Furthermore, the "sham exception" to the Noerr-Pennington doctrine, which would overcome Noerr-Pennington immunity, does not apply to invalidate the actions of the private sector defendants in the case at bar. ***HN8***[] "A 'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all, *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 n.4, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*, not one 'who 'genuinely **[**21]** seeks to achieve his governmental result, but does so *through improper means,"* *id., at 508, n.10* (quoting *Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 465, n.5* ([9th Cir.] 1987))." *Columbia, 499 U.S. at 380*.

In *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*, the Supreme Court held "that a 'conspiracy' exception to Noerr must be rejected." *Id. at 383*. While a jury had found that the defendant billboard company had conspired with the City of Columbia to keep the plaintiff, a rival, out of the city, the District Court granted defendants' motions for judgment notwithstanding the verdict. The Court of Appeals reversed and reinstated the verdict. The Supreme Court reversed the Court of Appeals and explained:

> Insofar as the identification of an immunity-destroying "conspiracy" is concerned, Parker and Noerr generally present two faces of the same coin. The Noerr-invalidating conspiracy alleged here is just the Parker-invalidating conspiracy viewed from the standpoint of the private-sector participants rather than the governmental participants. The same factors which, as **[**22]** we have described above, make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials.

Id. at 383.

In the case at bar, even viewing the facts and allegations in a light most favorable to plaintiff, the actions of the private sector defendants are protected by the Noerr-Pennington doctrine because their actions, at most, were aimed at procuring favorable government action. Accordingly, the federal antitrust claims against the private sector defendants are dismissed.

II. Plaintiff's State Law Claims

The City defendants assert that plaintiff's state law claims are based on the same facts and circumstances as its federal antitrust claims. They also aver that "the Donnelly Act is modeled on and governed by the same standards as the federal antitrust laws." *Music Center v. Prestini Musical Instruments Corp., 874 F. Supp. 543, 555 (E.D.N.Y 1995)*.

However, "this circuit has not gone **[**23]** so far as to apply the Noerr-Pennington doctrine to state law causes of action." *Suburban Restoration Co., Inc. v. ACMAT Corp., 700 F.2d 98, 101 (2d Cir. 1983)*. In *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988)*, the Supreme Court "announced that ***HN9***[] when all federal claims are eliminated in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction over remaining state law claims and dismissing them *without* prejudice." *Tops Markets, Inc. v. Quality Markets. Inc., 142 F.3d 90, 1998 U.S. App. LEXIS 7106*, (2d Cir. 1998) (quoting *Carnegie-Mellon, 484 U.S. at 350*). Thus, under *28 U.S.C. § 1367(c)(3)*, this court declines to exercise supplemental jurisdiction over the state law claims. See **[*195]** id. Therefore, plaintiff's state law claims are also dismissed, without prejudice.

CONCLUSION

Based on the foregoing, defendants' motions to dismiss (Items 11, 14, 16) are granted. Plaintiff's motion for a preliminary injunction (Item 3) is denied as moot. Accordingly, the complaint is dismissed, and the Clerk is ordered to enter judgment for the defendants.

So ordered.

JOHN T. CURTIN

[24]** United States District Judge

Dated: April 30, 1998

Khan v. State Oil Co.

United States Court of Appeals for the Seventh Circuit

March 20, 1998, Submitted ; May 5, 1998, Decided

No. 96-1309

Reporter

143 F.3d 362 *; 1998 U.S. App. LEXIS 8806 **; 1998-1 Trade Cas. (CCH) P72,141

Barkat U. Khan and Khan & Associates, Inc., Plaintiffs-Appellants, v. State Oil Company, Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94 C 35. Charles R. Norgle, Sr., Judge.

Disposition: Case remanded to the district court with directions to enter judgment for the defendant and dismissed the suit.

Core Terms

supplier, suggested retail price, gasoline, retailer, district court, price-fixing, Sherman Act, ceiling, pricing, margin, profit margin, retail price, per se rule, collusion, low-price, customer, maximum, argues, waived, floor, grade

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

A supplier is under no obligation to lower his price to his customer just because the customer wants to resell the supplier's product for less than the supplier has suggested without sacrificing any of his profit margin.

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For STATE OIL COMPANY, Defendant - Appellee: Paul T. Kalinich, KALINICH & MCCLUSKEY, P.C., Glen Ellyn, IL USA. John Baumgartner, CHURCHILL, BAUMGARTNER & QUINN, LTD., Grayslake, IL USA.

Judges: Before Posner, Chief Judge, and Flaum and Ripple, Circuit Judges.

Opinion by: POSNER

Opinion

[*363] On Remand from the Supreme Court of the United States

Posner, Chief Judge. This case is before us on remand from the Supreme Court, which, overruling *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*, vacated (*118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* our decision reported at *93 F.3d 1358 (7th Cir. 1996)*. The plaintiffs (collectively "Khan") operated a gas station under contract with the defendant, State Oil Company, whereby State Oil sold Khan gasoline **[**2]** for 3.25 cents less than the retail price suggested by State Oil. Khan was free to charge less than the suggested retail price, though if he did so his profit margin would be reduced--to zero or below if he charged a price 3.25 cents or more below the suggested retail price. But if Khan tried to charge more than the suggested retail price, then the contract required him to rebate to State Oil the difference. This placed an effective ceiling on his retail pricing, which we held, in reliance on *Albrecht,* violated *section 1* of the Sherman Act, *15 U.S.C. § 1*, per se.

The Supreme Court remanded for consideration of whether State Oil's maximum price-fixing violated the Sherman Act under the "Rule of Reason," as distinct from the per se rule, but Khan does not pursue this avenue of relief in the brief that he has filed with us on remand, and we consider it waived. He argues instead that we should return the case to the district court for trial on the theory that the contract placed a floor under his retail price, thus violating the per se rule, left undisturbed by the Supreme Court, against fixing a retailer's minimum **[*364]** price. Although this theory was not emphasized in the previous stages **[**3]** of this litigation, it was mentioned by the district court and we cannot say that it has been waived. But it is plainly without merit.

Khan argues as follows. (1) He was required by the contract to buy gasoline only from State Oil. (2) The suggested retail price was only 3.25 cents higher than the wholesale price that Khan had to pay, so, as a practical matter, he could not afford to sell below the suggested retail price, which thus became his floor price (as well as his lawful ceiling price), since he could not seek a lower price from some other supplier. (3) He could not make up any lost margin on gasoline that he sold below the suggested retail price by selling other grades of gasoline above the suggested retail price, since that would have violated the contract.

Argument (3) is flatly inconsistent with the Supreme Court's decision, for it would convert every maximum price-fixing case into a minimum price-fixing case. It is always possible that the retailer would have used profits obtained by piercing the ceiling imposed on him by his supplier to finance a low-price strategy in some other area of his business.

Argument (2) is frivolous, because it amounts to saying that a supplier **[**4]** must reduce his price to his retailer in order to enable the retailer to cut prices without sacrifice of margin. A supplier is free to charge any price he wants to his retailers. The fact that the higher that price is, the higher the retailer's price will have to be unless he is willing to sell below his cost has never been thought to be price-fixing. Suppose State Oil's suggested retail price for some grade of gasoline was $ 1 per gallon. Then its price to Khan would have been 96.75. If Khan had wanted to sell the gasoline for only 50, would this mean that State Oil would be required by the Sherman Act to reduce its price to Khan to 46.75, so that Khan's margin would be unimpaired? That is the implication of Khan's argument, and it has no basis in ***antitrust law***. We actually addressed the argument in our previous opinion, noting that "***HN1***[] a supplier is under no obligation to lower his price to his customer just because the customer wants to resell the supplier's product for less than the supplier has suggested without sacrificing any of his profit margin." *93 F.3d at 1360*. Nothing in the Supreme Court's opinion suggests that this statement was in error, and we reaffirm it today.

We must **[**5]** consider, however, whether the exclusivity feature in State Oil's contract with Khan can make these very bad arguments good. We think not. Khan does not tell us what the term of the contract is or whether it was terminable without penalty before expiration. Even if it was a long-term contract, there would be no basis for presuming in the absence of evidence (and there is no evidence bearing on this issue) that the effect was to interfere with the competitive pricing of gasoline. There is no suggestion of collusion among suppliers of gasoline, and in the absence of collusion a dealer who wanted to pursue a low-price strategy could seek out a supplier who shared his goals.

For these reasons and those stated by the Supreme Court, by us in our previous decision, and by the district court, we conclude that the suit has no merit, and so the case is remanded to the district court with directions to enter judgment for the defendant and dismiss the suit.

Bennett Elec. Co. v. Village of Miami Shores

United States District Court for the Southern District of Florida

May 7, 1998, Decided ; May 6, 1998, Filed

Case No. 97-0727-CIV-MORENO

Reporter

11 F. Supp. 2d 1348 *; 1998 U.S. Dist. LEXIS 8473 **; 1998-2 Trade Cas. (CCH) P72,214

BENNETT ELECTRIC COMPANY, a Florida corporation, and WEST SIDE SANITATION, INC., d/b/a Lazaro's Waste & Recycling Systems, Inc., a Florida corporation, Plaintiffs, vs. THE VILLAGE OF MIAMI SHORES, a Florida municipality, Defendant.

Disposition: **[**1]** Defendant's Motion to Dismiss GRANTED. Entire complaint dismissed with prejudice.

Core Terms

Ordinance, municipality, waste collection, Recycling, disposal, garbage, interstate commerce, flow control, solid waste, collecting, discriminate, processing, immunity, garbage collection, regulation, state action doctrine, local government, anti trust law, waste management, anticompetitive, out-of-state, haulers, selling, transfer station, state action, state policy, Plaintiffs', violates, firms, ton

LexisNexis® Headnotes

Constitutional Law > Congressional Duties & Powers > General Overview

International Law > Authority to Regulate > General Overview

International Trade Law > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Governments > Federal Government > US Congress

Transportation Law > Interstate Commerce > Federal Powers

HN1[] **Constitutional Law, Congressional Duties & Powers**

The *Commerce Clause* provides that Congress shall have Power To regulate Commerce with foreign Nations, and among the several States. *U.S. Const. art. I, § 8, cl. 3*. Although the *Commerce Clause* is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce. This negative restriction on state power is known as the "dormant" *Commerce Clause*.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Balancing Tests

Transportation Law > Interstate Commerce > Per Se Invalidity

HN2[] **Congressional Duties & Powers, Commerce Clause**

To determine whether an ordinance is valid despite its effect on interstate commerce, a court must undertake two inquiries. First, the court must determine whether the ordinance discriminates against interstate commerce. Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. If, however, the court finds that the ordinance does not discriminate against interstate commerce, then the court must proceed to the second inquiry: assessing whether the ordinance imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits.

Governments > Local Governments > Duties & Powers

HN3[] **Local Governments, Duties & Powers**

Garbage collection and disposal is a core function of local government in the United States. At their option, cities may provide garbage pick-up to their citizens directly or they may rely on a closely regulated private market to provide those services.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Governments > Public Improvements > General Overview

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

When a municipal government acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly public service, the state action doctrine exempts the municipality's anticompetitive activities from antitrust liability. The municipality's anticompetitive conduct need only be a "foreseeable result" of the statutes establishing the state policy to displace competition. It is not necessary for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN5[] **Exemptions & Immunities, Parker State Action Doctrine**

The U.S. Court of Appeals for the Eleventh Circuit employs a three-part test to determine whether the "clear articulation" test of the state action doctrine is satisfied for purposes of anti-trust law. The public entity must establish (1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

Fla. Stat. Ann. §§ 180.06(5) and *180.13(2)* "generally authorize" a municipality to provide waste collection services, and also constitute a clearly articulated and affirmatively expressed state policy to displace competition in the area of waste collection. It is clear that anticompetitive effects logically would result from this broad authority to regulate.

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For Defendant: Scott E. Perwin, Esq., Kenny Nachwalter Seymour Arnold Critchlow & Spector, P.A., Richard Sarafan, Esq., Richard & Richard, P.A., Miami, FL.

Judges: FEDERICO A. MORENO, UNITED STATES DISTRICT JUDGE.

Opinion by: FEDERICO A. MORENO

Opinion

[*1349] ***ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND ORDER CLOSING CASE***

This case presents the question of whether a municipality's decision to take control of the local waste collection market violates the *Commerce Clause* or the federal antitrust laws. The Court concludes that the municipality's actions neither discriminate against nor unduly burden interstate commerce, and that the municipality is entitled to state action immunity from the antitrust laws. Therefore, the municipality's motion to dismiss the Amended Complaint is GRANTED.

I. *BACKGROUND*

Pursuant to the Miami Shores Village Code, commercial establishments and residential units must use the waste collection and disposal services of the Village of Miami Shores unless authorized **[**2]** to hire a private, village-licensed waste collector. [1] Plaintiffs' Amended Complaint [2] alleges that this municipal Ordinance violates the *Commerce Clause*, and the Sherman and Clayton Acts.

In their Amended Complaint, Plaintiffs claim that Miami **[**3]** Shores did not begin to enforce the portion of the Ordinance at issue until July 1995. At that time, numerous multi-family buildings and businesses contracted with private collectors for waste collection and disposal services, instead of using Miami Shores' services. On July 11, 1995, Miami Shores' Public Works Director recommended to the Miami Shores Manager that the entities that used private collectors be prohibited from doing so and be required to use and pay for Miami Shores' waste collection and disposal services.

On July 18, 1995, the Miami Shores Council began to enforce the Ordinance based in part on the recommendation of the Public Works Director and the Manager. The Council required all accounts, except for certain accounts which were exempted, to use and pay for Miami Shores' waste collection and disposal services. Plaintiffs allege that the Council began enforcing the Ordinance in order to fund capital improvements that are unrelated to waste collection.

As of the July 18, 1995, Council vote, Plaintiff Bennett Electric Company was utilizing Miami Shores' waste collection and disposal services. In September 1995, Bennett received a $ 3,170.50 statement from Miami Shores **[**4]** for anticipated waste collection and disposal services from October 1, 1995 to September 30, 1996.

Bennett subsequently sent a letter to Miami Shores terminating the municipal waste collection and disposal service. On October 1, 1995, Bennett entered into a one-year contract with a private collector--Environmental Waste Systems ("EWS")--for waste collection and disposal services. Bennett's contract with EWS was for $ 737.52, which Bennett notes is less than 25% of what Miami Shores would have charged for comparable services.

[*1350] In early April 1996, Bennett received a notice from the Public Works Department indicating that the private collectors' licenses would not be renewed and that Bennett would be required to use Miami Shores' waste collection and disposal services. On April 26, 1996, Bennett's owner was informed by the Public Works Director that Bennett could no longer use the private collector, and that Bennett would have to use and pay for Miami Shores' waste collection and disposal services. Bennett was also informed by the Manager that Miami Shores would begin servicing Bennett on June 1, 1996.

In early May 1996, Bennett received a letter from the Public Works Director indicating **[**5]** that the charge for Miami Shores' waste collection and disposal services would be $ 3,589.35. Based on Miami Shores' actions, Bennett was unable to renew its contract with EWS after it expired on September 30, 1996, and Bennett was billed by both EWS and Miami Shores from June 1, 1996 through September 30, 1996.

Plaintiff West Side Sanitation, Inc., d/b/a Lazaro's Waste & Recycling Systems, Inc. ("Lazaro's") alleges that numerous contracts that it had with private commercial residents of Miami Shores to collect and dispose of their waste, as well as contracts that Lazaro's had purchased from another private collector, became valueless and were terminated as a result of Miami Shores' enforcement of the Ordinance.

II. *LEGAL ANALYSIS*

A. The *Commerce Clause*

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[1] Miami Shores' Village Code § 9-2(a) (the "Ordinance") provides, in pertinent part, that "every commercial establishment and residential unit shall utilize the waste collection services of the village, except as otherwise authorized in this chapter."

[2] Plaintiffs filed their original Complaint, which had named individual members of the Miami Shores Village Council as defendants, on March 21, 1997. Plaintiffs subsequently agreed to the voluntary dismissal of the individual defendants. On February 17, 1998, Plaintiffs filed an Amended Complaint, which named only the Village as a defendant, and which added a claim for declaratory relief under state law regarding the applicability of the Ordinance to source-separated recovered materials as defined by state law.

HN1[] The Commerce Clause provides that Congress "shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws **[**6]** imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984)*. This negative restriction on state power is known as the "dormant" Commerce Clause. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179, 131 L. Ed. 2d 261, 115 S. Ct. 1331 (1995)*.

HN2[] Under pertinent Supreme Court caselaw, this Court must conduct two inquiries to determine whether the Ordinance is valid despite its effect on interstate commerce. [3] First, the Court must determine "whether the ordinance discriminates against interstate commerce . . . ." *C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994)*. "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id. at 392* (citing *Maine v. Taylor, 477 U.S. 131, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986))*.

[7]** If, however, the Court finds that the Ordinance does not discriminate against interstate commerce, then the Court must proceed to the second inquiry: assessing "whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" *Id. at 390* (quoting *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970))*.

1. Discrimination Against Interstate Commerce

The parties' arguments as to whether the Ordinance violates the Commerce Clause focus on two recent cases addressing similar Commerce Clause issues: *C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994)*, and *USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995)*, *cert. denied*, *517 U.S. 1135, 134 L. Ed. 2d 544, 116 S. Ct. 1419 (1996)*. *Carbone* involved a challenge by a solid waste processing company and related entities to a so-called flow control ordinance adopted by the Town of Clarkstown, New York. The flow **[*1351]** control ordinance basically provided that all nonhazardous solid waste within the town had to be processed at a designated transfer station before **[**8]** leaving Clarkstown. At this transfer station, bulk solid waste would be separated into recyclable and nonrecyclable items. The recyclable waste would then be shipped to a recycling facility, while the nonrecyclable waste would be sent to a landfill or incinerator. Carbone operated a recycling center in Clarkstown, performing many of the functions that the transfer station would perform. For example, Carbone would sort and bale bulk solid waste, and then ship it off to various processing facilities.

Under the flow control ordinance, the processing fees charged at the transfer station would be used to amortize the cost of the station. The local contractor who agreed to construct the facility was permitted to charge haulers a so-called tipping fee of $ 81 per ton, and the town guaranteed the contractor a minimum of 120,000 tons per year. If the station did not receive the minimum 120,000 tons, the town agreed to pay the deficit in the tipping fees. After five years under this arrangement, the town would purchase the facility from the contractor for one dollar.

The facility's ability to reach the 120,000 ton yearly guarantee was made more difficult by the fact that the $ 81 per ton tipping **[**9]** fee was greater than the disposal cost on the private market. To solve this problem and to help achieve the 120,000 ton guarantee, the town passed the flow control ordinance, thereby requiring all nonhazardous solid waste within Clarkstown to pass through the transfer station.

[3] The parties do not dispute the fact that the Ordinance regulates interstate commerce, thus bringing the Ordinance "within the purview of the Commerce Clause." *C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994)*.

Under the flow control ordinance, Carbone was still allowed to receive solid waste, but Carbone had to bring the nonrecyclable items from that waste to the transfer station. Carbone thus could not ship the nonrecyclable waste itself, and Carbone had to pay the tipping fee on trash it had already sorted.

The Supreme Court held that the flow control ordinance violated the *Commerce Clause*. *Carbone, 511 U.S. at 386*. The Court explained that "the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id. at 391*. The Court further reasoned that the flow control ordinance "hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id. at 392*. Similarly, the flow **[**10]** control ordinance was found to "squelch[] competition in the waste-processing service altogether, leaving no room for investment from outside." *Id.*

The Court rejected the Town of Clarkstown's argument that special financing was needed for the facility to survive: "If so, the town may subsidize the facility through general taxes or municipal bonds. But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival business from out of State." *Id. at 394* (citation omitted).

In support of its argument that the Ordinance does not violate the *Commerce Clause*, Miami Shores attempts to distinguish *Carbone* and relies heavily on the Second Circuit Court of Appeals' decision in *USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995)*, *cert. denied*, *517 U.S. 1135, 134 L. Ed. 2d 544, 116 S. Ct. 1419 (1996)*. In *USA Recycling*, the Second Circuit analyzed, under the *Commerce Clause*, the Town of Babylon's decision to "take over the local commercial garbage market." *USA Recycling, 66 F.3d at 1275*. To establish control of the local market, the Town of Babylon **[**11]** hired two private companies: one to pick up commercial garbage, and the other to operate the incinerator to burn the garbage. To finance this system, Babylon relied on flat property taxes and user fees (based on the amount of garbage generated) paid by businesses and commercial property owners. The Second Circuit rejected the plaintiffs' arguments that Babylon's waste management plan discriminated against, or imposed an undue burden on, interstate commerce in violation of the *Commerce Clause*. *Id. at 1276*.

In its Motion to Dismiss, Miami Shores asserts that the Ordinance does not violate the *Commerce Clause* because, rather than selling waste collection services, Miami **[*1352]** Shores is providing these services as a municipal government performing traditional municipal functions that are not in conflict with federal law. Miami Shores argues that the instant case is more analogous to *USA Recycling* than to *Carbone*, and that the Ordinance thus does not violate the *Commerce Clause*. This Court agrees.

As in the Town of Babylon in *USA Recycling*, in Miami Shores "no one enjoys a monopoly position selling garbage collection services in [the Village's] commercial garbage market, because **[**12]** the [Village] has eliminated the market entirely. Not even the [Village] itself remains as a seller in the market. Although the [Village] is now the lone provider of garbage collection services . . ., it does so as a local government providing services to those within its jurisdiction, not as a business selling to a captive consumer base." *USA Recycling, 66 F.3d at 1283*.

Here, as in *USA Recycling*, the municipality has taken over the waste collection services to the exclusion of private haulers. *Id. at 1282*. Thus, "Babylon's [and Miami Shores'] waste management plan[s] differ[] dramatically from the flow control ordinances struck down by the Supreme Court in *Carbone* and by [the Second Circuit in a related case]. In both of those cases, the challenged flow control ordinances required local garbage haulers to buy processing or disposal services from a local facility. In Babylon [and in Miami Shores], local businesses do not buy services from anyone. Instead, the Town unilaterally provides garbage service to everyone in the District." *Id. at 1283*. Unlike the situation in *Carbone*, in the instant case, the Village "is not selling anything, [and] **[**13]** it cannot be considered to be a favored single local proprietor as in *Carbone." Id.* This Court concludes that if the Town of Babylon's decision to hire two private companies to control the local commercial garbage market satisfies the *Commerce Clause*, then Miami Shores' decision to take over the market itself, without favoring any private companies, certainly does not violate the *Commerce Clause*.

This Court also agrees with the *USA Recycling* court's rejection of the argument that *Carbone* "fashioned from the 'dormant' Commerce Clause a new, and unprecedentedly sweeping, limitation on local government authority to provide basic sanitation services to local residents and businesses, on an exclusive basis and financed by tax dollars." [4] *Id. at 1276*.

[14]** Plaintiffs argue that the Ordinance discriminates against interstate commerce because it hoards a local resource--waste--for the benefit of the favored local processor--Miami Shores. However, the *Carbone* Court merely found that the Clarkstown flow control ordinance constituted "just one more instance of local processing requirements that we long have held invalid." Carbone, 511 U.S. at 391 (citations omitted). The Court explained that the flow control ordinance was similar to laws that had previously been found by the Court to "hoard a local resource--be it meat, shrimp, or milk--for the benefit of local businesses that treat it." *Id. at 392*. The Court concluded that the flow control ordinance "hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.*

The *Carbone* Court's concerns are not implicated where, as here, a municipality has completely eliminated the private market. In Miami Shores, no "local businesses" benefit from the Ordinance, and there is no "preferred processing facility." *Carbone* does not forbid a municipality from taking over waste collection itself. Miami Shores' decision to provide waste **[**15]** collection services using its own trucks and employees ensures that local and out-of-state businesses and investment are treated equally. Therefore, the Ordinance does not discriminate against interstate commerce. *See* USA Recycling, 66 F.3d at 1285 (finding that the "Town [of Babylon] has indeed excluded all garbage haulers . . . from selling garbage collecting services to businesses in Babylon. The Town's waste management system treats all **[*1353]** garbage haulers alike and thus does not discriminate against interstate commerce.").

The distinction between a municipality taking over waste collection within its boundaries, as Miami Shores has done, and a municipality acting as a participant or regulator of a private market, was recognized by a district court in this Circuit, in a case relied on by Plaintiffs. *See* *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993)*, *aff'd without opinion*, *29 F.3d 641 (11th Cir. 1994)*. The court in *Waste Recycling* held that municipal flow control ordinances enacted by three cities (as named representatives of 36 local governments) violated the Commerce Clause. The ordinances at issue required **[**16]** that all solid waste collected within each city by public or private collectors be delivered only to the waste disposal facility of the Southeast Alabama Solid Waste Authority, a public non-profit corporation organized by four counties, along with more than 30 cities and towns within the counties, to provide for solid waste management. However, the *Waste Recycling* court recognized the difficult questions raised by the issues currently before this Court:

> The defendants hypothetically question whether it would violate the commerce clause if a single municipality completely occupied the collection and disposal of solid waste within its boundaries--that is, the city collected and disposed of all solid waste at its own landfill, and prohibited any participation by private parties. Because this is not the scenario presented in this case, the court need not reach this difficult question. Here, the parties have defined the issues as whether the cities are participants in or regulators of *private* markets and, if the latter, whether their regulation of these *private* markets violates the commerce clause; the issue is not whether the cities have *nationalized* the markets **[**17]** within their boundaries.

Waste Recycling, 814 F. Supp. at 1583 n.22 (emphasis added).

Plaintiffs assert several arguments to distinguish this case from *USA Recycling*. First, Plaintiffs argue that Miami Shores' actions are not "traditional municipal functions" and are illegal, while in *USA Recycling*, "New York law made clear that the Town is fulfilling a governmental duty, not making a sale, when it provides garbage services."

[4] Plaintiffs note that the ordinance in *USA Recycling* involved generally applicable taxes, while Miami Shores charges user fees as a private waste processor would. However, the Town of Babylon also employed user fees for garbage generated beyond a fixed base amount. *See* *USA Recycling, 66 F.3d at 1276, 1279*. In any event, even if Miami Shores relies solely on user fees rather than taxes, the Ordinance does not discriminate against interstate commerce.

USA Recycling, 66 F.3d at 1283. Plaintiffs claim that a municipality cannot foreclose private competition in waste processing and charge inflated prices to raise revenues. Plaintiffs also posit that Florida's enactment of the Solid Waste Management Act, Fla. Stat. § 403.702 et seq. (the "SWMA"), indicates that waste collection is no longer a traditional municipal function in Florida. The Court rejects these contentions.

The Florida Statutes and Florida caselaw support Miami Shores' arguments that waste collection is indeed a traditional municipal function. *See* Fla. Stat. § 180.06(5) (1997) (authorizing municipalities to "provide for the collection and disposal of garbage"); *id.* § 180.13(2) (1997) (authorizing municipalities **[**18]** to "establish just and equitable rates or charges to be paid to the municipality for the use of [a] utility by each person, firm or corporation whose premises are served thereby"); United Sanitation Servs. of Hillsborough, Inc. v. City of Tampa, 302 So. 2d 435, 436 (Fla. 2d DCA 1974) (although not addressing Commerce Clause issues, finding that "unlike virtually every other enterprise, the 'business' [of garbage collection] may not only be regulated, but in fact exclusively performed--as an essential part of a 'public service'--by municipalities or other governmental subdivisions, even if such a decision results in the complete preclusion of private facilities for the same use"); *see also* United Sanitation, 302 So. 2d at 436 (explaining that the "private business of [garbage] collection . . . is not, nor has it ever been, akin in any way to 'ordinary' examples of private enterprise--the selling of shoes, the repair of automobiles, or the selling of motel rooms. . . . The 'enterprise' of garbage collection is one of those unique callings which are subject to the plenary power of government."). Plaintiffs cite no authority to support the notion that Fla. Stat. § 180 has **[**19]** been repealed or that *United Sanitation* has been overruled by the SWMA.

The Court is also not convinced by Plaintiffs' argument that waste processing is a "proprietary," or quasi-private, function rather **[*1354]** than a "governmental" function based on Smoak v. City of Tampa, 123 Fla. 716, 167 So. 528 (Fla. 1936). While noting that "there is certainly nothing connected with garbage disposal that partakes of a public or governmental function," the *Smoak* court merely found that a city could not claim sovereign immunity in tort when its employees negligently perform garbage collection duties. 167 So. at 529. However, as Miami Shores notes, Florida courts no longer decide the sovereign immunity issue using the "proprietary/governmental" distinction, but rather employ an "operational/discretionary" distinction. *See* Dep't of Health & Rehab. Servs. v. B.J.M., 656 So. 2d 906, 911-912 (Fla. 1995). [5] In addition, a high-speed police chase can be an "operational" function that is not shielded from tort liability by sovereign immunity. *See* City of Pinellas Park v. Brown, 604 So. 2d 1222, 1227 (Fla. 1992). However, this surely does not indicate that police pursuit of criminals is not **[**20]** a governmental function.

The Court also notes that the SWMA contemplates that municipalities will play a significant role in providing waste collection services. *See, e.g.*, Fla. Stat. § 403.702(2)(i) (1997) (noting that one goal of the SWMA is to "encourage counties and municipalities to utilize all means reasonably available to promote efficient and proper methods of managing solid waste . . ."); Fla. Stat. § 403.7049(3) **[**21]** (1997) (defining "service area" as "the area in which the county or municipality provides, directly or by contract, solid waste management services").

The *USA Recycling* court noted that "for ninety years, it has been settled law that ***HN3***[] garbage collection and disposal is a core function of local government in the United States. At their option, cities may provide garbage pick-up to their citizens directly . . . or they may rely on a closely regulated private market to provide those services." USA Recycling, 66 F.3d at 1275. The *USA Recycling* court relied in part on two long-standing Supreme Court cases that, while not addressing Commerce Clause issues, are certainly relevant to the issues before this Court. In California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 50 L. Ed. 204, 26 S. Ct. 100 (1905) and Gardner v. Michigan, 199 U.S. 325, 50 L. Ed. 212, 26 S. Ct. 106 (1905), the Supreme Court rejected takings and due process challenges to San Francisco and Detroit ordinances that granted the exclusive garbage collection and disposal rights within the cities to single scavenger companies. The *USA Recycling* court found, and this Court

[5] Certain "discretionary" governmental functions are immune from tort liability. "Discretionary" acts are those involving "an exercise of executive or legislative power such that, for the court to intervene by way of tort law would inappropriately entangle it in fundamental questions of policy and planning." B.J.M., 656 So. 2d at 911 n.3. "Operational" functions, which are subject to tort liability, are those which are "not necessary to or inherent in policy or planning, that merely reflect[] a secondary decision as to how those policies or plans will be implemented." *Id.* at n.4.

agrees, that "if **[**22]** we were to rule in plaintiffs' favor, the municipal garbage systems upheld by the Court in *California Reduction* and *Gardner* would be unconstitutional, and municipalities could no loner undertake the traditional local governmental function of collecting town garbage." USA Recycling, 66 F.3d at 1294. This Court would overstep its authority if it concluded that waste collection was no longer a traditional municipal function in Florida.

Plaintiffs also attempt to distinguish *USA Recycling* on several additional grounds. First, Plaintiffs assert that the Town of Babylon used competitive bidding for its waste contract, thereby giving out-of-state private competitors a chance to compete in the market, while Miami Shores has eliminated all private competition by taking over the waste collection itself. Plaintiffs also argue that in *USA Recycling*, the Town of Babylon was saving its residents money by consolidating services, while Miami Shores is charging its customers more than private competitors would in an effort to raise revenues. Plaintiffs further claim that *USA Recycling* is incompatible with *Carbone* and is simply wrong. The Court finds these arguments untenable.

[23]** Miami Shores' decision to use its own trucks and employees, rather than those of an independent contractor, obviated the need for competitive bidding. The *USA Recycling* **[*1355]** court recognized the Town of Babylon's use of a competitive bidding process, which left open the possibility that an out-of-state firm could be selected to provide the waste collection services. *See* USA Recycling, 66 F.3d at 1287. Local and out-of-state firms were thus treated equally in Babylon, because either type of firm could theoretically be chosen to provide the waste collection duties. However, Miami Shores' decision to take over waste collection also results in equal treatment of local and nonlocal firms: all of them are precluded from collecting waste in the Village.

Plaintiffs also argue that Miami Shores' enforcement of the Ordinance stems from the Village's desire to raise revenue. *See* Amended Complaint PP 12, 31. After finding that the flow control ordinance discriminated against interstate commerce and "rigorous scrutiny" thus applied, the Court in *Carbone* noted that "by itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce." **[**24]** Carbone, 114 S. Ct. at 1684. However, Miami Shores' Ordinance does not discriminate against interstate commerce, and thus "rigorous scrutiny" does not apply, as in-state and out-of-state waste collection firms are treated alike. Therefore, even accepting as true the allegation that the Ordinance has resulted in increased bills for Bennett based in part on the Town's desire to raise revenues, this Court is not compelled to find that the Ordinance discriminates against interstate commerce.

Plaintiffs' contention that *USA Recycling* is both "simply wrong" and irreconcilable with *Carbone* is without merit. While both cases present similar issues, the Second Circuit in *USA Recycling* thoroughly analyzed *Carbone* and found it distinguishable. This Court's conclusion that Miami Shores' Ordinance does not violate the Commerce Clause is consistent with both *Carbone*, which is binding authority, and with *USA Recycling*.

2. Undue Burden on Interstate Commerce

Having determined that the Ordinance does not discriminate against interstate commerce, the Court must evaluate whether the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative **[**25]** local benefits." *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)*.

As in *USA Recycling*, Miami Shores' takeover of waste collection services "will not impose any different burdens on nonlocal as opposed to local garbage haulers." USA Recycling, 66 F.3d at 1287. All local and nonlocal private firms are treated equally by the Ordinance: they are prohibited from providing waste collection services in Miami Shores.

Plaintiffs argue that *USA Recycling* is distinguishable because the Town of Babylon hired its garbage hauler using a bidding process that left open the possibility that an out-of-state firm could be selected, "which would actually shift a portion of the garbage collection market into interstate commerce." Id. at 1287. Miami Shores does not use a competitive bidding process, as it simply provides the waste collection services with its own trucks and employees. However, neither an out-of-state nor a local firm could provide the waste collection services in Miami Shores, as the

Village does so itself. Therefore, the Miami Shores Ordinance "has imposed no greater burdens on nonlocal firms that it has placed on local firms." **[**26]** *Id. at 1287*.

In addition, the fact that Bennett may pay more for waste collection under the Ordinance does not compel a finding that the Ordinance discriminates against, or imposes an undue burden on, interstate commerce. The *USA Recycling* court noted that saving residents money by consolidating services was one benefit of the Town of Babylon's takeover of waste collection. *See id. at 1295*. However, as Miami Shores notes, the Ordinance may allow low-volume residential customers, who are more expensive to serve than high-volume commercial customers, to benefit from the lower unit costs associated with serving commercial customers. Nevertheless, even without this benefit, the mere fact that Bennett's waste collection bills may increase when the municipality provides the service does not dictate a finding that the Ordinance violates the *Commerce Clause*.

Assuming that the Ordinance did burden interstate commerce, other putative local benefits--including "safety, sanitation, [and] **[*1356]** reliable garbage service"--remain. *Id. at 1295*. The *USA Recycling* court further noted that municipalities have "legitimate--indeed, compelling" interests in taking over the garbage market. **[**27]** "In our multi-tiered federal system, local governments have historically borne primary responsibility for ensuring the safe and reliable disposal of waste generated within their borders--a role that Congress has expressly recognized. . . . Local governments must enjoy some leeway in coping with the solid waste crisis." *Id. at 1288*.

B. The Sherman Act

Miami Shores argues that Count II of the Complaint, which asserts a claim for monopolization under the Sherman Act, should be dismissed because Miami Shores' waste-collection activities are exempt from antitrust scrutiny pursuant to the state action doctrine. Miami Shores also contends that Count II should be dismissed because Miami Shores is not a seller in the relevant market. The Court finds that Miami Shores' actions are entitled to state action immunity from the antitrust laws. Therefore, the Court need not address whether Miami Shores is a seller in the relevant market.

1. The State Action Doctrine

Miami Shores contends that its actions are exempt from the federal antitrust laws under the state action doctrine enunciated in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* and *Town of* **[**28]** *Hallie v. City of Eau Claire, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*. ***HN4***[] When a municipal government acts pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation or monopoly public service, the state action doctrine exempts the municipality's anticompetitive activities from antitrust liability. *Town of Hallie, 471 U.S. at 44*; *see also Bankers Ins. Co v. Florida Residential Prop. and Cas. Joint Underwriting Ass'n, 137 F.3d 1293, 1296 (11th Cir. 1998)*. The municipality's anticompetitive conduct need only be a "foreseeable result" of the statutes establishing the state policy to displace competition. *Town of Hallie, 471 U.S. at 42*. "It is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Id.*

HN5[] The Eleventh Circuit employs a three-part test to determine whether the "clear articulation" test is satisfied. Miami Shores must establish "'(1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged **[**29]** action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct.'" *Crosby v. Hospital Auth. of Valdosta and Lowndes County, 93 F.3d 1515, 1532 (11th Cir. 1996)*, *cert. denied*, *137 L. Ed. 2d 328, 117 S. Ct. 1246 (1997)* (quoting *F.T.C. v. Hospital Bd. of Directors of Lee County, 38 F.3d 1184, 1187-88 (11th Cir. 1994)*). Plaintiffs argue that Miami Shores fails both the second and third parts of the *Crosby* test. [6]

[6] Plaintiffs agree that Miami Shores is a political subdivision of the state, thus satisfying the first prong of the *Crosby* test.

In support of its assertion of state action immunity, Miami Shores relies on *Florida Statutes §§ 180.06(5)* and *180.13(2)*. *Florida Statutes § 180.06(5)* authorizes municipalities to "provide for the collection and disposal of garbage." *Florida Statutes § 180.13(2)*, in turn, grants municipalities the power to "establish just and equitable rates or charges to be paid to the municipality for the use **[**30]** of [a] utility by each person, firm or corporation whose premises are served thereby . . . ."

This Court concludes that ***HN6***[] *Florida Statutes §§ 180.06(5)* and *180.13(2)* "generally authorize" Miami Shores to provide waste collection services, *see Crosby, 93 F.3d at 1532*, and also constitute a "clearly articulated and affirmatively expressed" state policy to displace competition in the area of waste collection. *See Town of Hallie, 471 U.S. at 44* (finding that Wisconsin statutes authorizing city to provide sewage services and to determine service area "evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation"). As in *Town of Hallie*, in **[*1357]** the instant case "it is clear that anticompetitive effects logically would result from this broad authority to regulate." *Id. at 42*.

In addition, the Eleventh Circuit has previously found that similar legislative grants of authority contained in *Fla. Stat. § 180.06* and related sections governing water and sewage services satisfied the state action test. *See Falls Chase Special Taxing Dist. v. City of Tallahassee, 788 F.2d 711 (11th Cir. 1986)*; *Auton v. Dade City, 783 F.2d 1009* ***[**31]*** *(11th Cir. 1986)*. Thus, Miami Shores is entitled to antitrust immunity under the state action doctrine.

Plaintiffs argue that the state action doctrine does not immunize Miami Shores' actions from antitrust scrutiny because the Florida legislature's enactment of the Solid Waste Management Act, *Fla. Stat. § 403.702 et seq*. (the "SWMA"), establishes a policy forbidding municipal monopolization of waste processing and supporting competition in the field. Plaintiffs claim that the provisions of the SWMA encompass almost all of the waste involved in this case, and that the Ordinance, both on its face and as applied, covers all waste generated by businesses within Miami Shores. Plaintiffs thus contend that the Ordinance violates state law and policy as set forth in the SWMA, and that the general statements concerning waste processing contained in Fla. Stat. § 180 are controlled by the explicit provisions of Florida's SWMA.

Miami Shores argues that the Ordinance is in compliance with the SWMA, that the goal of the SWMA is to protect the environment, rather than to promote competition in waste collection, and that the Court need not determine whether the Ordinance technically complies **[**32]** with the SWMA, as long as Florida has expressed a policy which contemplates anticompetitive behavior by the municipality.

Although *Fla. Stat. §§ 180.06(5)* and *180.13(2)* satisfy the state action test, thereby immunizing Miami Shores' anticompetitive behavior from the federal antitrust laws, the Court finds that Florida's SWMA expresses a policy supporting competition in waste processing involving "source-separated recovered materials" (SSRMs). [7] **[**33]** The SWMA provides, for instance, that a local government "may not require a commercial establishment that generates source-separated recovered materials to sell or otherwise convey its recovered materials to the local government or to a facility designated by the local government. . . ." *Fla. Stat. § 403.7046(3)*(1997). The SWMA also protects the right of an establishment that generates SSRMs to sell the SSRMs to a certified recovered materials dealer, as well as protecting the right of such dealers to purchase or collect such SSRMs from commercial establishments. *See id.* Other provisions of the SWMA also support competition related to SSRMs. *See id. § 403.7046(3)(d)*. [8]

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[7] The SWMA defines "recovered materials" to include "metal, paper, glass, plastic, textile, or rubber materials that have known recycling potential [and] can be feasibly recycled." *Fla. Stat. § 403.703(7)* (1997). "Source separated" is defined as the "recovered materials [that] are separated from solid waste where the recovered materials and solid waste are generated," and "*de minimis* solid waste . . . may be included in the recovered materials." *Fla. Stat. § 403.703(44)* (1997).

[8] *Fla. Stat. § 403.7046(3)(d)* provides, in pertinent part:

> In addition to any other authority provided by law, a local government is hereby expressly authorized . . . to enter into a *nonexclusive* franchise or to otherwise provide for the collection, transportation, and processing of recovered materials at

Miami Shores asserts in its briefs that, because the Ordinance and the SWMA are not in conflict, the Ordinance "does not prohibit Bennett . . . from making private arrangements for the collection of any source-separated recyclable materials, nor does it prohibit Lazaro's . . . from collecting and processing such materials." Rep. Mem. of Def. in Supp. of Mot. to Dis., at 12. The Court concludes that it need not decide whether the Ordinance is in strict compliance with the **[**34]** SWMA.

The Supreme Court has explained that, in the context of the state action doctrine:

> **[*1358]** in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law.

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 372, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991).

The Court in *City of Columbia* considered South Carolina statutes that authorized a municipality to regulate the size, location and spacing. of billboards. The Court rejected the argument that the municipality's regulation was not authorized if it was not, as the state statute required, adopted for a legislatively authorized purpose. The Court adopted the "broader" concept of authority for *Parker* purposes because otherwise, the federal court would "'inevitably become[] the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its **[**35]** power in a manner not authorized by state law.'" *Id. at 372* (quoting P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 212.3b, p. 145 (Supp. 1989)).

Therefore, for state action immunity purposes, this Court will examine the authority granted to Miami Shores under a broader concept than what might be used to determine the legality of Miami Shores' actions under Florida law.

Since the Court concludes that Fla. Stat. § 180 provides the necessary state policy to displace competition, and since Miami Shores agrees that the Ordinance does not cover source-separated recyclable materials because the Ordinance and the SWMA are not in conflict, this Court will not conduct a detailed analysis of whether the Ordinance technically complies with the SWMA. Analyzed under a broad concept of authority, Miami Shores' actions are entitled to *Parker* immunity from the federal antitrust laws.

III. *Declaratory Relief*

In Count III of their Amended Complaint, Plaintiffs seek a declaration that the Ordinance does not apply to them because Miami Shores has taken the position that the Ordinance does not apply to the collection of SSRMs. Bennett argues that Miami Shores cannot force it to use **[**36]** Miami Shores' waste processing services for SSRMs. Similarly, Lazaro's argues that Miami Shores cannot prevent it from collecting and processing SSRMs within Miami Shores.

As previously noted, Miami Shores contends that the SWMA and the Ordinance are not in conflict, and that the Ordinance "does not prohibit Bennett . . . from making private arrangements for the collection of any source-separated recyclable materials, nor does it prohibit Lazaro's . . . from collecting and processing such materials." Rep. Mem. of Def. in Supp. of Mot. to Dis., at 12. Nonetheless, because the Court has dismissed Plaintiffs' *Commerce Clause* and Sherman Act claims, the Court lacks subject matter jurisdiction over the state law claim for declaratory relief. *See* *28 U.S.C. § 1367(c)(3)*. Therefore, Count III is dismissed.

CONCLUSION

> commercial establishments provided that such franchise or provision *does not prohibit* a certified recovered materials dealer from entering into a contract with a commercial establishment to purchase, collect, transport, process, or receive source-separated recovered materials. . . .

(emphasis added).

Miami Shores' decision to take over the local waste collection market does not violate the *Commerce Clause*, and is immune from the federal antitrust laws pursuant to the state action doctrine. Therefore, the Defendant's Motion to Dismiss is GRANTED. The entire complaint is dismissed with prejudice.

DONE AND ORDERED in Chambers at Miami, Florida, this *7th* **[**37]** day of May, 1998.

FEDERICO A. MORENO

UNITED STATES DISTRICT JUDGE

Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.

United States District Court for the District of Minnesota, Fourth Division

May 7, 1998, Decided

Civil No. 4-96-804 (ADM/JGL)

Reporter

5 F. Supp. 2d 694 *; 1998 U.S. Dist. LEXIS 6626 **; 1998-1 Trade Cas. (CCH) P72,168

Minnesota Association of Nurse Anesthetists, Gayle McKay, Ladonna Schweer, John Okonek, Bernadine Okonek, Annette Atchison, Fred Benjamin, Bart Barry, Faye Leatherman, Sue Milbach, Sandra Henschke, Judith A. Schmidt and Gary Hagen, Plaintiffs, vs. Unity Hospital, Mercy Hospital, William MacNally, President and Chief Executive Officer of Unity and Mercy Hospitals, Allina Health System Corp., Mark Sperry, M.D., Gary Baggenstoss, M.D., John Murphy, in his capacity as Vice President of Unity and Mercy Medical Centers, James Cumming, M.D., John Rydberg, M.D., Midwest Anesthesia, P.A., Thelma M. Albay, M.D., Minda Castillejos, M.D., Teri Heil, M.D., Sang Hong, M.D., Ted Janossy, M.D., Raymond Kloepper II, M.D., John Magdsick, M.D., Thomas Maggs, M.D., Thomas Polta, M.D., John Roseberg, M.D., Jai Suh, M.D., Jeffrey Yue, M.D., Mark Eggen, M.D., Metropolitan Anesthesia Network, Allen Tank, Theodore Grindal, Esq., Craig Johnson, M.D. (both individually and in his capacity as President of the Minnesota Society of Anesthesiologists), St. Cloud Hospital, John Frobenius, Chief Executive Officer of St. Cloud Hospital, Linda Chmielewski, Vice President Hospital Operations of St. Cloud Hospital, Anesthesia Associates of St. Cloud Ltd., Gary A. Boeke, M.D., Philip F. Boyle, M.D., L. Michael Espeland, M.D., Alan D. Espelien, M.D., Paul J. Halverson, M.D., Lanse C. Lang, M.D., William H. Rice, M.D., Allan Reitz, M.D., and Annette E. Zwick, M.D., Defendants.

Disposition: **[**1]** Defendants' Motion for Summary Judgment GRANTED IN PART and DENIED IN PART. Plaintiffs' state law claims (Counts 2, 8, 12 and 16) DISMISSED WITHOUT PREJUDICE.

Core Terms

anesthesia, conspiracy, antitrust, Plaintiffs', Defendants', summary judgment, anesthesiologists, geographic, patients, market power, anti-competitive, relevant market, monopolization, anti trust law, reimbursement, terminated, summary judgment motion, fail to demonstrate, market share, conspired, detrimental effect, rule of reason, market area, Sherman Act, competitors, facilities, providers, alleges, billing, boycott

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Summary Judgment, Evidentiary Considerations**

A party is entitled to summary judgment as a matter of law only if it can show that no genuine issue of material fact exists. *Fed. R. Civ. P. 56(c)*. There is no different or heightened standard for summary judgment in a complex antitrust case. The basic inquiry on summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. If the evidence rebutting the motion for summary judgment is only colorable or not significantly probative, summary judgment should be granted.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Summary Judgment, Evidentiary Considerations**

At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. Rather, the court's function is to determine whether a dispute about a material fact is genuine, that is, whether a reasonable jury could return a verdict for the nonmoving party based on the evidence. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in favor of the non-moving party. If reasonable minds could differ as to the import of the evidence, summary judgment is inappropriate.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3[] **Summary Judgment, Opposing Materials**

Under *Fed. R. Civ. P. 56(c)*, the moving party bears the initial burden of demonstrating the absence of a genuine issue for trial. When a summary judgment motion is properly supported, the opposing party may not rest on the allegations or denials of its pleadings, but must come forward with sufficient evidence to demonstrate a genuine issue for trial. The non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN4[] Regulated Practices, Price Fixing & Restraints of Trade

To succeed on an antitrust claim, a plaintiff must prove that there has been "antitrust injury." Antitrust injury is defined as injury of the type that the antitrust laws were intended to prevent, and that flows from that which makes defendant's acts unlawful. The injury to the private plaintiff must coincide with the public harm, increasing the likelihood that public and private enforcement of the antitrust laws will further the same goal of increased competition.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act (Act) provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal." *15 U.S.C.S. § 1*. The statutory language, however, is not strictly interpreted; such an interpretation would clearly encompass many legitimate, competitive activities. The United State Supreme Court recognizes that the Act was intended to prohibit only unreasonable restraints of trade.

Antitrust & Trade Law > Sherman Act > Claims

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Sherman Act, Claims

To establish a claim under *§ 1* of the Sherman Act, a plaintiff must demonstrate (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce. The first element of a *§ 1* case requires that defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective. Concerted action forms the essence of a *§ 1* claim; unilateral actions do not give rise to antitrust liability under *§ 1*.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN7[] **Summary Judgment, Opposing Materials**

Although *Fed. R. Civ. P. 56* requires that the inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing a motion for summary judgment, ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a case under *§ 1* of the Sherman Act. The United States Supreme Court, in clarifying the nature and extent of a plaintiff's burden in establishing proof of a conspiracy that violates *§ 1*, holds that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment, a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. The plaintiff must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN8[] **Antitrust & Trade Law, Sherman Act**

It is possible to infer the existence of a conspiratorial agreement from consciously parallel conduct if the parallelism is accompanied by substantial additional evidence -- often referred to as the "plus factors." A plaintiff may satisfy the "plus factors" requirement by demonstrating that the conspirators acted against their own self-interest by engaging in the parallel conduct or that a high-level of interfirm communication existed in conjunction with the parallel actions. Where an examination of the proffered "plus factors" leads to an equally plausible inference that merely interdependent behavior is at hand, then there is no triable issue that would preclude a grant of summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

As to the reasonableness of the alleged restraint regarding a claim under *§ 1* of the Sherman Act, a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "per se" unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

If the challenged behavior in a claim under *§ 1* of the Sherman Act falls within the discrete category of conduct that is illegal per se, a plaintiff need not establish its anti-competitive effects.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

The United States District Court for the District of Minnesota agrees with most appellate courts, including the United States Court of Appeals for the Eighth Circuit, that the examination of the denial or revocation of hospital privileges occurs primarily under a rule of reason rather than per se analysis.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

In assessing the legality of a restraint of trade under the rule of reason, the focus is on the detrimental effects to competition. A plaintiff may demonstrate the existence of detrimental effects in one of two ways. First, a plaintiff may delineate a relevant market and show that the defendant has enough market power to significantly impinge on competition. Second, a plaintiff may demonstrate that the challenged practice has actually produced significant anti-competitive effects. If a plaintiff demonstrates the existence of actual detrimental effects, formal market analysis is unnecessary. Either showing -- market power or actual detrimental effects -- shifts the burden to the defendant to demonstrate pro-competitive effects. If the defendant satisfies this burden, the burden then shifts back to the plaintiff to demonstrate that any legitimate objectives could be achieved through substantially less restrictive means. The court then weighs the benefits and detriments to determine if the conduct is reasonable "on balance."

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

Relevant markets are defined both in terms of product and geography. A geographic market is that geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN14[] **Antitrust & Trade Law, Sherman Act**

Monopolization requires that a defendant possess monopoly power in a relevant geographic market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Monopolies & Monopolization, Attempts to Monopolize**

A claim of attempted monopolization requires a showing of (1) a specific monopolistic intent on the part of the defendant; (2) predatory or anti-competitive conduct on the part of the defendant in an effort to accomplish an unlawful purpose; (3) a dangerous probability of success; and (4) antitrust injury.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

The elements of a conspiracy to monopolize claim are (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN17[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To prevail under the essential facilities doctrine, the plaintiff must establish (1) control of an essential facility by a monopolist; (2) the inability to practically or economically duplicate the facility; and (3) the unreasonable denial of the use of the facility to a competitor when such is economically and technically feasible.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN18[] **Jurisdiction, Jurisdictional Sources**

Pursuant to *28 U.S.C.S. § 1367(c)(3)*, a district court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it has original jurisdiction. The district court has the discretion to exercise or to refuse to exercise pendent jurisdiction. The district court should exercise judicial restraint and avoid state law issues wherever possible.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN19[] **Jurisdiction, Jurisdictional Sources**

Factors that the district court should consider in deciding whether to exercise supplemental jurisdiction include (1) the stage of the litigation; (2) the difficulty of the state claim; (3) the amount of judicial time and energy necessary for the claim's resolution; and (4) the availability of a state forum.

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For AASC, Defendants: Joseph M. Musilek, Esq., Eric Tostrud, Esq., Lockridge Grindal Nauen & Holstein.

Judges: Ann D. Montgomery, UNITED STATES DISTRICT JUDGE.

Opinion by: Ann D. Montgomery

Opinion

[*698] MEMORANDUM OPINION AND ORDER

INTRODUCTION

The above-entitled matter came on for hearing before the undersigned United States District Judge on January 21, 1998, pursuant to Defendants' motion for summary judgment. This case alleges a conspiracy in which Defendants purportedly **[**2]** conspired to eliminate the use of certified registered nurse anesthetists in the provision of anesthesia services. Plaintiffs characterize the gravamen of their Complaint as follows: "To maintain their unusually high level of compensation, to facilitate their fraudulent billing and to increase their dominant position in the market, defendant anesthesiologists have conspired with defendant hospitals to terminate plaintiff CRNAs who they see as a threat both to their unusually high level of compensation and to the future of their profession." Pl.'s Mem. in Opp'n to S.J., at 1.

In their Complaint, Plaintiffs assert the following claims: violation of *§ 1* of the Sherman Act through unreasonable restraint on competition; violation of Minnesota's Antitrust Statute; violation of *§ 1* of the Sherman Act through illegal boycott; violation of *§ 2* of the Sherman Act through monopoly, attempted monopolization, and conspiracy to monopolize; violation of *§§ 1*, *2*, *14*, *15*, and *26* of the Sherman and Clayton Acts through an illegal tying arrangement; violation of federal antitrust laws through the denial of essential facilities; violation of the Minnesota Deceptive Trade Practices Act; violation of **[**3]** the Minnesota Whistleblower Statute; and civil conspiracy. [1]

BACKGROUND

I. The Parties

The Plaintiffs in this action include twelve certified registered nurse anesthetists ("CRNAs") and the Minnesota Association of Nurse Anesthetists ("MANA"). The Defendants include the Allina Health System, Mercy and Unity Hospitals and two of their administrators (the "Allina Defendants"); the anesthesiologists who work at Mercy and Unity Hospitals, their practice group, and its administrator (the "MAPA Defendants"); the St. Cloud **[**4]** Hospital and two of its administrators (the "St. Cloud Hospital Defendants"); the anesthesiologists who work at St. Cloud Hospital and their practice group **[*699]** (the "AASC Defendants"). [2] Defendants Unity and Mercy Hospitals, which are located in Fridley, Minnesota, and Coon Rapids, Minnesota, respectively, are jointly owned and administered by Allina Health System.

II. Factual Background

The landscape of the health care industry has undergone kaleidoscopic changes in the last decade. Today, models of health care built on cost containment and managed care predominate. This transformation has resulted in a number of conflicts which, like the present one, involve difficult human resource issues.

Anesthesiology is a medical specialty in which a qualified medical practitioner renders a patient **[**5]** insensitive to pain during invasive medical procedures. Both anesthesiologists ("MDAs") and CRNAs may administer anesthesia. Although CRNAs do not have the extensive medical education required for MDAs, CRNAs are clinically qualified to administer anesthesia under many circumstances. Stone Aff., Ex. 199, 201. Plaintiffs contend that the delivery of anesthesia services has historically been dominated by nurses rather than doctors. Stone Aff., Ex. 673. According to Plaintiffs, this balance began to shift to some extent when anesthesia delivery became more profitable. Despite this shift, sixty-five percent of the 26 million anesthetics in the United States are still administered by CRNAs. Stone Aff., Ex. 1.

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[1] United States District Judge Michael J. Davis dismissed a number of Plaintiffs' other claims in his September 29, 1995, Order ruling on Defendants' motion to dismiss. The dismissed claims included: violation of Minnesota's Consumer Fraud Act, tortious interference with contractual and prospective business and economic relations, unfair competition under Minnesota law, breach of implied covenant of good faith and fair dealing, and wrongful termination in violation of public policy.

[2] Plaintiffs also alleged claims against attorney Theodore Grindal, who represented the Minnesota Society of Anesthesiologists. Judge Davis, however, dismissed all claims against Grindal in his September 29, 1995 Order.

A significant portion of the recipients of anesthesia services are Medicare patients. As a result, the method and criteria for Medicare reimbursement are critically important for both MDAs and CRNAs. Due to the increasing profitability of the profession, Plaintiffs contend that MDAs across the country began to systematically tender multiple, contemporaneous Medicare bills for services provided by CRNAs but ostensibly supervised by MDAs. In an effort to discourage MDAs from billing **[**6]** for anesthesia services in which they played a de minimus role, Congress passed the Tax Equity And Fiscal Responsibility Act of 1982 ("TEFRA"). Plaintiff's Ex. 673, 199, 201. The TEFRA regulations "recognize that an anesthesiologist may either: (1) 'personally perform' the anesthesia service; (2) 'medically direct' concurrent anesthesia procedures (that is, two, three or four concurrent procedures) involving qualified anesthesia personnel, usually certified registered anesthetists ("CRNA"); or (3) medically supervise anesthesia procedures (that is, more than four concurrent cases)." Stone Aff., Ex. 280. Under the TEFRA regulations, "medical direction" applies only to concurrent procedures, never to a single case. Id. In short, TEFRA required that MDAs maintain a minimal level of involvement, supervisory or otherwise, in order to obtain Medicare reimbursement.

After implementation of the TEFRA regulations, the Health Care Financing Administration ("HCFA") continued to negotiate the delicate balance between reimbursement for MDA and CRNA services. Stone Aff., Ex. 280. Prior to 1989, hospitals billed Medicare collectively for CRNA services and other necessities such as anesthetics, **[**7]** equipment, and operating room time. The Omnibus Budget Reconciliation Act of 1986, however, authorized HCFA to develop a CRNA fee schedule payment system to allow separate Medicare reimbursement for services rendered by CRNAs. [3] Id. Consequently, in 1989, CRNAs **[*700]** could bill Medicare directly. CRNA services, however, are not billable when an MDA is billing for full-time service. The 1989 regulations provided: "When an anesthesiologist and an anesthetist are both involved in a single anesthesia service, the service is considered personally performed by the anesthesiologist. No separate payment is ordinarily recognized for the anesthetist's service." Stone Aff., Ex. 18. Plaintiffs contend that this and other changes to the reimbursement methodology fostered competition between MDAs and CRNAs.

[8]** Plaintiffs allege that Defendant MDAs disregarded the Medicare reimbursement requirements and used CRNAs, who were then employed by the hospitals, to actually provide the anesthesia services while the MDAs themselves spent little or no time in the operating room. Stone Aff., Exs. 534, 527, 578. Defendant MDAs allegedly continued to bill Medicare "as if they were personally present in the room and providing the services." Pl.'s Mem. in Opp'n to Df.'s Mot. for S.J., at 5. MDA billing practices allegedly became contentious after 1989, when CRNAs began to bill directly for the same services. Medicare and other insurers refused to pay both a CRNA bill and an MDA bill for the same procedure. Stone Aff., Ex. 242.

In 1991, Travelers Insurance Company performed an audit at Mercy Hospital, which revealed a problem with this "double-billing." Pursuant to its postpayment review of CRNA charges on Medicare claims, Travelers requested that Mercy repay $ 1476.91 for duplicative bills submitted by MDAs and CRNAs. Stone Aff., Ex. 18. The President of the American Society of Anesthesiology ("ASA") expressed alarm that "this intolerable situation has arisen because of claims being submitted by CRNAs **[**9]** for anesthesia services, which has led these carriers to issue new policies recognizing only the CRNA claim." Stone Aff., Ex. 456.

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[3] An official at the Health Care Financing Administration illustrated the difficulty of delineating a payment system for services rendered by CRNAs and/or MDAs:

> [HCFA] differentiated, for payment purposes between the services of CRNAs who are medically directed and the services of non-medically directed CRNAs, that is CRNAs working without being directed by an anesthesiologist. One issue HCFA had to address in these regulations was how to pay CRNAs where concurrent procedures aren't involved but both a CRNA and an anesthesiologist are involved in a single procedure. Both the proposed regulation . . . and the final regulation . . . included a regulatory provision that advised CRNAs that, if an anesthesiologist and a CRNA are both involved in a single anesthesia service, for purposes of determining whether to pay the CRNA, we would deem the service to have been personally performed by the anesthesiologist. In such cases, we also allow payment of the CRNA if the CRNA furnishes documentation to the carrier explaining the medical necessity for two anesthesia providers.

Stone Aff., Ex. 280 (letter to David S. Stone from the HCFA).

Theodore Grindal, an attorney for the state association of anesthesiologists, allegedly circulated a letter dated October 28, 1992, (the "Grindal letter") to all anesthesiologists in the state concerning Medicare reimbursement for MDAs and CRNAs. Plaintiffs contend the Grindal letter was a carefully constructed "blueprint" designed to eliminate CRNAs as competitors. The letter cautions the anesthesiologists that "active participation in such a hospital business decision making process (i.e. firing CRNAs) could expose anesthesiologists to legal liability under the antitrust laws." Stone Aff., Ex. 24. Although Grindal is no longer a defendant in the case, Plaintiffs allege that this letter provided the vehicle through which the conspiracy to restrain trade was effectuated.

In March 1994, Unity and Mercy Hospitals terminated the CRNAs employed at the hospitals. [4] Plaintiffs assert that the terminations were the product of a conspiracy to eliminate CRNAs as competitors in the provision of anesthesia services. Defendants maintain that the hospitals instead **[**10]** reorganized their anesthesia departments to address the economic realities of a dynamic health care market in which Medicare reimbursement was rapidly declining. The Defendant hospitals contend that the terminations were necessary to reduce costs and achieve the economic efficiency concomitant with sole-source contracting. Duncan Aff. I, Ex. 1.

Unity and Mercy Hospitals entered into an exclusive contract with the practice group, Midwest Anesthesia, P.A. ("MAPA"), in March 1994, to provide anesthesia services at the hospitals for five years. Duncan Aff. I, Ex. 2. Rather than have the hospitals employ CRNAs directly, the contract required that MAPA provide CRNA coverage. Unity and Mercy offered the CRNAs the opportunity to continue working at the hospitals as either employees of the anesthesiologists or as independent subcontractors to the anesthesiologists. **[*701]** The CRNAs **[**11]** formerly employed by Unity and Mercy formed an organization called Nurse Anesthesia Services, P.A. ("NASPA"), which then contracted with MAPA to provide CRNA services at Unity and Mercy. Wasche Aff., P 7.

Despite the transition to sole-source contracting, Defendants maintain that nothing has changed in the clinical practice of CRNAs at Unity and Mercy. Defendants continue to use the "anesthesia care team" model, in which an MDA supervises two or more CRNAs in the administration of anesthesia. Haviland Aff., P 3. Defendants maintain that CRNA responsibilities have not changed significantly and that CRNAs continue to engage in the same scope of practice that existed before the reorganization. Duncan Aff. I, Ex. 4.

In November 1994, St. Cloud Hospital also reorganized its anesthesia department in a similar fashion. [5] For Fiscal Year 1993, St. Cloud Hospital experienced a net loss of $ 247,000 on anesthesia reimbursement. Hospital administrators at St. Cloud contend that they anticipated greater losses if they continued to employ CRNAs directly. Id. As a result, they terminated the CRNAs and entered into an exclusive contract with the anesthesiology group at the hospital, Defendant **[**12]** Anesthesia Associates of St. Cloud ("AASC"). Plaintiffs contend that the reorganization at St. Cloud Hospital occurred as the result of a conspiracy with other Defendants to eliminate CRNAs. Parsons Aff., PP 4-5. Defendants maintain, however, that St. Cloud Hospital, like Unity and Mercy, was merely responding to the economic realities of declining Medicare reimbursement and cost containment pressures. Id.

Defendant St. Cloud Hospital invited the previously employed CRNAs to continue practicing at the hospital as employees of AASC. Chmielewski Dep., at 255-56. Some CRNAs accepted employment with AASC; some did not. Honkomp Aff., P 12. Defendants maintain that there has been no change in the clinical practice of CRNAs at St. Cloud Hospital.

Plaintiffs also allege **[**13]** that CRNAs who reported fraudulent billing practices among the MDAs suffered retaliation from the Defendant Hospitals. Plaintiffs contend that in the wake of the Traveler's audit certain CRNAs met with hospital administrators to advise them that the CRNAs had observed widespread fraudulent billing by

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[4] The record suggests that administrators at Unity/Mercy began to consider terminating the CRNAs in early 1993. Stone Aff., Exs. 292, 295, 212.

[5] Hospital administrators at St. Cloud Hospital made the decision to terminate CRNAs and reorganize the anesthesia department in the fall of 1993. The hospital, however, did not complete its transition to sole-source contracting until November 1994.

MDAs. Plaintiff's allege that they were terminated by the Defendant hospitals, not only to eliminate them as competitors, but also in retaliation for reporting alleged Medicare fraud.

DISCUSSION

I. Standard for Summary Judgment

HN1[] A party is entitled to summary judgment as a matter of law only if it can show that no genuine issue of material fact exists. *Fed.R.Civ.P. 56(c)*; *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986)*. There is no different or heightened standard for summary judgment in a complex antitrust case. *Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1490 (8th Cir. 1992)*. The basic inquiry on summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *477 U.S. at 251-52, 106 S. Ct. at **[**14]** 2512*. If the evidence rebutting the motion for summary judgment is only colorable or not significantly probative, summary judgment should be granted. *Id. at 249, 106 S. Ct. at 2511*.

HN2[] At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. *Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1376-1377 (8th Cir. 1997)* (citing *Anderson, 477 U.S. at 249, 106 S. Ct. at 2510*)). Rather, the court's function is to determine whether a dispute about a material fact is genuine, that is, whether a reasonable jury could return a verdict for the nonmoving party based on the evidence. *Id. at 1377*. The evidence of the non-movant is to be believed, and all justifiable inferences **[*702]** are to be drawn in favor of the non-moving party. Id. "'If reasonable minds could differ as to the import of the evidence,'" summary judgment is inappropriate. Id. (quoting *Anderson, 477 U.S. at 250*, S. Ct. at 2511.)

HN3[] Under *Federal Rule of Civil Procedure 56(c)*, the moving party bears the initial burden of demonstrating the absence of a genuine issue for trial. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.,* ***[**15]*** *475 U.S. 574, 586-87*; *106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538 (1986)*. When a summary judgment motion is properly supported, the opposing party may not rest on the allegations or denials of its pleadings, but must come forward with sufficient evidence to demonstrate a "genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita, 475 U.S. at 586-87*.

II. Antitrust Claims

A. Antitrust Injury

HN4[] To succeed on an antitrust claim, a plaintiff must prove that there has been "antitrust injury." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Antitrust injury is defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." Id. The injury to the private plaintiff must coincide with the public harm, "increasing the likelihood that public and private enforcement of the antitrust laws will further the same goal of increased competition." *Todorov v. DCH Healthcare* ***[**16]*** *Auth., 921 F.2d 1438, 1449-50 (11th Cir. 1991)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 320*; *82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)* (antitrust laws were enacted for the "protection of competition, not competitors"); see also 2 Areeda & Hovenkamp, ***Antitrust Law***, P 362 ("Compensation for that injury must be consistent with the purposes of ***antitrust law*** generally and with the rationale for condemning the particular defendant").

In the present case, Plaintiffs must demonstrate the existence of antitrust injury. This can be accomplished by establishing that the Defendants changed their behavior in an anti-competitive way such as an increase in the price of anesthesia beyond competitive levels or a decrease in the output or quality of care decreased. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 31 n. 52, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* ("The record simply tells us little if anything about the effect of this arrangement on price or quality of anesthesiological services"); *Oksanen v. Page Memorial Hospital, 945 F.2d 696, 708-09 (4th Cir. 1991)* ("The fact that a hospital's decision caused a disappointed physician to practice medicine **[**17]** elsewhere does not of itself constitute antitrust injury"). Because the HCFA sets the prices for anesthesia in Medicare and Medicaid cases, Defendants cannot exercise any potential market power to raise the price for anesthesia services in those cases. In such public-pay cases, the rate of reimbursement is fixed. Regarding private-pay patients, Plaintiffs offer little support for their contention that fewer CRNAs in the labor force will result in higher anesthesia prices. [6]

Plaintiffs contend that the removal of CRNAs as hospital employees results in public antitrust injury because CRNAs are no longer available to thwart the alleged "double-billing" and Medicare fraud. **[**18]** Such an injury, however, is not the type the antitrust laws were designed to prevent. As such, it does not constitute a legally cognizable "antitrust injury." Plaintiffs boldly assert several other types of injury but provide no record support for these assertions, offering instead "to present extensive testimony and evidence at trial . . . ." Pls.' Mem. in Opp'n to Dfs.' Mot. for S.J., at 51; see also *Robles, M.D. v. Humana Hospital Cartersville, 785 F. Supp. 989, 999* ("[Plaintiff] has only made conclusory statements and unsupported allegations concerning what might happen in the future **[*703]** to obstetric prices if he is not allowed to compete in this particular . . . market").

Plaintiffs rely on Judge Davis' decision that they established sufficient antitrust injury to withstand Defendants' motion to dismiss. Judge Davis' Order, however, was issued prior to the completion of discovery. Based on the fully developed record, Plaintiffs have failed to demonstrate a triable issue as to the existence of antitrust injury. Further, even if this Court were to find that Plaintiffs have satisfied the requirement of demonstrating antitrust injury, there are alternative grounds, discussed below, **[**19]** for granting Defendants' motion for summary judgment.

B. Conspiracy

HN5[] *Section 1* of the Sherman Act provides, in pertinent part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal." *15 U.S.C. § 1*. The statutory language, however, is not strictly interpreted; such an interpretation would clearly encompass many legitimate, competitive activities. See *United States v. Topco Assocs., 405 U.S. 596, 606*; *92 S. Ct. 1126, 1133, 31 L. Ed. 2d 515 (1972)*. The Supreme Court recognized that the Act was intended to prohibit only unreasonable restraints of trade. *Board of Trade of Chicago v. United States, 246 U.S. 231, 238*; *38 S. Ct. 242, 244, 62 L. Ed. 683 (1918)* ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition").

HN6[] To establish a claim under *§ 1* of the Sherman Act, a plaintiff must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade **[**20]** under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce. *Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 (9th Cir. 1991)*. The first element of a *§ 1* case requires that defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. Concerted action forms the essence of a *§ 1* claim; unilateral actions do not give rise to antitrust liability under *§ 1*. *Willman v. Heartland Hosp. East, 34 F.3d 605, 610 (8th Cir. 1994)*.

HN7[] Although *Rule 56* requires that "the inferences drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion, . . . ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita, 475 U.S. at 587*. In Matsushita, the Supreme Court clarified the nature and extent of a plaintiff's burden in establishing proof of a conspiracy that violates *§ 1*. The Court held:

> Conduct as consistent with permissible competition as with illegal conspiracy does **[**21]** not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment . . ., a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility' that the alleged

[6] Plaintiffs' expert, Dr. Jerry Cromwell, draws vague conclusions and speculates about the impact of the termination of the CRNAs. On the issue of antitrust injury, the Cromwell report does not offer empirical evidence similar to that of Defendants' expert, Dr. William Lynk. As a result, it does not effectively refute the findings of Dr. Lynk.

> conspirators acted independently. [Plaintiffs] . . . must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Id. at 588 (citations omitted).

In a recent case interpreting Matsushita, the Eighth Circuit rejected plaintiffs' contention that the district court "usurped the jury's function by inferring lawful conduct from defendants' descriptions of the marketplace." Corner Pocket of Sioux Falls, Inc. v. Video Lottery Technologies, Inc., 123 F.3d 1107, 1112 (8th Cir. 1997). The Eighth Circuit commented: "Because '***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case,' the court must necessarily weigh the summary judgment evidence of both parties in determining whether plaintiffs' evidence 'tends to exclude the possibility that the alleged conspirators acted independently.'" **[**22]** Id. (citing Matsushita, 475 U.S. at 588).

[*704] In the present case, Plaintiffs rely primarily on evidence of "parallel conduct" in an effort to demonstrate the existence of a conspiratorial agreement. Plaintiffs allege that the hospitals terminated their CRNAs at approximately the same time, with the same motivation, and in a similar manner. [7] Plaintiffs contend that the similar courses of action undertaken at Unity/Mercy and St. Cloud Hospital compel an inference of conspiracy. According to Plaintiffs, the Grindal letter provided a "blueprint" for this purportedly tacit collusion.

[23]** Many courts have examined the issue of conscious parallelism in the context of parallel pricing in oligopolistic markets. [8] Although the instant case does not involve parallel *pricing*, the fundamental tenets of conscious parallelism are applicable. ***HN8***[] It is possible to infer the existence of an agreement from consciously parallel conduct if the parallelism is accompanied by substantial additional evidence -- often referred to as the "plus factors." *In re Potash Antitrust Litigation, 954 F. Supp. 1334, 1350 (D. Minn. 1997)* (citing Torodov v. DCH Healthcare Authority, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991)).

A plaintiff, for example, may satisfy the "plus factors" requirement by demonstrating that the conspirators acted against **[**24]** their own self-interest by engaging in the parallel conduct or that a high-level of interfirm communication existed in conjunction with the parallel actions. See e.g., Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1242 (3rd Cir. 1993); Market Force, Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1172 (7th Cir. 1990); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 883 (8th Cir. 1978) (requiring additional evidence such as evidence that the parallel conduct was "inconsistent with the self-interest of the individual actors"). "Where an examination of the proffered 'plus factors' leads to an equally plausible inference that merely interdependent behavior is at hand, then there is no triable issue that would preclude a grant of summary judgment . . . ." *In re Potash, 954 F. Supp. at 1351*.

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[7] Plaintiffs allege that Defendants engaged in conscious parallelism in an effort to eliminate CRNAs as competitors. The allegations of parallel behavior include the following: "Defendant MDAs secretly approached the Defendant hospitals to terminate their CRNA employees and later lied about the communications to make it appear the hospitals had independently decided to do so;" "both hospitals used operations improvement-type vehicles as a smoke screen to terminate the CRNAs;" "both hospitals claims [sic] that they terminated the CRNAs because they were losing money even though the facts demonstrate that CRNAs were profitable;" "both hospitals used severance as a carrot and a stick to force CRNAs to work for the MDAs;" "both hospitals refused to meet with CRNAs individually or jointly;" "both hospitals excluded CRNAs from the restructuring process;" "both MDA groups refused to allow CRNAs to see their contracts with the hospital prior to being employed by the MDAs . . .;" "both MDA groups hired Ted Grindal and his firm to represent them . . .;" "both hospitals and MDAs negotiated indemnifications from the hospitals to the MDAs to pay their legal fees . . .;" "both hospitals threatened to bring in the same . . . national temporary anesthesia services agency . . .;" "the MDAs at both hospitals made similar statements to the effect that CRNAs got what they were asking for by obtaining the right to direct bill . . . ." Pl.'s Mem. in Opp'n to Dfs.' Mot. for S.J. at 19-24.

[8] An oligopoly is a market containing only a few sellers, in which all sellers recognize that they are primarily interdependent. Consequently, an oligopolist seller will likely account for its competitor's reactions in determining output and prices. VI Areeda, § 1410b at 65.

Plaintiffs contend that numerous actions taken by Defendant hospitals evidence collusion. [9] However, the only action articulated by Plaintiffs that involves conduct which arguably could be interpreted as contrary to Defendants' self-interest is that Defendant hospitals terminated the CRNAs even though the CRNAs were profitable. Although Plaintiffs criticize the profitability **[**25]** analysis conducted at Defendant St. Cloud Hospital, Plaintiffs do not affirmatively demonstrate that the hospitals acted against their own self-interest in terminating the CRNAs. Plaintiff's bald assertion that "it is clear that shifting CRNAs off of the hospital payroll and onto the MDA payroll actually substantially increased the cost of anesthesia" is insufficient to constitute a 'plus factor.' Even if true, this assertion, which is offered with little factual support, merely indicates **[*705]** that the cost to the consumer or third party payer increased. Plaintiffs do not address whether the decision was economically efficient for the hospitals. To be a 'plus factor' the action must be against the interest of each defendant hospital; accordingly, Plaintiffs have failed to establish that this is a 'plus factor' based on the contrary to self-interest analysis.

Plaintiffs do not explicitly contend that the level of interfirm communication **[**26]** is sufficiently high to constitute a 'plus factor.' Plaintiffs suggest, however, that information was channeled between hospitals and professional associations through Theodore Grindal and Al Tank. There is a paucity of sufficient evidence to support this allegation of channeled communication. Defendants concede that three telephone conversations occurred in which anesthesia was discussed: one between St. Cloud Hospital President John Frobenius and Unity/Mercy Hospital President Bill MacNally; one between Frobenius and Unity/Mercy Vice President John Murphy; and one between St. Cloud Hospital Vice President Linda Chmielewski and Murphy. Defendants contend that the brief conversations occurred after Unity/Mercy publicly announced the reorganization of the anesthesia department in July 1993.

Plaintiffs also allege that a number of documents found in the files of AASC could only have come from Unity/Mercy. The documents, most of which are of unknown origin, are neither quantitatively nor qualitatively sufficient to satisfy the requirement for 'plus factors.' The three brief telephone conversations and the documents identified by Plaintiffs do not constitute the requisite high-level of **[**27]** interfirm communication, which "viewed in conjunction with paralleling acts, can serve to allow a jury to reasonably infer a conspiracy." See *In re Potash, 954 F. Supp. at 1351* (citing *Market Force Inc., 906 F.2d at 1172*). Given these facts, even when viewed in the light most favorable to the non-moving party, it is equally plausible that the Defendant hospitals acted independently, in response to market conditions, in terminating their respective CRNA employees.

Plaintiffs also rely on the affidavit of a CRNA from Florida, Randolph Harvey, to indicate the existence of an agreement. Harvey allegedly overheard Defendant Craig Johnson, an anesthesiologist at St. Cloud Hospital, talking with several people at a breakfast meeting in May 1993. Harvey allegedly heard Johnson say: "We have a way to take care of CRNAs in Minnesota to gain control of anesthesia without worrying about antitrust. We will get the hospitals to fire the CRNAs and force them to work for us, or the CRNAs may apply for privileges as private contractors with the hospital. . . ." Harvey Aff., P 4.

In *Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810 (11th Cir. 1990)*, cert. denied, *495 U.S. 924, 109 L.* ***[**28]*** *Ed. 2d 322, 110 S. Ct. 1960 (1990)*, the Eleventh Circuit Court of Appeals held that similar statements were insufficient as a matter of law to establish a conspiracy. The plaintiff in Bolt, a physician whose privileges had been revoked at three different hospitals within two months, alleged that the hospitals and others conspired to unreasonably restrain trade. Bolt testified that one of the defendant physicians made the following statements to the credentials committee at one of the hospitals:

> "Listen, here's the plan. They're going to get rid of [Bolt] at [Halifax Hospital]. That means we're going to get rid of him at [Orman Beach Hospital] and I think because the other two hospitals are going to get rid of him, we've got to seriously think of getting rid of him at [Daytona Community Hospital]."

Bolt, 891 F.2d at 826. The Eleventh Circuit held that the statements were insufficient to permit an inference of conspiracy. The court opined: "Viewed in the light most favorable to Dr. Bolt, the evidence merely establishes that the decisionmakers at each one of the three hospitals based their decisions at least in part on matters that occurred at the other **[**29]** two hospitals." *Id. at 827*.

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[9] See supra note 6 (listing allegedly collusive or parallel conduct).

Similarly, when viewed in the light most favorable to Plaintiffs, the Harvey affidavit does not refer to an agreement between Defendants to terminate the CRNAs. It is equally plausible that the statements attributed to Dr. Johnson merely reflect his own interpretation of the situation at St. Cloud Hospital. As in Bolt, the statements do not **[*706]** evidence *concerted* action or an *agreement* of any kind.

The Defendants' actions were equally consistent with permissible, legitimate business conduct as they were with an illegal conspiracy. Consequently, Plaintiffs have failed to demonstrate the existence of a genuine issue of material fact on the element of conspiracy.

C. Reasonableness of Restraint

Despite the conclusion that Plaintiffs have failed to demonstrate a contract, combination, or conspiracy, the second prong of a *§ 1* claim will be addressed to assess whether there is a genuine issue of material fact regarding the reasonableness of the alleged restraint. ***HN9***[] "[A] restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to **[**30]** be known as the 'Rule of Reason,' under which the 'test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'" *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 457-58*; *106 S. Ct. 2009, 2017, 90 L. Ed. 2d 445 (1986)* (citation omitted).

1. The Per Se Rule

HN10[] If a court determines that the challenged behavior falls within the discrete category of conduct that is illegal per se, a plaintiff need not establish its anti-competitive effects. *Flegel, D.O. v. Christian Hospital, Northeast-Northwest, 4 F.3d 682, 686 (8th Cir. 1993)*. In the present case, Plaintiffs assert that because Defendants' conduct resulted in the exclusion of a class of medical service providers, Defendants' actions are so manifestly anti-competitive that they are illegal per se.

HN11[] Most courts of appeals, including the Eighth Circuit Court of Appeals, have examined the denial or revocation of hospital privileges primarily under a rule of reason rather than per se analysis. *Flegel, D.O. v. Christian Hospital, Northeast-Northwest, 4 F.3d 682, 686 (8th Cir. 1993)* (citing *Oksanen v. Page* ***[**31]*** *Memorial Hosp., 945 F.2d 696, 708-09 (4th Cir. 1991)* (en banc), cert. denied, *502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137*, (1992); *Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1412 (9th Cir. 1991)*, cert. denied, *502 U.S. 994, 112 S. Ct. 617, 116 L. Ed. 2d 639 (1991)*; *Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1445 n. 1 (9th Cir. 1988)*; *Goss v. Memorial Hosp. Sys., 789 F.2d 353, 354-55 (5th Cir. 1986))*. In Bhan, the Ninth Circuit Court of Appeals addressed the applicability of per se analysis in the context of group boycotts, such as the one alleged in Count 1 of Plaintiffs' Complaint. The court determined that "the per se rule should be invoked for a group boycott when the challenged activity would almost always tend to be anti-competitive." *Bhan, 929 F.2d at 1412*.

Significantly, in a situation very analogous to the present case, the plaintiff in Bhan alleged that physicians conspired with a hospital to allow only physician, rather than nonphysician, providers to offer specific medical services. The court recognized that under certain circumstances, "the practice of excluding nonphysician providers as a class would appear to be anti-competitive." **[**32]** Id. The court determined, however, that under some circumstances "the choice of physician over nonphysician providers may actually sharpen competition by making [the hospital] a more attractive competitor in the patient market." Id. As a result, the court held that the rule of reason was applicable, because the practice of excluding nonphysicians was not one that would always have an anti-competitive effect. Adopting this analysis, the Court will examine the challenged conduct under the rule of reason.

2. Rule of Reason Analysis

HN12[] In assessing the legality of a restraint of trade under the rule of reason, courts focus on the detrimental effects to competition. *Flegel, 4 F.3d at 687*. A plaintiff may demonstrate the existence of detrimental effects in one of two ways. Id. (citing IFD, 476 U.S. at 460-61; *106 S. Ct. at 2019*). First, a plaintiff may delineate a relevant market and show that the defendant has enough market power to significantly impinge on competition. *Bhan, 929 F.2d at 1413*; see also 7 Phillip Areeda, ***Antitrust* [*707] *Law*** PP 1507, 1511 (1986). Second, a plaintiff may demonstrate that the challenged practice has actually produced significant anti-competitive **[**33]** effects. If a plaintiff demonstrates the existence of actual detrimental effects, formal market analysis is unnecessary. *FTC, 476 U.S. at 460-61*; *106 S. Ct. at 2018-19*.

"Either showing -- market power or actual detrimental effects -- shifts the burden to the defendant to demonstrate pro-competitive effects." *Flegel, 4 F.3d at 688*. If the defendant satisfies this burden, the burden then shifts back to the plaintiff to demonstrate that any legitimate objectives could be achieved through substantially less restrictive means. Id. (citing *Bhan, 929 F.2d at 1413*). The court then weighs the benefits and detriments to determine if the conduct is reasonable "on balance." Id.

(a) Actual Detrimental Effects

In the present case, Plaintiffs assert, albeit in a footnote, that "there is proof of actual detrimental effects, to wit: an actual increase in the price of anesthesia as a result of CRNAs being forced to leave hospital employment and to work for MDAs." [10] Despite this assertion of alleged "fact," there is a dearth of evidence indicating Defendants' conduct actually had an adverse impact on competition. As previously discussed, there has been no showing that the price **[**34]** of anesthesia services has increased substantially, that the output has decreased, or that the quality has declined. [11] Plaintiffs cannot demonstrate a genuine factual issue regarding the existence of actual anti-competitive effects.

[35]** (b) Market Power

Because Plaintiffs failed to show actual detrimental effects, Plaintiffs must instead demonstrate that Defendants have market power in a well-defined relevant market. *Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 318 (8th Cir. 1986)*. ***HN13***[] Relevant markets are defined both in terms of product and geography. *Flegel, 4 F.3d at 689*; *Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994)*. A geographic market is that geographic area "to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *Morgenstern, 29 F.3d at 1296*.

Plaintiffs assert that the definition of the relevant market is a factual inquiry which is typically reserved for the jury. The Eighth Circuit, however, has held that market definition, like any issue, "is subject to summary judgment if the Plaintiffs fail to provide sufficient evidence from which a jury could reasonably find in their favor." *Flegel, 4 F.3d at 690* (citing *Assam Drug, 798 F.2d at 317*; *Bhan, 929 F.2d at 1413 n. 9*).

Plaintiffs allege unreasonable restraint of trade in two product markets: (1) the labor market for CRNA services; [12] **[**36]** and (2) the market for anesthesia services to customers. Regarding the labor market for CRNA services, Plaintiffs concede that the market is national or potentially larger in scope. Cromwell Rebuttal Report, at 3-4 ("[Dr. Lynk] rightly concludes (paragraph 27) that so long as a sufficient number of these providers [MDAs and CRNAs] remains geographically **[*708]** mobile, their tendency to locate in areas where demand is highest prevents local

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[10] Plaintiffs cite to successive pages in their memorandum in support of this proposition. The cited pages, however, do not contain any significant evidence of an increase in the price of anesthesia. Moreover, Plaintiffs' memorandum is not evidence properly before the Court.

[11] Plaintiffs assert, through the affidavit of Ladonna Schweer, that the quality of anesthesia services has declined at the Defendant hospitals since the termination of CRNAs as direct hospital employees. Schweer's affidavit recites inadmissible hearsay from another employee "that, based on her personal observations since the CRNAs at Unity and Mercy were terminated as employees of the hospital, the quality of care in those hospitals has decreased rather than increased." Stone Aff., Ex. 14, at 2. Moreover, the notes purportedly offered in support of these conclusory statements merely contain critiques of recent services. Without any reference to prior delivery of services, the notes are not probative of any *increase* or *decrease* in the quality of care.

[12] Plaintiffs attempt to address the labor markets for both CRNAs and MDAs. Plaintiffs' expert, however, concedes that "the defendant hospitals have no power to alter the national average income of anesthesiologists." Cromwell Rebuttal Report, at 3-4.

anesthesia providers from being insulated from the national conditions of supply and demand"). The deposition testimony of CRNAs affirmed that the labor market for anesthesia providers is national. CRNA depositions revealed significant, interstate job mobility among CRNAs who received job offers or accepted employment in other states as a result of the reorganizations at issue in this case. See Lynk Report, Table 5, Fig. 2. Because the labor market for CRNA services is national, the Defendant hospitals have no power to impact the market. Consequently, there is no factual issue regarding the labor market that would preclude summary judgment.

[37]** The market for anesthesia services requires more detailed analysis. [13] Although Judge Davis noted that Plaintiffs' Complaint alleged anti-competitive conduct in three different potential markets, Plaintiffs have settled on a theory of atomized markets for St. Cloud Hospital and the Allina system, which includes Mercy, Unity, United, St. Francis, and the Phillips Eye Institute.

i. The Allina System

Defendants contend that the seven-county Twin Cities metro area is the appropriate geographic market within which Allina hospitals compete for patients. Defendants maintain that using the metro area to define the market parameters is actually underinclusive of the relevant geographic market. Nevertheless, Defendants conclude that even this under-inclusive benchmark results in a finding of insufficient market power. Plaintiffs assert: "We disagree **[**38]** with the approach of using the entire 7-county area as the single market area for the five Allina hospitals. . . . We believe that the true market areas of the Allina hospitals need to be parsed out one by one." Cromwell Rebuttal Report, at 14.

Defendants' expert, Dr. Lynk, defines the geographic market for Allina hospitals using a technique referred to as the Elzinga-Hogarty ("E-H") method. The E-H test is a method created by professors of economics, Kenneth G. Elzinga and Thomas F. Hogarty, "to analyze patterns of consumer origin and destination and to identify relevant competitors of the merging entities." *FTC, 69 F.3d 260, 264*. The E-H approach involves adding counties to Allina's market area until 90% of its surgical patients are included within that geographical area. The method is premised on the simple notion that if a hospital draws a significant number of patients from a county, it is competing for patients in that county, and consequently, that county should be included in its market area. See generally Lynk Report; Cromwell Rebuttal Report, at 5.

Using patient origin data and the E-H method of market definition, Defendants' expert, Dr. Lynk, determined that Allina's **[**39]** relevant geographic market was at least as large as the Twin Cities metro area. Within this market, he concluded that the Allina Defendants had a market share of 31%. Such a market share is insufficient as a matter of law to constitute market power. [14] See *Jefferson Parish, 466 U.S. at 26-27* (30% market share is insufficient to infer market power even in the face of "'market imperfections' that permit petitioners to charge noncompetitive prices for hospital services…").

Plaintiffs' expert, Dr. Cromwell, rejects the E-H approach and favors a formulation articulated by the Justice Department. The Justice Department approach "seeks to identify a geographic **[**40]** market area such that a hypothetical firm that was the only present and future producer or seller of the relevant product in that area could profitably impose a small but significant and nontransitory increase in price." Cromwell Rebuttal Report, at 7. Under this analysis, Dr. Cromwell contends that "St. Cloud and Mercy & Unity **[*709]** Hospitals definitely enjoy such market power in their 20-25 mile market areas." Id. Plaintiffs, however, provide little information regarding how and in what context the Justice Department implements their preferred approach. Similarly, Plaintiffs cite no case in which such a methodology is used. Despite Plaintiffs' criticism of the E-H test, the methodology has been accepted by the Eighth Circuit. *FTC, 69 F.3d at 264*.

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[13] Because anesthesia is provided attendant to surgery, surgical statistics may be used as a proxy indicating the proportion of anesthetics provided at a given hospital.

[14] Plaintiffs rely on *Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988)* in support of their antitrust claims. Oltz, however, is distinguishable because the defendants in that case had an 84% market share. Also, the plaintiff CRNA in Oltz was prevented from delivering any anesthesia services, unlike Plaintiffs in the present case.

Plaintiffs also use mileage figures to delineate the relevant markets. To that end, Plaintiffs' expert, Dr. Cromwell, selected distances of 10 miles and 25 miles as parameters within which to define the relevant market. Plaintiffs, however, fail to provide significant factual or legal support for the use of these particular distances as benchmarks. Dr. Cromwell merely offers his opinion that 25 miles is the maximum reasonable patient **[**41]** travel distance. Cromwell Rebuttal Report, at 12. Dr. Cromwell notes that 25 miles is "the threshold distance the federal government uses to define an 'isolated sole community hospital.'" Id. Because none of the hospitals at issue in this case constitute a sole community hospital, the 25 mile benchmark is inapposite and arbitrary, particularly in the absence of any cited authority for the use of this distance in the context of market definition.

Recent decisions by the Eighth Circuit establish a stringent requirement that a party accurately define the relevant market. In *Morgenstern v. Wilson, 29 F.3d 1291 (8th Cir. 1993)*, the court held that the plaintiff had failed to successfully define the relevant geographic market area, because the plaintiff did not analyze where consumers could practicably turn for alternative sources of the product. *Id. at 1296-97* ("[Plaintiff's] expert focused upon where Lincoln and Omaha residents *actually* went, as opposed to where they *could* practicably go, for their cardiac surgery services, and specifically presented insufficient evidence regarding whether or not [defendants'] patients could practicably turn for alternative sources **[**42]** of the product to Omaha or other more distant heart programs").

Similarly, in *Bathke v. Casey's General Stores, Inc., 64 F.3d 340 (8th Cir. 1995)*, the Eighth Circuit affirmed the district court's grant of summary judgment on the basis of plaintiff's failure to define a relevant geographic area. As in Morgenstern, the court determined that the plaintiff's expert neglected to offer evidence regarding the alternative areas defendants' customers could practicably turn for the products in question. *Id. at 345*; see also *FTC, 69 F.3d at 269* (criticizing plaintiff's expert's analysis because it merely analyzed current patient flow into and out of the three Joplin hospitals as well as hospitals located within a twenty-seven mile radius of Joplin and therefore provided only "a static, rather than a dynamic, picture of the acute care market in Joplin. . ."). In the case at hand, Plaintiffs failed to adequately address the question of where consumers could practicably go for alternative sources of anesthesia services, a flaw which is fatal to their definition of the relevant geographic market.

Plaintiffs further contend that an atomized market, which separates the Allina facilities, **[**43]** is more appropriate. Although Plaintiffs' expert, Dr. Cromwell, advocates an atomized market and critiques Dr. Lynk's use of the E-H method, Dr. Cromwell offers no other evidence of the relevant geographic market for the Allina system. Rather, Dr. Cromwell relies on generalized assertions about the oligopolistic nature of the market. [15] See e.g., Cromwell Rebuttal Report, at 16.

[44]** **[*710]** ii. St. Cloud Hospital

Dr. Lynk also conducted the first part of the E-H test for the St. Cloud Hospital market and concluded that St. Cloud Hospital obtains 90% of its anesthesia/surgical patients from a ten-county area in central Minnesota. Lynk Report, P 35. Within this area, the hospital has a 34.6% market share. Id. This market share, like that of the Allina system, is

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[15] Dr. Cromwell opines:

> Allina's market share of inpatient and ambulatory surgery for its five hospitals (excluding St. Francis but including Phillips Eye) was 32.84, almost exactly what Dr. Lynk estimated. However, the three hospitals in the Healtheast system enjoyed a 9.4% market share while the four hospitals in the Fairview system (including the University of Minnesota) enjoyed a 27.7% share. This leaves four independents: North Memorial, Methodist, St. Paul-Ramsey, and Hennepin County. The overall Herfindahl Index for the four independents and the three systems was 2116, above the threshold for antitrust concerns by the Justice Department. The three systems, alone, generated a Herfindahl Index value of 1935, a value exceeding the Justice Department's threshold. Coupled with the fact that Mercy & Unity Hospitals have a special geographic niche on the northeast side of the Mississippi River, these index values certainly raise anti-competitive concerns.

Cromwell Rebuttal Report, at 16. This is the only evidence proffered by Dr. Cromwell that attempts to quantify market share in the context of the Allina system. It appears, however, that Dr. Cromwell merely aggregates hospitals or systems when it is advantageous to do so.

not sufficient to constitute anti-competitive market power. See *Jefferson Parish, 466 U.S. at 26-27*; *Morgenstern, 29 F.3d at 1296*; Lynk Report, P 35.

Dr. Cromwell attempts to counter the conclusions of Dr. Lynk by analyzing St. Cloud Hospital's market share based on seemingly arbitrary mileage figures, including the city limits, ten miles outside the city, and 25 miles outside the city. The shortcomings of Dr. Cromwell's approach become more apparent when one considers the alternative hospitals that are 25-35 miles away and 50-70 miles away. Cromwell Report, P 23. Plaintiffs acknowledge, through Dr. Cromwell, that such alternatives exist but offer no analysis indicating to what extent patients would travel to these facilities in search of anesthesia alternatives. As such, Plaintiffs' proffered market **[**45]** definition is insufficient as a matter of law. See *Morgenstern, 29 F.3d at 1297*.

Plaintiffs have not demonstrated the existence of a genuine issue of material fact concerning the relevant geographic market for anesthesia services with regard to either the Allina system or the St. Cloud Hospital. Plaintiffs have failed to delineate a relevant market in both situations and therefore have failed to show the existence of a factual issue regarding an unreasonable restraint of trade. Plaintiffs' failure to show an unreasonable restraint of trade and their failure to produce evidence of a conspiracy provide alternative grounds for granting summary judgment as to Plaintiffs' *§ 1* claims, which are asserted in Counts I, III, and V.

C. Illegal Boycott

Count III of Plaintiffs' Complaint alleges an illegal boycott of CRNA labor. Count III specifically alleges that the purported boycott "has had a direct anti-competitive effect on relevant markets. . . ." Complaint, P 87. As discussed above, however, Plaintiffs failed to demonstrate the existence of a genuine issue of material fact regarding anticompetitive effects in a relevant market. Also, the boycott claim cannot withstand summary judgment **[**46]** in light of the fact that many CRNAs continue to practice at the Defendant hospitals.

D. Tying Claim

Count V alleges that Defendants conspired to illegally "tie" anesthesiological services to surgical services. [16] Because a successful claim of illegal tying requires proof of legally sufficient market power, it is unnecessary to delve further into the merits of Plaintiffs' tying claim. See e.g., *Jefferson Parish, 466 U.S. at 13-14* ("We have condemned tying arrangements when the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market"). As discussed above, Plaintiffs have failed to demonstrate that Defendants have market power in the relevant markets.

[47]** E. Monopolization

Count IV of Plaintiffs' Complaint alleges monopolization, attempted monopolization, and a conspiracy to monopolize, in violation of *§ 2* of the Sherman Act. ***HN14***[] Monopolization requires that a defendant possess monopoly power in a relevant geographic market. As discussed above, Allina's market **[*711]** share of 31% and St. Cloud Hospital's market share of 34.6% do not reflect monopoly power. Moreover, Defendants contend, and this Court agrees, that the Defendant hospitals "cannot be liable for monopolizing a service they do not provide," because it is the anesthesiologist groups that actually provide the anesthesia services. Dfs.' Mem. in Supp. of Mot. for S.J., at 59; see *Boczar v. Manatee Hospitals and Health Systems, Inc., 731 F. Supp. 1042, 1047 (M.D. Fla. 1990)*.

HN15[] A claim of attempted monopolization requires a showing of: (1) a specific monopolistic intent on the part of the defendant; (2) predatory or anti-competitive conduct on the part of the defendant in an effort to accomplish an

[16] Although in *Jefferson Parish, 466 U.S. 2, 21, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*, the Court held that markets for anesthesia services and surgical services were sufficiently distinct to allege an illegal tying arrangement, the Court also recognized that this alone did not make an exclusive contract illegal and that there was nothing inherently illegal about packaged sales. *466 U.S. at 24-25*.

unlawful purpose; (3) a dangerous probability of success; and (4) antitrust injury. *Midwest Radio v. Forum Publishing Co., 942 F.2d 1294, 1297 (8th Cir. 1991)*. As discussed previously, **[**48]** Plaintiffs failed to demonstrate antitrust injury, and as such, cannot maintain a claim for attempted monopolization.

HN16[] The elements of a conspiracy to monopolize claim are: (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize. *Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 843 F.2d 1154, 1157 (8th Cir. 1988)*. As discussed in the context of *§ 1* of the Sherman Act, Plaintiffs have failed to demonstrate a genuine factual issue as to the existence of a conspiracy.

F. Denial of Essential Facilities Claim

Count VI alleges a claim for denial of essential facilities. ***HN17***[] "To prevail under the essential facilities doctrine, the plaintiff must establish '(1) control of an essential facility by a monopolist; (2) the inability to practically or economically duplicate the facility; and (3) the unreasonable denial of the use of the facility to a competitor when such is economically and technically feasible.'" *Willman v. Heartland Hospital East, 34 F.3d 605, 612-13 (8th Cir. 1994)* (internal citation omitted). Because Plaintiffs have failed to demonstrate that Defendants possess monopoly power **[**49]** in any relevant market, Plaintiffs cannot avoid summary judgment on this claim as well. Moreover, many CRNAs continue to provide anesthesia services at Defendant hospitals, albeit within a different employment structure. As such, Plaintiffs cannot sustain a claim for denial of essential facilities.

G. Supplemental Jurisdiction

By virtue of this Order granting summary judgment on Plaintiffs' federal antitrust claims, the only remaining claims are Plaintiff's state law claims. As such, this Court must decide whether or not to exercise supplemental jurisdiction over the state claims.

HN18[] Pursuant to *28 U.S.C. § 1367(c)(3)*, a district court may decline to exercise supplemental jurisdiction over a claim if: "the district court has dismissed all claims over which it has original jurisdiction,. . . ." A district court has the discretion to exercise or to refuse to exercise pendent jurisdiction. *Marshall v. Green Giant Co., 942 F.2d 539, 549 (8th Cir. 1991)* (citation omitted). Courts should "exercise judicial restraint and avoid state law issues wherever possible." *Condor Corp. v. City of St. Paul, 912 F.2d 215, 220 (8th Cir. 1990)*.

HN19[] Factors a court should consider in deciding whether **[**50]** to exercise supplemental jurisdiction include: the stage of the litigation; the difficulty of the state claim; the amount of judicial time and energy necessary for the claim's resolution; and the availability of a state forum. *Marshall, 942 F.2d at 549 (8th Cir. 1991)* (quotation omitted). See also *Hanson v. Hancock Memorial Hosp., 938 F. Supp. 1419, 1434 (N.D.Iowa 1996)* (citing *Willman v. Heartland Hosp. East, 34 F.3d 605, 613-14 (8th Cir. 1994))* ("matter may be remanded even after the parties have completed a lengthy and complex discovery process and the court has disposed of a motion for summary judgment just weeks before trial").

Upon a review of all the factors, the Court concludes it will not exercise supplemental jurisdiction. Consequently, Plaintiffs' remaining claims will be dismissed without prejudice, so that they may be considered in an appropriate state forum.

[*712] CONCLUSION

Based on the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. Defendants' Motion for Summary Judgment is **GRANTED** as to all of **[**51]** Plaintiffs' federal antitrust claims (Counts 1 through 6); Defendants' Motion for Summary Judgment is **DENIED** as to Plaintiffs' state law claims (Counts 2, 8, 12, and 16).

2. Plaintiffs' state law claims (Counts 2, 8, 12, and 16) are **DISMISSED WITHOUT PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Ann D. Montgomery

UNITED STATES DISTRICT JUDGE

Dated: May 7, 1998

End of Document

[Ezekwo v. American Bd. of Internal Med.](#)

United States District Court for the Southern District of New York

May 11, 1998, Decided ; May 12, 1998, Filed

95 Civ. 10625 (RO)

Reporter

18 F. Supp. 2d 271 *; 1998 U.S. Dist. LEXIS 6707 **; 1998-1 Trade Cas. (CCH) P72,169

IFEOMA EZEKWO, M.D., Plaintiff, -against- AMERICAN BOARD OF INTERNAL MEDICINE, MONTEFIORE MEDICAL CENTER, EMPIRE BLUE CROSS AND BLUE SHIELD, and THE BRONX HEALTH PLAN, Defendants.

Disposition: **[**1]** Defendants' motions granted except for BHP's claims for immunity, which rendered moot.

Core Terms

recommendation, certification, antitrust, summary judgment, immunity, internal medicine, peer, conspiracy, by-laws, Sherman Act, defendants', Staff

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN1[] **Remedies, Damages**

One who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may receive treble damages under § 4 of the Clayton Act. *15 U.S.C.S. § 15(a)*. Section 16 provides for injunctive relief. *15 U.S.CS. § 26*.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

HN2[] **Business Administration & Organization, Peer Review**

The Health Care Quality Improvement Act, 42 U.S.C.S. § 11101-11152, provides for immunity where a peer review process meets certain criteria and is undertaken to achieve certain statutorily permissible ends. The Act establishes a rebuttable presumption of the peer review's propriety that must be overcome by a preponderance of the evidence.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

HN3[] **Business Administration & Organization, Peer Review**

In part, *42 U.S.C.S. § 11111* provides in regards to limitations on damages for professional review actions that if a professional review action (as defined in *§ 11151(9)*) of this title) of a professional review body meets all the standards specified in *§ 11112(a)* of this title, the professional review body, any person acting as a member or staff to the body, any person under a contract or other formal agreement with the body, and any person who participates with or assists the body with respect to the action, shall not be liable in damages under any law of the United States or any State (or political subdivision thereof) with respect to the action.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN4[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

42 U.S.C.S. § 11112(a) provides that for purposes of the protection set forth in *§ 11111(a)* of this title, a professional review action must be taken (1) in the reasonable belief that the action was in furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action as warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in *§ 11111(a)* of this title unless the presumption is rebutted by a preponderance of the evidence. *42 U.S.C.S. § 11112(a)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > Professional Review

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN5[] **Motions to Dismiss, Failure to State Claim**

A "professional review action," as the Health Care Quality Improvement Act, 42 U.S.C.S. § 11101-11152, defines it, is an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of a physician. Such term also includes professional review activities relating to a professional review action. *42 U.S.C.S. § 11151(9)*. A "professional review activity" means an activity of a health care entity with respect to an individual physician (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity, (B) to determine the scope or conditions of privileges or membership, or (C) to change or modify such privileges or membership. *42 U.S.C.S. § 11151(10)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN6[] **Regulated Practices, Private Actions**

Even under the liberal Federal Rules of Civil Procedure, there is a limit to how much a court may be called upon to divine in assessing the sufficiency of the complaint before it, particularly when the plaintiff is represented by counsel.Conclusory allegations of antitrust violations are simply not enough.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN7[] **Regulated Practices, Private Actions**

While summary disposition is difficult as to antitrust claims, it is not improper.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN8[] **Entitlement as Matter of Law, Genuine Disputes**

Although defendants have the initial burden to show that no genuine issue of material fact exists as to a plaintiff's claims, once met, plaintiff is required to designate specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. As such, plaintiff needs to point to genuine issues of material fact that (1) defendants violated laws and (2) the violation caused her actual injury. More than a metaphysical-doubt has to be shown, and plaintiff needs to set forth facts tending to preclude inferences of permissible conduct.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN9[] **Regulated Practices, Private Actions**

Where conduct is as consistent with permissible conduct as with an illegal conspiracy it does not, standing alone, support an inference of antitrust conspiracy. Evidence must be presented that tends to exclude the possibility that the defendants were acting independently.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Sherman Act, Claims**

In order to bring a private action under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, an antitrust injury must be proven. The Sherman Act protects competition, not competitors. Thus, vital to any antitrust claim is the allegation that the defendants' conspiracy or illegal contract has caused injury to competition. Plaintiffs must prove antitrust injury that reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. In turn, in order to find market injury, the impact within the market must be assessed, requiring some factual submission as to that market's structure and the services offered therein.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN11[] **Antitrust & Trade Law, Sherman Act**

To show an injury under the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff must show (1) a contract, combination or conspiracy; (2) in restraint of trade; (3) affecting interstate commerce existed between the defendants. Indeed, only if the collusion necessary for the first element is evident can the court consider whether issues of fact exist as to whether an antitrust violation, per se or otherwise, has been committed.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

The inference of "opportunity to conspire" is insufficient; a triable issue must exist as to whether an illegal contract between or "concerted action" by the defendants exists. Moreover, a plaintiff is required to negate any reasonable inference that the defendants acted independently and/or properly by showing they had made a conscious commitment to a common scheme designed to achieve an unlawful objective. The ordinary prospect of competition from any defendant is not enough on which to base her claim, and any consequent commercial injury to her as an individual is irrelevant.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN13[] **Regulated Practices, Private Actions**

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***.

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

Section 2 of the Sherman Act, *15 U.S.C.S. § 2*, requires injury to the market, as opposed to individual impact.

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Antitrust & Trade Law, Sherman Act**

An "attempted monopolization" claim requires a plaintiff to prove (1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power.

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Judges: Richard Owen, United States District Judge.

Opinion by: Richard Owen

Opinion

[*272] *OPINION AND ORDER*

OWEN, District Judge

Plaintiff, Dr. Ifeoma Ezekwo, is a physician licensed in New York State to practice both internal medicine and opthamology. She maintains a practice at 2685 Grand Concourse in Bronx, New York, and had admitting privileges at various hospitals. [1] Regardless of these credentials, however, Dr. Ezekwo did not receive board certification in internal medicine until August 1997, after having failed the certifying exam in 1984, **[*273]** 1990, 1992, **[**2]** 1994, and 1995. Despite her practice, but flowing from her repeated exam failures, Dr. Ezekwo now asserts that the American Board of Internal Medicine, the certifying organization, along with various health care providers have conspired to boycott her from the practice of and restrained trade in internal medicine, and that they have

[1] Dr. Ezekwo has maintained a practice in internal medicine since 1983. She became licensed in opthamology in 1988. As of April 1993, she represented that she held admitting privileges at Beth Israel Medical Center hospitals, Our Lady of Mercy Medical Center (233rd Street and Pelham Divisions) and Manhattan Eye, Ear and Throat Hospital.

monopolized, or attempted to monopolize, the market area being defined as roughly the North Central Bronx. All of these claims are asserted under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, with Dr. Ezekwo seeking treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act respectively, *15 U.S.C. §§ 15*, *26*. [2]

[3]** The defendants are the certifying organization, the said American Board, and Montefiore Medical Center, Empire Blue Cross/Blue Shield, and The Bronx Health Plan (BHP), an HMO regulated under New York law. In response to Dr. Ezekwo's claims, each, other than Empire, seeks judgment on the pleadings, *Fed. R. Civ. P. 12(c)*. All seek dismissal of the complaint for failure to state a claim for which relief can be granted on the basis of *Fed. R. Civ. P. 12(b)(6)*. The Board, Montefiore and BHP also move for conversion to summary judgment as allowed under *Fed. R. Civ. P. 12(b)*, *56(c)*. Finally, Montefiore and BHP also assert immunity under The Health Care Quality Improvement Act, *42 U.S.C. §§ 11101-11152*, which grants limited immunity as to money damages for those participating in professional peer review processes. *42 U.S.C. §§ 11101(5)*, *11111(a)*.

The Board administers the certifying exam that Dr. Ezekwo repeatedly failed. It is a private, non-membership organization that provides for the voluntary certification of internists, which the public and health care employers may, but are not required to, rely upon in making health care and employment choices. The Board is not a health care provider **[**4]** or employer and creates its certification criteria independent of the market, having no control over how the certification is used or perceived once it is granted. [3]

Over the years, however, [4] the Board's certification has become an important credential for internists, with many (but not all) hospitals, insurance companies and HMOs relying on its certification of a doctor's knowledge and competence in the field of internal medicine. The other defendants, Montefiore, Empire, and BHP, each rely upon the Board's certification--among other things--to some extent in their employment choices. It is this reliance that Dr. Ezekwo equates with conspiracy.

[5]** When Dr. Ezekwo first failed the Board's examination in 1992, she requested--under the Board's established review procedures--that her exam be rescored by hand. [5] When the hand-scoring revealed no errors, Dr. Ezekwo suggested that "foul play" had taken place. After asking for and not receiving substantiation for the claim, the Board offered Dr. Ezekwo the opportunity to review her examination along with the answer key, and to meet with the Board, along with her counsel, so the Board could explain its scoring procedure. Dr. Ezekwo did not accept the Board's offer.

In the same year, Dr. Ezekwo applied to Montefiore for admitting privileges in its Departments of Medicine and Opthamology. The record **[**6]** substantiates that these applications **[*274]** were processed according to Montefiore's by-laws and established procedures. [6] **[**7]** Of particular note, Montefiore's by-laws set forth the

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[2] ***HN1***[] One "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may receive treble damages under Section 4 of the Clayton Act. *15 U.S.C. § 15(a)*. Section 16 provides for injunctive relief. *15 U.S.C. § 26*.

Due to the fact that Dr. Ezekwo passed the certifying examination in August 1997, the injunctive relief sought against the certifying organization is now moot.

[3] To receive the Board's certification, a doctor must complete three years of post-graduate training in internal medicine and pass the two-day written exam that the Board administers.

[4] The Board has been certifying internists for over 50 years, and is, indeed, the only such certifying body in the field of internal medicine.

[5] The Board's examination is machine-scored in the first instance. Under the Board's review procedures, if a candidate for certification believes the exam to be erroneously scored, he or she can request hand scoring. If a candidate fails the exam more than two times, he or she can go over the exam with a Board officer.

[6] Montefiore's Medical Staff By-Laws delineate the process for obtaining voluntary attending privileges as well as full-time staff admitting privileges. The hospital is divided into clinical departments that correspond to areas of medical and surgical practice. The by-laws provide that each department is responsible for establishing its own criteria for the grant of clinical privileges. The

general qualifications required of a doctor seeking admission to its medical staff: (1) the doctor must be licensed to practice in New York State, (2) must be able to document his or her background, experience, training, (3) must demonstrate competence, good reputation, character and ability to work with others, as well as physical and mental capacity to practice, and (4) must provide supporting letters of recommendation. The by-laws also require that the applicant demonstrate an ability and willingness to satisfy the teaching and research needs of the Hospital. [7] Finally, the Department of Medicine requires the Board's certification in internal medicine as part of the documentation supporting an applicant's knowledge and expertise in the field. [8]

Dr. Ezekwo was first interviewed by Montefiore in July 1992, by the Chair and Vice-Chair of the Department of Medicine. She was later interviewed by the Credential Committee in June 1993, which unanimously recommended her application be denied in July 1993. Shortly thereafter, both the Committee on Promotions & Appointments and the Divisional Credentials Committee recommended the same. Finally, in accordance with the by-laws, Dr. Ezekwo was informed that the Medical Staff Executive Committee (Executive Committee) had prepared an adverse recommendation for the Board of Trustees, on September 24, 1993. [9] The stated rationale for the **[**8]** adverse recommendation was (1) an evident limited fund of medical knowledge based on Dr. Ezekwo's two previous failures on the certification examination, (2) lack of ongoing involvement in house staff teaching programs and an ambivalent attitude regarding participation in the Medical Department's educational programs, and (3) failure to obtain adequate letters of recommendation from Chiefs of Medical Services at other institutions regarding Dr. Ezekwo's current hospital practice. Upon receiving notice of the adverse recommendation, Dr. Ezekwo exercised her right of appeal, requesting a hearing before the Ad Hoc Hearing Committee in October 1993.

[9]** Dr. Ezekwo's request for a hearing triggered the extensive appellate procedures established **[*275]** under Montefiore's Medical Staff By-Laws. [10] The first hearing was held on November 30, 1993, with six subsequent evidentiary sessions being held, involving over twenty hours of review, ending February 7, 1995. While aware of her right to counsel, Dr. Ezekwo appeared on her own behalf. [11] Dr. Ezekwo presented documentary evidence in large volume and testimony is support of her applications. [12] At the close of the hearings, the Hearing Committee

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applications receive a three-tiered evaluation, by (1) the Promotion and Appointment Committee, (2) the relevant Department Chair, and (3) the pertinent divisional Credential Committee of the Medical Staff. The Department of Medicine then reviews each application, the accompanying letters of recommendation, and interviews the applicant. Finally, the Medical Staff Executive Committee makes a recommendation to Montefiore's Board of Trustees as to whether privileges should be extended to the applicant.

[7] Montefiore is a voluntary tertiary care teaching hospital, affiliated with the Albert Einstein College of Medicine of Yeshiva University.

[8] Exceptions are made for certain doctors with whom the hospital has a prior history or regarding whom the hospital has established knowledge of competence and quality of care; i.e., recent graduates from resident training and nationally renowned researchers, as well as doctors who have been on the medical staff for years.

[9] Under Montefiore's Medical Staff By-Laws, an applicant has numerous opportunities for hearing and appeal of adverse recommendations. The by-laws provide that an applicant can appeal the Executive Committee's recommendation *prior* to that recommendation being relayed to the Board of Trustees. If appeal is taken, the applicant can request a hearing before the Ad Hoc Hearing Committee of the Executive Committee, where the applicant can submit further documentation, examine and cross-examine witnesses, and be represented by counsel. After that hearing, the Ad Hoc Hearing Committee makes a written recommendation to the Executive Committee, which then issues another recommendation for the Board of Trustees. Within fifteen days of that issuance, the applicant may request another appeal if still dissatisfied with the outcome. The second appeal takes place strictly on the record, as reviewed by either the Board of Trustees or a committee thereof, although the applicant does have the right to request oral argument at this stage. If a committee of the Board of Trustees makes the review, it then issues a recommendation to the Board as a whole. The Board as a whole can accept or reverse the prior recommendation, or send it back to the Executive Committee for further consideration or amend the recommendation itself. In any event, the Board's determination is a final one.

[10] *See, id*.

[11] There were occasions, however, where Montefiore received communications from a Joseph Fleming, Esq., who described himself as Dr. Ezekwo's attorney.

requested a written report marshalling the evidence from both the Executive Committee and Dr. Ezekwo. Dr. Ezekwo refused, however, to provide *her* report.

After two meetings to review the record in February and May of **[**10]** 1994, the Hearing Committee issued a 45-page report and recommendation to the Executive Committee, noting that Dr. Ezekwo had failed the certification examination three times and--while this was not the sole basis for the denial of privileges--it did evince "a lack of fundamental medical knowledge". It also found that Dr. Ezekwo had failed to secure acceptable letters of recommendation; those provided did not address Dr. Ezekwo's teaching ability and working relationships, nor did they include the evaluation of her clinical practice by the Chiefs of Service of those hospitals where Dr. Ezekwo already had privileges. Finally, the Hearing Committee noted that Dr. Ezekwo had refused to confirm in writing that she would satisfy the Medical Department's teaching requirements despite the fact that such written confirmation was required of all applicants. [13] On these bases, the Hearing Committee recommended denial of Dr. Ezekwo's applications. A copy of the Committee's report was provided to Dr. Ezekwo. The Executive Committee's unanimous confirmation of its original denial of Dr. Ezekwo's applications, based on the Hearing Committee's findings, followed on June 12, 1995.

[11]** Again, under Montefiore's Medical Staff By-Laws, Dr. Ezekwo received notice of both the Executive Committee's adverse recommendation and her right to further appellate review. Dr. Ezekwo requested that review, which was provided on August 9, 1995. [14] Dr. Ezekwo was then informed, on August 17, 1995, that the Medical Committee of the Board of Trustees had upheld the denial of privileges. Its recommendation was reported to the full Board of Trustees in October of 1995, and the full Board's final denial was reported to Dr. Ezekwo on October 12, 1995. [15]

[12]** Earlier, in April 1993, Dr. Ezekwo first accused defendant The Bronx Health Plan (BHP) and Montefiore of collusion. [16] She first approached BHP for participation in its **[*276]** network in January 1993, and the exchange of communications that followed quickly led to threats of litigation on Dr. Ezekwo's part. [17] BHP chose not to put Dr. Ezekwo into its application process, stating: (1) it did not need additional opthamologist for efficiency reasons; (2) Dr. Ezekwo was not affiliated with any of the hospitals with which BHP contracted; and (3) of particular relevance to

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[12] The hearing's record included over 700 transcript pages and 200 exhibits.

[13] At the same time, the Hearing Committee addressed Dr. Ezekwo's claims that Montefiore had acted improperly and in bad faith, basing its denial on racial or gender or religious discrimination, and that Dr. Ezekwo's failure at board certification was somehow orchestrated by hospital personnel in fear of competition from her managed care practice. The Hearing Committee found the claims conclusory and without basis.

[14] Pursuant to the by-laws, this second review was strictly of the record, although Dr. Ezekwo was informed that she could request oral argument and did not do so. *See, supra*, note 10.

[15] Beyond Montefiore's procedures and review regarding Dr. Ezekwo's admitting privileges, the matter has received thorough review as well from the Public Health Council of New York State (the Council) as well as the New York State Division of Human Rights (DHR). In September 1993, Dr. Ezekwo filed a complaint against Montefiore with the Council under Public Health Law § 2801-b. That filing was deemed premature given that the Montefiore's appellate procedures were pending. Dr. Ezekwo filed again, subsequent to Montefiore's final determination, on November 11, 1995. As of the time of argument and briefing, the Council had not issued its final determination. As to the DHR investigation, Dr. Ezekwo's complaint against Montefiore was dismissed with a finding of no probable cause to believe the discrimination alleged had occurred.

[16] Evidently, the BHP offices are in the same building facility as Montefiore Medical Center Clinic. Montefiore was one of the hospitals with which BHP contracted at that time, the others being Bronx-Lebanon Hospital Center and Barnabas Hospital.

[17] On January 18, 1993, Dr. Ezekwo wrote to BHP requesting information on BHP's health plan, "so that [she] could start participating immediately." BHP responded on February 1, 1993, that the Plan had no need at that time for additional opthamologists. Dr. Ezekwo replied on February 15, 1993, accusing BHP of discrimination and "anti fair business" and threatening litigation. Separately, on the same date, Dr. Ezekwo requested an investigation by the New York State Insurance Commissioner. (After making inquiries on April 4, 1993, the Commissioner's office did not pursue the matter. After a further communication from Dr. Ezekwo's counsel on February 25, 1995, BHP responded that is would not consider Dr. Ezekwo's queries and applications in the area of opthamology or internal medicine, and clarified its position as to why.

participation as an internist, BHP did not use seek solo practitioners for participation in its Plan. As BHP explained, because its network is structured such that its "primary care services are presently provided in comprehensive settings such as community health centers, where the entire family can receive a broad array of services under one roof, Dr. Ezekwo could not--as a solo practitioner--"provide the comprehensive services that [BHP's] members demand." Later, in response to Dr. Ezekwo's accusation of collusion, BHP responded as before but further emphasized that (1) even if Dr. Ezekwo were affiliated with one of its **[**13]** contracted hospitals, it had the right to not retain her services, and (2) BHP is an independent HMO, "not an operational unit" of Montefiore. At no point in its communications with the Dr. Ezekwo did BHP mention board certification, although it is clearly a requirement under its participation criteria.

[14]** Finally, at some point during this chronology, Dr. Ezekwo apparently approached defendant Empire for participation within its HMO or PPO structure, but was evidently rejected. [18]

In the first instance, I address Montefiore's and BHP's claims to immunity from money damages under Health Care Quality Immunity Act of 1986, *42 U.S.C. §§ 11101-11152* (the Act). ***HN2***[] The Act provides for such immunity where a peer review process meets certain criteria and is undertaken to achieve certain statutorily permissible ends. [19] The Act establishes a rebuttable presumption of the peer review's propriety that must be overcome by a preponderance of the evidence. [20] **[**17]** As such, although addressed on summary judgement, "[Dr. Ezekwo bore]

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[18] There are in the record no facts as to what transpired between Dr. Ezekwo and Empire.

[19] ***HN3***[] In pertinent part, *Section 11111* provides:

(a) In general

(1) Limitations on damages for professional review actions

If a professional review action (as defined in *section 11151(9)*) of this title) of a professional review body meets all the standards specified in *section 11112(a)* of this title . . .

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action, shall not be liable in damages under any law of the United States or any State (or political subdivision thereof) with respect to the action . . . .

42 U.S.C. § 11111.

[20] ***HN4***[] *Section 11112(a)* provides:

(a) In general

For purposes of the protection set forth in *section 11111(a)* of this title, a professional review action must be taken--

(1) in the reasonable belief that the action was in furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action as warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in *section 11111(a)* of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. § 11112(a).

the burden of proving that the peer review process was not reasonable." *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 630 (3rd* ***[*277]*** *Cir. 1996)*. At issue is whether Dr. Ezekwo submitted sufficient evidence to allow **[**15]** a jury-finding that, objectively, a health-care employer had unreasonably believed that it had met the standards set by the Act. *See Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1333 (11th Cir. 1994)*; *Austin v. McNamara, 979 F.2d 728, 734-35 (9th Cir. 1992)*. There is not enough on the record before me to determine the contours of BHP's peer review procedures, or even if it was applied in this instance. Therefore, even with the statutory presumption of propriety where a peer review process is used, BHP's claim to immunity cannot be upheld. *See, e.g., Matthews, 87 F.3d at 634* (letter communication between individual doctor and hospital did not equate with a "professional review activity" such that the Act's immunity was triggered). But, Montefiore, on the other hand, has clearly established that a full and fair peer review process was used in this case, [21] and that it should properly receive immunity under the Act as to Dr. Ezekwo's monetary claims. Although the Act does not extend to decisions based solely on "the physician's association, or lack of association, with a professional society or association", it is clear on the record that Montefiore's rejection **[**16]** of Dr. Ezekwo is based on considerations relating to competence, and not just Dr. Ezekwo's non-certification. [22] This leaves, however, her ongoing claims for injunctive relief against Montefiore, the monetary claims against the Board, and both types of claims as pursued against Empire and BHP.

As stated at the outset, all defendants have sought dismissal for failure to state a claim, with the Board, Montefiore and BHP seeking summary judgment. *See Fed. R. Civ. P. 12(b)(6)*, *56(c)*.

Empire is the only defendant **[**18]** that moved to dismiss with no motion for summary judgment. Accordingly, I first address Empire's motion to dismiss. At the threshold, I observe that ***HN6***[] "even under the liberal Federal Rules of Civil Procedure, there is a limit to how much a court may be called upon to divine in assessing the sufficiency of the complaint before it, particularly when the plaintiff is represented by counsel." *Heart Disease Research Found. v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)*. Conclusory allegations of antitrust violations are simply not enough. *See Int'l Audiotext Network, Inc. v. American Tel. and Tel. Co., 893 F. Supp. 1207, 1211 (S.D.N.Y. 1994)*, *aff'd 62 F.3d 69 (2d Cir. 1995)*. Dr. Ezekwo needed to "'adequately . . . define the relevant product market, . . . allege antitrust injury, [and] . . . allege conduct in violation of antitrust laws.'" *Id.* (citation omitted). Thus, viewing Dr. Ezekwo's pleading as favorably as possible, Empire's motion is granted, as not a single fact is alleged to support the claim that Empire properly operates in Dr. Ezekwo's market, and allegations of conspiracy are limited to the statutory conclusion. [23]

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[21] ***HN5***[] A "professional review action", as the Act defines it, is:

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity . . . which affects (or may affect)(adversely the clinical privileges, or membership in a professional society, of a physician. Such term . . . also includes professional review activities relating to a professional review action.

42 U.S.C. § 11151(9). A "professional review activity" means:

> an activity of a health care entity with respect to an individual physician--
>
> (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,
>
> (B) to determine the scope or conditions of privileges or membership, or
>
> (C) to change or modify such privileges or membership.

42 U.S.C. § 11151(10).

[22] *See 42 U.S.C. 11151(9)(A)*.

[23] Because Dr. Ezekwo has already amended her complaint, leave to replead will not be granted. *See Berger v. Lowden, 1997 U.S. Dist. LEXIS 4516, 1997 WL 170823* (S.D.N.Y.) at *4.

[19]** As to the remaining defense motions, I need to and do reach only those for summary judgment, which are granted. The Second Circuit has recognized that, ***HN7***[] while summary disposition is difficult as to antitrust claims, it is not improper. *Capital Imaging Assocs. v. Mohawk Valley Med. Assoc., Inc., 996 F.2d 537, 541 (2d Cir. 1993)*. ***HN8***[] Although the defendants have the initial burden to show that no genuine issue of material fact exists as to Dr. Ezekwo's claims, once met, Dr. Ezekwo is **[*278]** required to designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Fed. R. Civ. P. 56(e)*. As such, she needed to point to "genuine issue[s] of material fact that (1) defendants violated the antitrust laws and (2) the violation caused her actual injury." *Maric v. St. Agnes Hosp. Corp., 65 F.3d 310, 313 (2d Cir. 1995)*. More than "a metaphysical-doubt" had to be shown, and Dr. Ezekwo needed to "set forth facts [] tending to preclude inference[s] of permissible conduct". *Capital Imaging Assocs., 996 F.2d at 542*. Summary judgment is granted not only because the defendants meet their initial **[**20]** burden, but because Dr. Ezekwo has utterly failed to counter with any specific facts undercutting the independence and legitimacy of the defendants' actions. [24]

First, ***HN10***[] in order to bring a private action under the Sherman Act, an antitrust injury must be proven. The Sherman Act protects competition, not competitors. *Balaklaw v. Lovell, 14 F.3d 793, 797 (2d Cir. 1994)* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, **[**21]** Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. Thus, vital to any antitrust claim is the allegation that the defendants' conspiracy or illegal contract has caused injury to competition. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734 (9th Cir. 1987)*. "'Plaintiffs must prove antitrust injury. . . [that] reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Balaklaw, 14 F.3d at 797* (quoting *Brunswick Corp., 429 U.S. 477 at 489)*. In turn, in order to find market injury, the impact within Dr. Ezekwo's market must be assessed, requiring some factual submission as to that market's structure and the services offered therein. *Balaklaw, 14 F.3d at 800*. While Dr. Ezekwo has submitted North Central Bronx--however that is defined--as the geographical market, she submits no other evidence regarding its contours. She makes only the bare allegation that her clients have less market choice due to her lack of association with defendants, providing no substantial evidence that shows the number of internists offering services in that area or that the options available to the public **[**22]** have been limited by the defendants' actions. As such, no alleged facts suggest market injury, and accordingly antitrust standing has not been established.

Second, even if Dr. Ezekwo could show antitrust injury, her claim under *Section 1* would fail on the merits. [25] She does not allege facts supporting an inference that ***HN11***[] "(1) a contract, combination or conspiracy; (2) in restraint of trade; (3) affecting interstate commerce" existed between the defendants. *Maric, 65 F.3d at 313*. Indeed, only if the collusion necessary for the first element was evident could I consider whether issues of fact exist as to whether an antitrust violation, per se or otherwise, has been committed. [26]

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[24] ***HN9***[] Where "'conduct is as consistent with permissible conduct as with [an] illegal conspiracy" it "does not, standing alone, support an inference of antitrust conspiracy.'" *Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir. 1987)* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986))*. Evidence must be presented that "'tends to exclude the possibility that [the defendants] were acting independently.'" *Id*. (quoting *Monsanto Co. v. Spray-Rite Servs. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984))*.

[25] *Section 1* of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." *15 U.S.C. § 1*.

[26] The fact that Dr. Ezekwo has pleaded a "per se" boycott violation does not change the outcome, because a per se allegation still requires a showing that antitrust injury has occurred, *Balaklaw, 14 F.3d at 800*.

[23]** Dr. Ezekwo has alleged no factual support for her claim of conspiracy, asserting only a theoretical construct. [27] ***HN12***[] The inference of "opportunity to conspire" is insufficient; a triable issue must exist as to whether an illegal contract between or "concerted action" by the defendants exists. *See Maric, 65 F.3d at 313* **[*279]** (citing *Capital Imaging Assocs., 996 F.2d at 545*). *See also Fort Wayne Telsat v. Entertainment and Sports Programming Network, 753 F. Supp. 109, 115 (S.D.N.Y. 1990)* (factual basis for allegation of conspiracy under Sherman Act, *Section 1*, is required). Moreover, Dr. Ezekwo was required to negate any reasonable inference that the defendants acted independently and/or properly by showing they had made "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (CA3 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)*); *Capital Imaging Assocs., 996 F.2d at 545*. The ordinary prospect of competition from any defendant is not **[**24]** enough on which to base her claim, *Maric, 65 F.3d at 314*, and any consequent commercial injury to her as an individual is irrelevant. *See, e.g., Balaklaw, 14 F.3d at 797*; *Rutman Wine Co., 829 F.2d at 735*. Thus, the essence of Dr. Ezekwo's complaint is that the Board, alone, developed arbitrary certification criteria that set her up for failure, and the other three defendants then relied thereon to her commercial detriment. There is only the unsubstantiated claim that defendants acted within the market for "internal medicine", and no showing that defendants agreed to or colluded in conduct injurious to that market. [28] Accordingly, the factual allegations not supporting a showing of concerted action, Dr. Ezekwo's *Section 1* claim is dismissed on summary judgment as to defendants so moving.

[25]** Dr. Ezekwo has also asserted a claim under Sherman Act, *Section 2*, *15 U.S.C. § 2*, alleging that the defendants have monopolized, or attempted to monopolize, the market for internal medicine. Dr. Ezekwo's *Section 2* claim falls on said defendants' motions for summary judgment for much the same reasons as do her *Section 1* claims.

First, ***HN14***[] the Act's *Section 2* requires injury to the market, as opposed to individual impact, which--again--is not established on this record. *See, e.g., Volmar Distrib., Inc. v. New York Post Co., 825 F. Supp. 1153, 1159-60 (S.D.N.Y. 1993)*. Additionally, at trial Dr. Ezekwo would have to prove that the defendants both "possess[] monopoly power in the relevant market, and . . . [that they have willfully acquired or maintained] that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*. *See also, Irvin Indus. v. Goodyear Aerospace Corp., 974 F.2d 241, 244 (2d Cir. 1992)* (requiring monopoly power in the relevant market, anticompetitive conduct by the defendant, **[**26]** and injury in fact caused by that conduct). There are simply no facts alleged supporting this. [29] Dr. Ezekwo has not even addressed how exactly the Board operates in the market, and has alleged no facts supporting the conclusion that Montefiore and BHP have or are seeking monopoly power, much less that such power has been wrongfully acquired or maintained, or caused

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[27] ***HN13***[] "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466-67, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*.

[28] While Dr. Ezekwo stresses the fact that BHP is located in the same building as a Montefiore clinic, that proximity does not support an inference of conspiracy. Likewise, Dr. Ezekwo asserts the fact that many individuals on Montefiore's reviewing committees are board certified as indicative of conspiracy. But, without a more specific factual basis, the assertion represents only "an opportunity to conspire". *See Maric, 65 F.3d at 313* (citation omitted). Finally, Dr. Ezekwo argues that further discovery would allow her to substantiate her claims. *See Fed. R. Civ. P. 56(f)*. But, in light of the extensive review her case has received on administrative levels, greater discovery would be abusive without a concrete showing of market harm. *See, e.g., Rutman Wine Co., 829 F.2d at 738*; *Car Carriers v. Ford Motor Co., 745 F.2d 1101, 1106-107 (7th Cir. 1984)*, *cert. denied*, ***470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)***.

[29] ***HN15***[] An "attempted monopolization" claim would require Dr. Ezekwo to prove "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power." *Int'l Audiotext Network, Inc., 893 F. Supp. at 1212* (citations omitted). Again, no facts asserted give rise to a reasonable inference that could meet any of these elements.

subsequent market injury. Dr. Ezekwo's *Section 2* claim under the Sherman Act is likewise dismissed on summary judgment.

[*280] In sum, all of defendants' motions are granted as specified above, except for BHP's claims for immunity, which **[**27]** however is hereby rendered moot.

Submit orders on notice.

Dated: New York, New York

May 11, 1998

Richard Owen

United States District Judge

End of Document

Autry v. Northwest Premium Servs.

United States Court of Appeals for the Seventh Circuit

January 12, 1998, Argued ; May 13, 1998, * Decided

No. 97-3035

Reporter
144 F.3d 1037 *; 1998 U.S. App. LEXIS 9564 **

Kimberly Autry, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. Northwest Premium Services, Inc., Northwest Insurance Network, Inc., and Martin Joseph, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97-C-2545. Charles P. Kocoras, Judge.

Autry v. Northwest Premium Servs., 1997 U.S. Dist. LEXIS 10593 (N.D. Ill., July 17, 1997)

Disposition: District court's dismissal of Autry's TILA and state law claims Reversed and Remanded.

Core Terms

insurance business, regulating, premium, financing, insured, federal statute, McCarran Act, state law, insurance company, state statute, invalidate, impair, policyholder, finance company, district court, disclosure, financing agreement, federal law, antitrust, checks, courts, preemption, exemption

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) challenges the sufficiency of the complaint for failure to state a claim upon which relief may be granted.

Civil Procedure > Appeals > Standards of Review > De Novo Review

* This opinion has been circulated among all judges of this court pursuant to Circuit Rule 40(e). No judge favored a rehearing en banc.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN2[] **Standards of Review, De Novo Review**

Whether a district court correctly dismissed a complaint is a question of law that an appellate court reviews de novo.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > Appeals > Standards of Review

HN3[] **Dismissal, Involuntary Dismissals**

In reviewing a motion to dismiss, an appellate court reviews all facts alleged in the complaint and any inferences reasonably drawn therefrom in the light most favorable to the plaintiff. Dismissal is warranted only if the plaintiff can prove no set of facts in support of her claims that would entitle her to relief.

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

HN4[] **Legislation, Effect & Operation**

The starting point in a case involving the meaning of a statute is the language of the statute itself.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial Governments > Relations With Governments

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN5[] **Constitutional Law, Supremacy Clause**

See *15 U.S.C.S. § 1012(b)*.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Constitutional Law > Supremacy Clause > General Overview

Insurance Law > ... > Savings Clause > Business of Insurance Test > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Governments > State & Territorial Governments > Relations With Governments

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN6[] **Federal Regulations, Antitrust Regulations**

The first clause of the McCarran-Ferguson Act, *15 U.S.C.S. § 1012(b)*, establishes that state law enacted for the purpose of regulating the business of insurance preempts federal law of general applicability to the extent the federal law invalidates, impairs, or supersedes the state law. It also creates an exception to this preemption. If the federal law specifically relates to the business of insurance, the federal law may be applied even if it would invalidate, impair, or supersede a state law.

Constitutional Law > Supremacy Clause > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

Insurance Law > Industry Practices > General Overview

Banking Law > Consumer Protection > Truth in Lending > General Overview

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN7[] **Constitutional Law, Supremacy Clause**

The test to determine whether the first clause of the McCarran-Ferguson Act, *15 U.S.C.S. § 1012(b)*, precludes application of a federal statute when state law has enacted a law regulating such agreements requires three inquiries. First, does the federal statute at issue specifically relate to the business of insurance? Second, was the state statute enacted for the purpose of regulating the business of insurance? Third, would application of the federal statute invalidate, impair or supersede the state law?

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN8[] **Legislation, Interpretation**

The three part inquiry is the appropriate test for questions involving the first clause of *15 U.S.C.S. § 1012(b)* of the McCarran-Ferguson Act although many courts utilize a four part test.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Governments > Legislation > Interpretation

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Governments > Courts > Judicial Precedent

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN9[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

To understand fully the impact of analyzing the activity regulated instead of the purpose of the regulation itself, a court must examine how other courts have determined whether an activity is part of "the business of insurance."

Constitutional Law > Supremacy Clause > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN10[] **Constitutional Law, Supremacy Clause**

See *215 Ill. Comp. Stat. 5/513a9*.

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Federal Regulations > General Overview

Insurance Law > Industry Practices > General Overview

HN11[] **Legislation, Interpretation**

A statute is enacted for the purpose of regulating the business of insurance if it possesses the end, intention, or aim of adjusting, managing, or controlling the relationship between the insurance company and the policyholder, directly or indirectly.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

Constitutional Law > Supremacy Clause > General Overview

Insurance Law > Contract Formation

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN12[] **Standards of Performance, Creditors & Debtors**

A financing agreement is a contractual arrangement separate from an insurance policy, and an insurance company acts not as an insurance company but as a creditor under the financing agreement contract. Financing activity is ancillary to the insurance relationship.

Constitutional Law > Supremacy Clause > General Overview

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN13[] **Constitutional Law, Supremacy Clause**

A statute enacted to regulate disclosure and delivery requirements in premium financing agreements is not the kind of statute rightfully protected from federal preemption under the McCarran-Ferguson Act, *15 U.S.C.S. § 1012(b)*.

Counsel: For KIMBERLY AUTRY, Plaintiff - Appellant: Daniel A. Edelman, EDELMAN & COMBS, Chicago, IL USA.

For NORTHWEST PREMIUM SERVICES, INCORPORATED, NORTHWEST INSURANCE NETWORK, INCORPORATED, MARTIN JOSEPH, Defendants - Appellees: Cary S. Fleischer, CHUHAK & TECSON, Chicago, IL USA.

Judges: Before Bauer, Coffey, and Kanne, Circuit Judges.

Opinion by: KANNE

Opinion

[*1038] Kanne, *Circuit Judge*. In April 1997, Kimberly Autry filed a class action complaint in the United States District Court for the Northern District of Illinois. Count I of her complaint alleged that the disclosures contained in her Premium Financing Agreement ("Agreement") violated the Truth In Lending Act ("TILA"), *15 U.S.C. § 1601 et seq.* Autry also alleged that the disclosures violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("Illinois CFA"), *815 Ill. Comp. Stat. 505/1 et seq*. The district court granted the defendants' motion to dismiss Count I of the complaint on the ground that the McCarran-Ferguson Act ("McCarran Act"), *15 U.S.C. § 1012(b)*, barred application of TILA to the Agreement. The district court then declined to exercise its supplemental jurisdiction authority over Autry's state law claims. Because we find that the McCarran Act does not bar application **[**2]** of TILA to the Agreement, we reverse the dismissal of Autry's complaint and remand for further proceedings consistent with this opinion.

I. History

In June 1996, Autry financed the purchase of an insurance policy on her automobile by signing a Premium Finance Agreement and Disclosure Statement. Autry claims that the disclosures in the Agreement misstate the amount financed, the finance charge, and the total amount of payments in violation of TILA and the Illinois CFA. Autry sued both Northwest Premium Services, Inc. and Northwest Insurance Network, Inc. because she contends that the Agreement refers to both parties and the identity of the party that actually extended the credit is unclear.

The defendants filed a motion to dismiss in June 1997, asking that the district court dismiss the TILA count as barred by the McCarran Act. The district court granted defendants' motion, finding that under our precedent in *Lowe v. Aarco-American, Inc.,* ***[*1039]*** *536 F.2d 1160, 1162 (7th Cir. 1976)*, [1] the financing of insurance premiums was part of the "business of insurance" under the McCarran Act, that application of TILA would impede Illinois law, and therefore premium financing activities were **[**3]** beyond the reach of TILA and instead governed solely by state law. The district court dismissed Autry's TILA claim with prejudice and dismissed her state law claims without prejudice.

On appeal, Autry asks us to reevaluate whether premium financing is part of the "business of insurance." Autry argues that several Supreme Court cases decided after *Lowe* suggest that *Lowe* was incorrectly decided and we should now overrule it. In addition, Autry notes the circuit split on the issue between our Circuit and the Fifth as a reason to reconsider *Lowe*. In the alternative, Autry argues that even if premium financing is the "business of

[1] *Lowe* was overturned on other grounds by *NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992)*. The district court determined that the *American Family* decision left Lowe's holding that premium financing involved the "business of insurance" untouched.

insurance," TILA does not impair, invalidate, or supersede the Illinois law on premium financing agreements, and therefore **[**4]** TILA may still be applied.

The defendants respond that *Lowe* was correctly decided and that the intervening Supreme Court cases only serve to reinforce Lowe. They urge us to renew our holding in *Lowe* that premium financing constitutes the "business of insurance." Defendants also argue that application of TILA would impede the state law in the area, and thus TILA may not be applied. They ask that we find that the McCarran Act bars Autry's TILA claim. [2]

II. Analysis

A. *Standard of Review*

HN1[] A motion to dismiss under *Rule 12(b)(6)* challenges the sufficiency of the complaint for failure to state a claim upon which relief may be granted. *See* *Fed. R. Civ. P. 12(b)(6)*. ***HN2***[] Whether a district court correctly dismissed a complaint is a question of law that we review *de novo. See Moss v. Healthcare Compare* *Corp., 75 F.3d 276, 279 (7th Cir. 1996)*. ***HN3***[] In reviewing a motion to dismiss, we review all **[**5]** facts alleged in the complaint and any inferences reasonably drawn therefrom in the light most favorable to the plaintiff. *See* *Caldwell v. City of Elwood, 959 F.2d 670, 671 (7th Cir. 1992)*. Dismissal is warranted only if the plaintiff can prove no set of facts in support of her claims that would entitle her to relief. *See* *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*.

B. The McCarran-Ferguson Act

1. History

Congress enacted the McCarran Act in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)*. *See* *United States Dept. of the Treasury v. Fabe, 508 U.S. 491, 499, 124 L. Ed. 2d 449, 113 S. Ct. 2202 (1993)*. Prior to *South-Eastern Underwriters*, courts had determined that issuing an insurance policy was not a transaction in commerce and therefore not subject to federal regulation. *See id*. (citing *Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183, 19 L. Ed. 357 (1869))*. Thus "'States enjoyed a virtually exclusive domain over the insurance industry.'" *Id*. (quoting *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 539, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978))*.

This situation was soon to change. In light of "the emergence of an interconnected and interdependent national economy," *id.*, courts expanded their **[**6]** conception of interstate commerce. This expanded conception led the Supreme Court to hold that an insurance company that conducted business across state lines was engaged in interstate commerce and thus subject to federal antitrust laws. *See* *South-Eastern Underwriters, 322 U.S. at 533*. This development caused states to be concerned about their power to tax and regulate the insurance industry. See *Fabe, 508 U.S. at 499*. Specifically, *South-Eastern* **[*1040]** *Underwriters* "threatened the continued supremacy of the States," *SEC v. National Sec., Inc., 393 U.S. 453, 459, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969)*, "in regulating the dealings between insurers and their policy holders," *id.* Congress responded by passing the McCarran Act.

Congress expressed the purpose of the McCarran Act in its first section:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011. As this section demonstrates, Congress intended the McCarran Act to allow the states to regulate the business **[**7]** of insurance "free from inadvertent preemption by federal statutes of general applicability." *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1488-89 (9th Cir. 1995)*. To this end, Congress reversed the standard rules for preemption, creating a "clear-statement rule . . . that state

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[2] This description reflects how the parties have framed the issue for review. We conceptualize the inquiry differently. See infra.

laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *Fabe, 508 U.S. at 507*.

2. The Language of the McCarran Act

HN4[] "'The starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself.'" *Fabe, 508 U.S. at 500* (quoting *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 210, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979))*. ***HN5***[] The specific statutory provision at issue in this case is § 2(b) of the Act, which provides as follows:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates **[**8]** to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1012(b).

Section 2(b) contains two clauses, separated by the colon. The first clause may be broken down into two phrases: ***HN6***[] The first establishes that state law "enacted . . . for the purpose of regulating the business of insurance" preempts federal law of general applicability to the extent the federal law invalidates, impairs, or supersedes the state law. The second phrase creates an exception to this preemption--if the federal law specifically relates to the business of insurance, the federal law may be applied even if it would invalidate, impair, or supersede a state law. The second clause, known as the "antitrust exemption," provides that federal ***antitrust law*** will control the business of insurance unless that business is regulated by state law. The Supreme Court recently **[**9]** elaborated on the purposes behind the clauses:

> The first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for "the business of insurance" from the federal antitrust laws.

Fabe, 508 U.S. at 505.

C. *The Appropriate Inquiry for Cases Involving the First Clause of the McCarran Act*

This case turns on the application of the first clause of § 2(b). ***HN7***[] The question before us is whether the first clause of the McCarran Act precludes application of TILA to premium financing agreements when Illinois has enacted a law regulating such agreements. This question requires three inquiries: first, does the federal statute at issue "specifically relate to the business of insurance;" second, was the state statute "enacted **[*1041]** . . . for the purpose of regulating the business of insurance"; and third, would application of the federal statute "invalidate, impair or supersede" the state law. *See id. at 501*; *see also Ambrose v. Blue Cross & Blue Shield, 891 F. Supp. 1153, 1158 (E.D. Va. 1995)*, *aff'd*, *95* ***[**10]*** *F.3d 41 (4th Cir. 1996)*.

HN8[] While we find this three part inquiry is the appropriate test for questions involving the first clause of § 2(b), we note that many courts utilize a four part test. *See, e.g., Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185, 1998 WL 70610 (3d Cir. 1998)*; *Merchants Home Delivery Serv., 50 F.3d at 1489*. The four part test runs as follows:

> The McCarran-Ferguson Act precludes the application of a federal statute if: (1) the statute does not "specifically relate" to the business of insurance, (2) the acts challenged under the statute constitute the business of insurance, (3) the state has enacted a law or laws regulating the challenged acts, and (4) the state law would be superseded, impaired or invalidated by the application of the federal statute.

Merchants Home Delivery Serv., 50 F.3d at 1489 (citing Cochran v. Paco, Inc., 606 F.2d 460, 464 (5th Cir. 1979)). The first and last parts of this test are identical to the first and last parts of the three part test. The difference lies in parts two and three. While the three part test asks "was the state statute enacted for the purpose of regulating the business of insurance," the four part test breaks **[**11]** this down into two questions: (a) is the action at issue part of the business of insurance, and (b) has the state enacted a law to regulate this action?

We decline to use the four part test for two reasons: First, the Court in *Fabe*, while not explicitly setting forth a three part test, stated:

> The parties agree that application of the federal priority statute would "invalidate, impair, or supersede" the Ohio priority scheme and that the federal priority statute does not "specifically relate to the business of insurance." All that is left for us to determine, therefore, is whether the Ohio priority statute is a law enacted "for the purpose of regulating the business of insurance."

Fabe, 508 U.S. at 501. This language leads us to believe that the Supreme Court conceptualized the inquiry as involving those three questions. Second, the four part test misplaces the emphasis of the inquiry. The four part test requires the court to examine the activity at issue to determine whether the *activity being regulated* is part of the "business of insurance." However, the statutory language counsels us to examine the *purpose for which the statute was enacted* to determine whether the statute is one **[**12]** "enacted . . . for the purpose of regulating the business of insurance." While this distinction may seem somewhat semantic, the effect is far from inconsequential.

HN9[] To understand fully the impact of analyzing the activity regulated instead of the purpose of the regulation itself, we must examine how courts have been determining whether the activity is part of "the business of insurance." The Supreme Court has twice defined the term "business of insurance" in the context of the second clause, or "antitrust exemption," of the McCarran Act. *See* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 73 L. Ed. 2d 647, 102 S. Ct. 3002 (1982); Royal Drug, 440 U.S. at 210. In *Pireno*, the Court stated the test as follows:

> Three criteria [are] relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Pireno, 458 U.S. at 129. Courts using the four part test borrow **[**13]** this definition and apply it to the "activity" under scrutiny to determine whether the activity is part of "the business of insurance." *See, e.g., Sabo*, 1998 WL 70610 at *6; Merchants Home Delivery Serv., 50 F.3d at 1490.

The problem with this approach is that it casts too small a net to capture all of the statutes that were "enacted . . . for the purpose of regulating the business of insurance." **[*1042]** There will be cases where the regulated activity does not constitute the "business of insurance" as that term is defined in *Pireno*, yet the statute that regulates the activity may have been enacted "for the purpose of regulating the business of insurance." As the *Fabe* Court stated, the "broad category of laws enacted 'for the purpose of regulating the business of insurance' . . . necessarily encompasses more than just the 'business of insurance.'" Fabe, 508 U.S. at 505.

Take, for example, the statute at issue in *Fabe*. The state statute at issue regulated creditor priority in a bankruptcy dissolution and gave policyholders a higher preference than they received under the federal statute. If we asked only whether the activity in question, bankruptcy dissolution, was the "business of insurance" **[**14]** as defined in *Pireno*, the answer would be "no." If the activity in question is not the "business of insurance," it would follow from the four part test that the statute enacted to regulate it cannot be a statute "enacted . . . for the purpose of regulating the business of insurance." Yet, as the Supreme Court noted, the preferencing of policyholders "serves to ensure that, if possible, policyholders ultimately will receive payment on their claims." Id. at 506. "Because the [state] statute is 'aimed at protecting or regulating' the performance of an insurance contract . . . it follows that it is a law 'enacted for the purpose of regulating the business of insurance' within the meaning of the first clause of § 2(b)." Id. at 505 (citation omitted). In sum, courts applying the four part test may have concluded that the McCarran Act did not preclude application of the federal statute, while the Supreme Court, applying what we believe to be a three part test, reached the opposite conclusion.

The Supreme Court did not simply look to the activity being regulated to determine whether it qualified as the "business of insurance." Instead, it dissected the statute and looked to an ultimate **[**15]** effect of the statute: increased probability of enforcement of the insurance contract. *Id. at 502-05*. Thus, a statute that regulates bankruptcy proceedings may still be a statute "enacted . . . for the purpose of regulating the business of insurance" even though bankruptcy proceedings themselves are not the "business of insurance." The Supreme Court's approach reinforces our belief that the four part test misplaces the emphasis by examining the activity regulated by the statute instead of the purpose of the statute.

We conclude that the appropriate test to employ is the three part test. *Accord* Ambrose, 891 F. Supp. at 1161 & n.5. The three part test requires the following three inquiries: (1) Does the federal statute at issue "specifically relate to the business of insurance"? If so, the standard preemption rules apply and the federal statute is applied. If the federal statute does not "specifically relate to the business of insurance," a court must ask (2) whether the state statute was "enacted . . . for the purpose of regulating the business of insurance." If the state law was not enacted for this purpose, then the court's inquiry ends. If, however, the state statute was so enacted, **[**16]** a court must proceed to determine (3) whether application of the federal statute would "invalidate, impair or supersede" the state law. If the federal statute would have one of these effects, then it may not be applied in the face of the state law. On the other hand, if the federal statute would not "invalidate, impair, or supersede" state law, then the federal statute may be applied. [3]

[17]** **[*1043]** Neither party in this action suggests that TILA specifically relates to the business of insurance. We therefore proceed to whether the Illinois statute was "enacted . . . for the purpose of regulating the business of insurance." If it was so enacted, we proceed to the third inquiry. If, however, the state statute was not "enacted . . . for the purpose of regulating the business of insurance," then the state statute is outside of the McCarran Act's protective umbrella and our inquiry ends.

D. *Determining Whether 215 Ill. Comp. Stat. 5/513a9 Is a Statute Enacted for the Purpose of Regulating the Business of Insurance*

Section 513a9 of the Illinois Compiled Statutes provides as follows:

> § 513a9. ***HN10***[] Premium finance agreement.
> (a) A premium finance agreement must be dated and signed by or on behalf of the named insured, and the printed portion shall be in at least 8-point type. The following items must be set forth on the first page of the accepted finance agreement:
> (1) the total amount of the premiums;
> (2) the amount of the down payment;
> (3) the principal balance (the difference between items (1) and (2));
>
> (4) the amount of the finance charges expressed in dollars and as an annual **[**18]** percentage rate;
> (5) the balance payable by the insured (sum of items (3) and (4));
> (6) the number of installments, the due dates thereof, and the amount of each installment expressed in dollars; and
> (7) the policy numbers or binder numbers.
> (b) The premium finance company is required to furnish full and complete disclosure of the terms and conditions of the premium finance agreement including, but not limited to, the specific insurance coverages

[3] We recognize that our formulation today differs from the one used in *American Deposit Corp. v. Schacht, 84 F.3d 834, 838 (7th Cir. 1996)*, *cert. denied*, *__ U.S. __, 136 L. Ed. 2d 123, 117 S. Ct. 185 (1996)*. In *Schacht* we first addressed whether the state statute was "enacted . . . for the purpose of regulating the business of insurance." After answering that question in the affirmative, we asked whether the particular activity at issue in the case was part of the "business of insurance." No doubt we took this second step because *Fabe* counsels that a statute "need not be treated as a package which stands or falls in its entirety," *Fabe, 508 U.S. at 509 n.8*, and instead that a state statute should only displace federal law "to the extent that it regulates policyholders," *id. at 508*. Because we find that the Illinois statute regulating premium financing agreements is not one "enacted . . . for the purpose of regulating the business of insurance," we need go no further.

> financed to the named insured no later than the date that the first premium payment notice is sent to the insured.
> (c) As to policies written primarily for personal, family, or household use, the premium finance company must:
> (1) deliver or mail the premium check or checks in the amount of the principal balance directly to the insurer or insurers unless the insurer or insurers have given written authority to the premium finance company to deliver the checks to the producer;
> (2) issue the premium check or checks payable to the insurer, insurers, or, if the insurer gives written authority to the premium finance company, to the producer; and
>
> (3) properly identify the premium check or checks by policy number or binder number when the premium is **[**19]** paid to the insurer or insurers.
> (d) As to all other policies the premium finance company may:
> (1) deliver or mail the premium check or checks in the amount of the principal balance directly to the producer; and
> (2) issue the premium check or checks payable to the producer.

215 Ill. Comp. Stat. 5/513a9. [4]

[20]** Although we have settled the question of whether we should use a four part test and look at the activity regulated or employ a three part test and look to the purpose of the statute itself, we must still resolve how to determine whether the statute at issue is one "enacted . . . for the purpose of regulating the business of insurance." The Court has addressed this question twice in its history, the first time in *National Securities* and the second time in *Fabe*.

[*1044] The Supreme Court in *National Securities* concluded that a law "enacted . . . for the purpose of regulating the business of insurance" is one "aimed at protecting or regulating [the] relationship [between insurer and insured], directly or indirectly." *National Sec., 393 U.S. at 460*. The Court elaborated:

> Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which Paul v. Virginia held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement--these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely **[**21]** to their status as reliable insurers that they to [sic] must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder.

Id. In *Fabe*, the Court stated, "the broad category of laws 'enacted for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe, 508 U.S. at 505*. Putting the *Fabe* and *National Securities* formulations together, ***HN11***[] a statute is "enacted . . . for the purpose of regulating the business of insurance" if it possesses the end, intention, or aim of adjusting, managing, or controlling the relationship between the insurance company and the policyholder, directly or indirectly. [5]

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[4] In their brief, the defendants refer to several statutes within Article XXXII of the Illinois Compiled Statutes. Article XXXII is entitled "Premium Finance Companies," and the statutes within it regulate all manner of things related to such companies. However, the only state statute at issue in this case is *215 Ill. Comp. Stat. 5/513a9*, the statute relating to premium finance agreements. Specifically, the only sections at issue are subsections (a) and (b) of § 513a9. The question we must address is whether § 513a9 is a law "enacted . . . for the purpose of regulating the business of insurance." Examining other state statutes, even if such statutes are located in the same section of the Illinois Compiled Statutes, would not assist our inquiry and we therefore decline to do so.

[5] We confess some uncertainty as to whether *Fabe* counsels us to employ the *Pireno* test in cases involving the first clause of § 2(b) to determine whether a statute is one "enacted . . . for the purpose of regulating the business of insurance." Although the Court distinguished *Pireno* as applying to cases involving the antitrust exemption, it employed a *Pireno* analysis in its discussion.

[22]** Under this formulation, we hold that 215 Ill. Comp. Stat. 5/513a9 is not a statute "enacted . . . for the purpose of regulating the business of insurance." The Illinois law addresses the relationship between a creditor and a debtor, not the relationship between an insurance company and a policyholder. Although sections (a) and (b) of the statute regulate disclosure in the financing of insurance premiums, and subsections (c) and (d) regulate to whom the finance company must deliver the premium check, the critical point is that the state is attempting to protect the interests of the borrower qua borrower. The statute may serve to protect someone who happens to be an "insured," but it does not protect that person in his capacity as a party to a contract of insurance. The fact that the money borrowed ultimately pays insurance premiums is incidental. The statute in question **[*1045]** simply regulates the lending activities of companies involved in premium finance.

Our analysis is the same even if it is the insurance company doing the financing. ***HN12***[] The financing agreement is a contractual arrangement separate from the insurance policy itself, and the insurance company acts not as an insurance company **[**23]** but as a creditor under that contract. The financing activity is ancillary to the insurance relationship. Thus, the Illinois statute, which regulates the debtor-creditor relationship under premium financing agreements, does not possess an end, intention, or aim of directing, managing, or controlling the relationship between the insurance company and the policyholder. As such it is not a law "enacted . . . for the purpose of regulating the business of insurance" and therefore it is outside the scope of the McCarran Act. Because the Illinois statute is outside of the McCarran Act's protective umbrella, it does not preempt federal law, and the court may apply TILA.

E. *Lowe v. Aarco-American, Inc.*

In *Lowe* we summarily determined that the credit sale of insurance policies by an insurance broker and a premium finance company was part of the "business of insurance" and therefore exempt from TILA's application. *See* 536 F.2d at 1162. The Fifth Circuit, in Perry v. Fidelity Union Life Ins. Co., 606 F.2d 468 at 470 (5th Cir. 1979) and Cochran, 606 F.2d at 460, disagreed with our holding and created a circuit split.

In *Lowe*, we asked whether the activity of premium financing was part of the "business **[**24]** of insurance." As argued *supra*, given intervening Supreme Court decisions and particularly the recent *Fabe* opinion, we believe that the appropriate inquiry is whether the statute at issue is one "enacted . . . for the purpose of regulating the business of insurance," not whether the activity the statute regulates may properly be considered the "business of insurance." This approach, in addition to being consistent with the language of the statute, has the added benefit of addressing state law statute by statute to determine whether it trumps federal law. Under the *Lowe* approach, any state statute

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Many other courts have struggled with the same question. *See, e.g.,* Ambrose, 891 F. Supp. at 1160. We do not understand *Fabe* to require the *Pireno* analysis in this situation. We read the *Fabe* Court's *Pireno* analysis as responding to the petitioner's argument that the appropriate question was whether the liquidation of an insolvent insurance company is part of the "business of insurance." By interpreting the statute as not merely ranking creditor priority in bankruptcy, but as affecting the actual performance of the insurance contract, the Supreme Court established that even under *Pireno* the statute was one "enacted . . . for the purpose of regulating the business of insurance." Thus the Supreme Court defeated the petitioner's argument on its own ground. Understanding the Court's Pireno analysis in this context, we conclude that the *Pireno* analysis is not a necessary part of determining whether a statute is "enacted . . . for the purpose of regulating the business of insurance." This understanding comports with the *Fabe* Court's statement that:

> Both *Royal Drug* and *Pireno* . . . involved the scope of the antitrust immunity located in the second clause of § 2(b). We deal here with the first clause, which is not so narrowly circumscribed. The language of § 2(b) is unambiguous: The first clause commits laws "enacted . . . for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do.

Fabe, 508 U.S. at 504. Additionally, the *Pireno* criteria focus on the activity regulated by the statute. Since we have previously determined that our focus is not on the activity itself, the *Pireno* factors provide too narrow a test. *Accord* Ambrose, 891 F. Supp. at 1160-61 & n.5 ("To the extent that Pireno and Royal Drug consider whether the practice being regulated is itself the business of insurance, their analysis is inapplicable in a case controlled by the broader first clause of Section 2(b).").

regulating any aspect of premium financing would be immune from federal preemption because premium financing is "the business of insurance."

We hold that ***HN13***[] a statute enacted to regulate disclosure and delivery requirements in premium financing agreements is not the kind of statute rightfully protected from federal preemption under the McCarran Act. To the extent that our approach to this question and our holding departs from our prior decision in Lowe, we overrule our decision in *Lowe*.

For the forgoing reasons, we Reverse the district court's dismissal of Autry's TILA and state law claims **[**25]** and Remand for proceedings consistent with this opinion.

Jefferson v. Chevron U.S.A.

Court of Appeal of Louisiana, Fourth Circuit

May 26, 1998, Decided

No. 98-CA-0254 C/W No. 97-C-2436

Reporter

713 So. 2d 785 *; 1998 La. App. LEXIS 1340 **; 98-0254 (La.App. 4 Cir. 05/26/98);

ELMIRA P. JEFFERSON, ET AL. v. CHEVRON U.S.A. INC., ET AL.

Subsequent History: [1]** Released for Publication July 6, 1998.

Prior History: AN APPEAL AND SUPERVISORY WRITS FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS. NO. 94-5562, DIVISION "H-12". HONORABLE MICHAEL G. BAGNERIS, JUDGE.

Disposition: AFFIRMED IN PART; WRIT GRANTED; AND JUDGMENT VACATED IN PART; CASE REMANDED.

Core Terms

prices, jobbers, summary judgment, stations, plaintiffs', gasoline, fuel, dealers, trial court, contracts, relevant market, reasons, unfair, antitrust claim, defense motion, motor fuel, wholesalers, antitrust, retailers, selling, summary judgment motion, violations, compete, price discrimination, non-antitrust, supervisory, commodity, deceptive, contends, leased

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgments are favored, and the rules regarding such should be liberally applied. *La. Code Civ. Proc. Ann. art. 966A(2)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Standards of Review, De Novo Review**

Appellate courts review summary judgments de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] **Entitlement as Matter of Law, Genuine Disputes**

A motion for summary judgment which shows that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law shall be granted. *La. Code Civ. Proc. Ann. art. 966* C(1)

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN4[] **Summary Judgment, Partial Summary Judgment**

A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case. *La. Code Civ. Proc. Ann. art. 966(E)*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN5[] **Antitrust & Trade Law, Sherman Act**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal. *La. Rev. Stat. Ann. § 51:122*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN6[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

To state a claim under *La. Rev. Stat. Ann. § 51:122*, the plaintiff is required to allege that the defendant is a party to a contract which results in an unreasonable restraint of trade.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN7[] **Conspiracy to Monopolize, State Regulation**

No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state. *La. Rev. Stat. Ann. § 51:123*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

***HN8*[]** **Conspiracy to Monopolize, State Regulation**

In order to recover under *La. Rev. Stat. Ann. § 51:123*, the plaintiff is required to prove that defendant either attempted to monopolize or conspired to monopolize any part of the trade or commerce within this state. Monopoly power is defined as the ability to control prices or to exclude competition from the market. To determine the existence of monopoly power, it is necessary to define the market within which that power is allegedly exercised.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

***HN9*[]** **Price Discrimination, Buyer Liability**

No person, doing business in Louisiana, and engaged in the production, manufacture, or distribution of any commodity in general use, who shall, intentionally, for the purpose of injuring or destroying the business of a competitor in any locality, discriminate between different sections, communities, cities, or localities in the state by selling such commodity at a lower rate in one section, community, city, or locality, than is charged for the commodity by such person in another section, community, city, or locality, after making due allowance for the difference if any, in the grade or quality of the commodity and in the actual cost of transportation of the commodity from the point of production, if a raw product, or from the point of manufacture, if a manufactured product. All sales so made shall be prima facie evidence of unfair discrimination. *La. Rev. Stat. Ann. § 51:331*.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

***HN10*[]** **Private Actions, Remedies**

Louisiana courts have held in traditional tort cases that private rights of action exist for violation of a statute. This rule of law is also applicable in the present antitrust suit.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

***HN11*[]** **Price Discrimination, Buyer Liability**

La. Rev. Stat. Ann. § 51:333 provides that all contracts made in violation *La. Rev. Stat. Ann. § 51:331* are void.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN12[] **Regulated Practices, Trade Practices & Unfair Competition**

La. Rev. Stat. Ann. § 51:1405(A) provides in part that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Torts > Business Torts > Unfair Business Practices > General Overview

HN13[] **Business Torts, Unfair Business Practices**

La. Rev. Stat. Ann. § 51:1409 confers a right of private action on any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal from unlawful trade practices. This language has been held to confer the private right of action on both consumers and business competitors, such as the plaintiff dealers in this case.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Torts > Business Torts > Unfair Business Practices > General Overview

HN14[] **Trade Practices & Unfair Competition, State Regulation**

The Louisiana Unfair Trade Practices Law (LUPTA), codified at *La. Rev. Stat. Ann. §. 51:1401, et seq.*, provides a cause of action both for trade practices which are "unfair" and those which are "deceptive." An act is not required to be both unfair and deceptive. A practice is unfair when it offends established public policy and when the practice is unethical, oppressive, unscrupulous, or substantially injurious. A trade practice is "deceptive" for purposes of LUTPA when it amounts to fraud, deceit or misrepresentation.

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Judges: (Court composed of Judge Robert J. Klees, Judge Steven R. Plotkin and Judge James F. McKay, III).

Opinion by: ROBERT J. KLEES

Opinion

Pg 1

[*787] This case comes before this Court on Chevron U.S.A.'s motion for summary judgment. Chevron has devolutively appealed from the trial court's denial of its motion for summary judgment as to plaintiffs' antitrust claims and has filed an application for supervisory writs from the ruling of the trial court on plaintiffs' non-antitrust claims. Although the trial court rendered judgment in plaintiffs' **[**2]** favor, plaintiffs answered defendant's appeal on the basis of statements made in the trial court's reasons for judgment. On joint motion of the parties, this Court consolidated the writ application with the present appeal.

For the reasons stated more fully herein, we affirm the trial court's judgment denying defendant's motion for summary judgment as to plaintiffs' antitrust claims. As to the trial court's ruling on plaintiffs' non-antitrust claims, we grant defendant's application for supervisory writs, vacate the ruling of the trial court and remand for further proceedings.

PROCEDURAL HISTORY

In March of 1994, the plaintiffs brought the present suit for damages against Chevron U.S.A. ("defendant") and three of Chevron's wholesale distributors. Plaintiffs alleged violations of the Louisiana Anti-Trust statute, *LSA-R.S. 51:121, et seq.*, and violations of the Louisiana Unfair Trade Practices Act, *LSA-R.S. 51:1401, et seq.* Plaintiffs further asserted claims against defendant for other violations of state law, including breach of contract, abuse of rights, intentional interference with business relationship, misrepresentation and unjust enrichment.

[Pg 2] Defendant answered **[**3]** plaintiffs' petition, and subsequently brought a motion for summary judgment. Following a hearing, the trial court denied defendant's motion and issued written reasons for judgment.

This devolutive appeal followed. While the usual procedural vehicle for seeking review of a denial of a motion for summary judgment would have been by supervisory writ, defendants were afforded an expedited right of appeal from the trial court's ruling pursuant to *LSA-R.S. 51:135*, a special provision for review of antitrust actions. However, the appellate jurisdiction conferred by *LSA-R.S. 51:135* applies specifically to antitrust claims, and, absent irreparable injury, defendant has no right to appeal the denial of the summary judgment as to plaintiffs' non-antitrust claims. *La. Code Civ. Proc. art. 2083*; *Orleans Parish School Bd. v. Scheyd, Inc., 95-2653 (La. App. 4 Cir. 4/24/96), 673 So. 2d 274*. Accordingly, defendant sought supervisory writs of review of these issues, and this Court has consolidated this writ application with the present appeal. Thus, both the antitrust claims and the non-antitrust claims will be considered at this time, albeit through separate procedural vehicles.

FACTS

[4]** The following statement of facts is taken from plaintiffs' petition and from the documents submitted at the motion for summary judgment.

The plaintiffs in this case are current or former Chevron service station dealers in the Greater New Orleans area. Defendant Chevron U.S.A. refines, produces and manufactures various petroleum products and motor fuels, including gasoline and diesel fuels, and markets these products in three ways. First, it sells gasoline to branded independent dealers, such as plaintiffs, who also generally lease their service station outlets from Chevron. Second, Chevron sells gasoline to wholesalers and unbranded retailers, commonly referred to as "jobbers." Jobbers sell the gasoline to "jobber-supplied" stations under the Chevron insignia [Pg 3] and trademark. Further, jobbers provide their own transportation for the delivery of motor fuels. Third, Chevron sells gasoline directly through Chevron-owned service stations operated by Chevron employees, or "co-op" stations.

The plaintiffs in this case represent the first level in Chevron's distribution system. Each of the plaintiffs in this case entered into Dealer Supply Contracts ("contracts") with Chevron that obligate **[**5]** them to buy all of their Chevron branded gasoline directly from **[*788]** Chevron, and to pay "Company's [Chevron's] prices to Dealer in effect at the time and place of delivery for the particular product, grade, quantity and type of delivery involved, as established by Company from time to time." (Dealer Supply Contract, paragraph 3(b)). All but two of the plaintiff dealers also lease their stations from Chevron pursuant to a Lease Agreement containing a variable monthly rent computed partly on the basis of the number of gallons of Chevron fuel that the plaintiffs have sold each month. Chevron contends that it has a substantial financial investment in the acquisition, remodeling and maintenance of the leased stations and further maintains the environmental responsibility for the fuel purchased by the independent dealers.

Defendants Val J. Dauterive & Sons, Inc., Dade Vincent, Inc. d/b/a Metro Oil & Gas, and Huber Oil Company, Inc. are Chevron "jobbers" who purchase gasolines and diesel fuels from Chevron for resale, and who distribute those products to independent stations and retailers not bearing the Chevron trademark. By the terms of the contracts, Chevron prohibits the plaintiff dealers **[**6]** from purchasing Chevron motor fuels from Chevron's jobbers, and Chevron prohibits the jobbers from selling Chevron motor fuels to the plaintiff dealers. By this lawsuit, plaintiffs seek a declaratory judgment and injunctive relief prohibiting the defendant jobbers from refusing to sell fuel to plaintiffs. These defendants did not participate in the motion for summary judgment brought in the trial court by [Pg 4] defendant Chevron, and plaintiffs' claims against these defendants are not part of this appeal.

The basis of plaintiffs' claims against Chevron is that Chevron arbitrarily manipulates the price of the fuel it sells to the independent dealers and unreasonably prohibits plaintiffs from purchasing the fuel at lower prices from the jobbers. The price the plaintiff dealers pay to Chevron for gasolines and diesel fuels is called the "dealer tank wagon," or "DTW" price. Based on the DTW price in effect, the plaintiffs set the price to the public or "street price." The price the jobbers pay for their wholesale supplies of motor fuels purchased from Chevron is referred to as the "rack" price, and the jobber-supplied stations set their street price accordingly. At the co-op stations, Chevron **[**7]** retains title to the fuel until it is sold to the public at the pump, and Chevron sets the street price for the gasoline.

Chevron periodically adjusts the prices for its fuels based on a zone pricing mechanism. Chevron has established price zones, which it refers to as "price reference areas," and Chevron makes "temporary competitive adjustments" based on the prices of the competition in the particular area. Plaintiffs allege that Chevron enhances the competitive advantage of its company-operated stations by dictating the DTW and the subsequent retail price charged by the plaintiff dealers.

Plaintiffs allege in their petition that Chevron's DTW prices to the plaintiff dealers have been unreasonably higher than Chevron's rack price to the defendant jobbers. Plaintiffs contend that the rack prices to the jobbers have been so much lower than the DTW prices that the jobbers have been able to resell to independent stations and retailers at prices much lower than the DTW prices the plaintiff dealers are forced to pay to Chevron. Plaintiffs contend that the differential is greater than the cost of transportation or other costs incurred by the jobbers. Plaintiffs argue that the differential **[**8]** between DTW and rack prices has damaged [Pg 5] the ability of the plaintiff dealers to compete effectively with jobbers who resell unbranded Chevron motor fuels at significantly lower prices, and has also damaged the ability of the plaintiff to compete with Chevron's own co-op stations.

Further, plaintiffs allege that Chevron improperly administered the variable rent program to increase Chevron's rental revenue whenever the effects of their pricing manipulation reduced the volume of fuel plaintiffs could sell.

Plaintiffs allege that for the purposes of the antitrust violations, the relevant geographic market involved is the Greater New Orleans area, including the Parishes of Orleans, Jefferson, St. Bernard and Plaquemines. Plaintiffs allege that the relevant product market is Chevron motor fuels (gasoline and diesel fuels).

[*789] SUMMARY JUDGMENT STANDARDS

The standard for summary judgments under Louisiana law has been recently modified by legislative revision of *Article 966 of the Code of Civil Procedure.* ***HN1***[] Summary judgments are now favored, and the rules regarding such should be liberally applied. *La. Code Civ. Proc. art. 966A(2)*; *Oakley v. Thebault, 96-0937, (La. App. 4 Cir. 11/13/96),* ***[**9]*** *684 So. 2d 488, 490*. ***HN2***[] Appellate courts review summary judgments de novo. ***HN3***[] A motion for summary judgment which shows that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law shall be granted. *La. Code Civ. Proc. art. 966* C(1); *Smith v. Our Lady of the Lake Hosp. Inc., 93-2512 (La. 7/5/94), 639 So. 2d 730, 751*.

Further, Louisiana law now authorizes a partial summary judgment. By Acts 1997, No. 483, effective July 1, 1997, the legislature revised *La Code of Civ. Proc. art. 966(E)*, which now provides as follows:

> ***HN4***[] A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case.

We will consider the motion now before us with these standards in mind.

[Pg 6] LOUISIANA ANTITRUST STATUTE

The plaintiffs allege violations by the defendant of *LSA-R.S. 51:122*, which provides:

> ***HN5***[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.

LSA-R.S. 51:122 is virtually identical **[**10]** to *Sec. 1, et seq.* of the Sherman Act (*15 U.S.C. § 1 et seq.*), and in reviewing allegations of violations of the Sherman Act, federal courts have applied the Rule of Reason to determine which contracts or combinations constitute an unreasonable restraint of trade. *Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Although Louisiana's ***antitrust law*** is not as well developed as the federal law, our courts have nonetheless recognized that the broad language of Louisiana's prohibition against every contract, combination, or conspiracy in restraint of trade should not be taken literally, but must be interpreted to reach only those combinations or contracts which are "unlawful." See, *Louisiana Power & Light Co. v. United Gas Pipe Line Co., 518 So. 2d 1050, 1053 (La. App. 4 Cir. 1987)*, writ denied, *523 So. 2d 232 (La. 1988)* and cases cited therein. ***HN6***[] To state a claim under *LSA-R.S. 51:122*, the plaintiff is required to allege that the defendant is a party to a contract which results in an **unreasonable** restraint of trade. *Reppond v. City of Denham Springs, 572 So. 2d 224, 230 (La. App. 1 Cir. 1990)*. (Emphasis added.)

[11]** Plaintiffs allege that Chevron has contracted in a manner so as to exclude plaintiffs from purchasing fuels at competitive prices. Plaintiffs allege that by continually refusing to allow them to purchase gasoline at lower prices from the wholesalers/jobbers, Chevron is unreasonably restraining trade. Defendant contends that there is a reasonable basis for its refusal to allow plaintiffs to [Pg 7] purchase fuel from the jobbers: the jobbers are a "different class of trade," and defendant has a substantial investment in the leased stations which is not present with the fuel sold to the jobbers, thereby justifying the price differential.

Plaintiffs' claims against Chevron also rest on the theory that defendant's actions constitute monopolized trade in violation of *LSA-R.S. 51:123*, which provides:

> ***HN7***[]
>
> No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state.
>
> ***HN8***[]
>
> In order to recover under *LSA-R.S. 51:123*, the plaintiff is required to prove that defendant either attempted to monopolize or conspired to monopolize any part of the trade or commerce within this state. Monopoly **[**12]** power is defined as the ability to control prices or to exclude competition from the market. *U. S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391-92, 76 S. Ct. 994, 1005-06, 100 L. Ed. 1264 (1956)*; *Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 So. 2d 1149, 1161, n. 31 (La. 1986)*. To determine the existence of monopoly **[*790]** power, it is necessary to define the market within which that power is allegedly exercised. *Louisiana Power & Light Co. v. United Gas Pipe Line Co., 478 So. 2d 1240, 1248 (La. App. 4th Cir. 1985)*, writ granted, *484 So. 2d 130 (La. 1986)*, affirmed in part, reversed in part, *493 So. 2d 1149 (La. 1986)*.
> The trial court denied defendant's motion for summary judgment on these antitrust claims on the basis that there exist material issues of disputed facts. In its reasons for judgment, the trial court stated:
>
> > The Court finds that plaintiffs claims under *La Rev. State. 51:122* and *51:123* present issues of material fact which cannot be determined on a Motion for Summary Judgment. Plaintiffs' [sic] allege that Chevron and its jobbers have contracted in a manner so as to exclude the plaintiffs from purchasing fuels at competitive wholesale **[**13]** [Pg 8] prices, thereby benefitting Chevron's co-op stations and the stations supplied by jobbers. Defendant asserts that it has not violated Louisiana ***antitrust law*** because it does not

> control the "relevant market." Chevron asserts that the relevant market in New Orleans is comprised of all gasoline. Plaintiffs argue that the relevant market for antitrust purposes is Chevron motor fuel products sold in the Greater New Orleans area. These arguments only highlight the material facts in dispute involving the antitrust claims.

On appeal from this ruling, defendants contend that plaintiffs' antitrust claims must fail as a matter of law because Chevron lacks power in the relevant market to commit the alleged violations. In support of this argument, defendant submitted the affidavit of David Kaplan, an economic consultant with experience in antitrust cases. Kaplan reviewed plaintiffs' antitrust claims and opined that the marketing of gasoline in the New Orleans area is intensely competitive and that Chevron's relatively small market presence prevents it from engaging in uncompetitive conduct. Chevron argues therefore that the prices to dealer supply stations must be considered fair because **[**14]** Chevron is in line with the prices of its competitors.

However, the parties disagree as to how to define the relevant market. Plaintiffs contend that the relevant market is Chevron branded gasoline, and they submit affidavits which state that they must compete with other Chevron stations which are able to sell the gas at a lower price based on Chevron's pricing mechanisms. In support of this position, plaintiffs rely on the case of *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*, which holds that antitrust claims can be based on a singlebrand market power.

Defendants contend that the relevant market includes all products reasonably interchangeable with defendant's product, and therefore the relevant market is not just defendant's particular brand, but is all gasoline being sold in the relevant [Pg 9] geographic area. Defendant contends that there is no dispute that Chevron has only a 12% share of the gasoline market in New Orleans, and that share is insufficient, as a matter of law, to empower Chevron to impose an unreasonable restraint of trade or to possess monopoly power. In support of this position, defendant cites to **[**15]** several cases from other jurisdictions that hold that a single gasoline manufacturer and distributor does not have sufficient market power in the relevant retail gasoline market to obtain a monopoly or restrain trade.
However, the cases cited by defendants are unpersuasive as the holdings in those cases are based on other state statutes which are not applicable in this case. Our review of the record indicates that by prohibiting the plaintiff dealers from purchasing fuel from the jobbers, Chevron is restraining trade. Whether this restraint is unreasonable is a question of fact. Plaintiffs have alleged that they are unable to compete in the relevant market based on Chevron's DTW prices and plaintiffs' inability to purchase fuel at a lower price from the jobbers. These are likewise factual issues which must be reserved for a trial on the merits.

Further, we agree with the trial court that the definition of the relevant market is a triable issue on the question of monopoly power and the reasonableness of restraint. We find that whether the product is "all gas" or "Chevron gas" is a question of fact which **[*791]** remains in dispute. Although plaintiffs admit that they compete with stations **[**16]** selling other brands of gasoline, plaintiffs also allege that they compete in the Chevron gasoline market against jobber-supplied stations and co-ops. Thus, there is a question of fact as to whether the relevant market is wholesale Chevron products or the entire retail gasoline market in the New Orleans area. We conclude therefore that it is premature to draw conclusions as a matter of law at this point in the case, and the trial court correctly denied defendant's motion for summary judgment as to these antitrust issues.
[Pg 10] LOUISIANA PRICE DISCRIMINATION STATUTE

Plaintiffs also assert a claim that defendant's conduct constitutes unfair price discrimination in violation of *LSA-R.S. 51:331*, which provides as follows:

> ***HN9***[] No person, doing business in Louisiana, and engaged in the production, manufacture, or distribution of any commodity in general use, who shall, intentionally, for the purpose of injuring or destroying the business of a competitor in any locality, discriminate between different sections, communities, cities, or localities in the state by selling such commodity at a lower rate in one section, community, city, or locality, than is charged for the commodity by such **[**17]** person in another section,

> community, city, or locality, after making due allowance for the difference if any, in the grade or quality of the commodity and in the actual cost of transportation of the commodity from the point of production, if a raw product, or from the point of manufacture, if a manufactured product. All sales so made shall be prima facie evidence of unfair discrimination.

Defendant first contends that plaintiffs do not have a private right of action under the price discrimination statute. Defendant relies on *LSA-R.S. 51:334*, which provides that the Attorney General examines complaints against corporations and determines whether to institute proceedings against that corporation.

However, ***HN10***[] Louisiana courts have held in tradtional tort cases that private rights of action exist for violation of a statute. *Regional Transit Authority v. Lemoine, 93-1896, 93-1897 (La. App. 4 Cir. 11/16/95), 664 So. 2d 1303, 1309*, writ denied, 96-0412 (La. 3/29/96), *670 So. 2d 1234*. We find that this rule of law is also applicable in the present antitrust suit. Although the penalties applicable to violations of this statute which are contained in *LSA-R.S. 51:332* may not be **[**18]** imposed absent proceedings filed by the Attorney General, the plaintiffs in this case may assert a claim that Chevron violated the price discrimination statute in its attempt to prove that Chevron's contracts are unlawful under Louisiana law. Moreover, ***HN11***[] *LSA-R.S. 51:333* provides that all contracts made in violation of LSA-R.S. [Pg 11] 51:331 are void, and plaintiffs assert a claim for damages based on contracts which they allege are unlawful and void.
In its reasons for judgment, the trial court did not specifically address plaintiffs' claims of violation of the price discrimination statute. Nevertheless, we have reviewed the record before us and have determined that summary judgment as to these claims is not appropriate.
It is undisputed in the present case that Chevron has sold motor fuels to the defendant jobbers at prices below those charged to the plaintiffs under their supply contracts. Those jobbers, in turn, sell fuel to retail stations that compete with plaintiffs, but at much lower prices than those charged to plaintiffs by Chevron. Chevron also sells fuels directly to the public through its company operated stations which also compete with plaintiffs.

Defendant argues that it **[**19]** is not prohibited by this statute from charging wholesalers different prices than retailers. Further, defendant contends that the statute only prohibits discrimination in prices based on geographic locations.

However, the Louisiana statute provides that it shall be unlawful to "discriminate between different sections, communities, cities, or localities in the state by selling such commodity at a lower rate than is charged for the commodity in another section, community, **[*792]** city, or locality. . ." Plaintiffs allege in this case that Chevron has established "price reference areas," and the prices of fuel to the dealers in these areas are different. We find the price discrimination statute to be applicable in this case, and we find that there are disputed issues of fact as to whether defendant has violated this statute to defeat summary judgment.

Further, although Chevron is entitled to charge wholesalers different prices than retailers, there must be a justification for the difference set forth by the supplier. See, *Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*. In the Hasbrouck case, several independent retailers sued [Pg 12] Texaco under the Robinson-Patman **[**20]** Act amendment to the Clayton Act [1] for refusing to sell gasoline to them at the same prices at which it sold to its jobbers. Texaco argued that the price given to its jobbers was a "functional discount." However, the Supreme Court ruled that discounts available to some, but not all persons in a motor fuel distribution chain are discriminatory and illegal. The Court further found that to pass scrutiny under the federal Act, the discount must be related to either the supplier's savings or the wholesaler's costs.

In the present case, defendant contends that the price difference is based on the cost of transportation; however, plaintiffs have alleged that the wholesalers/jobbers could sell the fuel to them at a lower price than Chevron charges, notwithstanding their costs of transportation. Defendant also contends that it has a substantial investment in the leased stations, and therefore the DTW price compensates Chevron **[**21]** for these investments. However, two of the plaintiffs in this case do not occupy a leased station but nevertheless

[1] The Louisiana statute is closely analogous to this federal statute. See, *15 U.S.C. § 13*.

pay Chevron the higher DTW price for its fuel. We find that Chevron failed to offer sufficient evidence to carry its burden on summary judgment that there is some permissible basis for the disparity between the prices Chevron charges to plaintiff and those it charges to the jobbers. Thus, there remain disputed issues of fact as to whether Chevron's price differentials constitute illegal price discrimination under *LSA-R.S. 51:331*. These issues must be resolved following a trial on the merits.
LOUISIANA UNFAIR TRADE PRACTICES ACT

Plaintiffs further contend that defendant's actions are in violation of the Louisiana Unfair Trade Practices Law, *LSA-R.S. 51:1401, et seq.* ("LUTPA").

HN12[] *LSA-R.S. 51:1405(A)* provides in part:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[Pg 13] Further, ***HN13***[] *LSA-R.S. 51:1409* confers a right of private action on "any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal" from unlawful trade practices. **[**22]** This language has been held to confer the private right of action on both consumers and business competitors, such as the plaintiff dealers in this case. *Morris v. Rental Tools, Inc., 435 So. 2d 528, 532 (La. App. 5th Cir. 1983)*.

HN14[] LUTPA provides a cause of action both for trade practices which are "unfair" and those which are "deceptive." An act is not required to be both unfair and deceptive. What constitutes unfair and/or deceptive practices is not specifically defined, but is determined on a case by case basis. Wyatt v. PO2, *Inc., 26,675 (La. App. 2 Cir. 3/1/95), 651 So. 2d 359*, writ denied, 95-0822 (La. 5/5/95), *654 So. 2d 331*.

The statutory definition of an "unfair" practice is broad and subjectively stated and does not specify particular violations. *Jarrell v. Carter, 577 So. 2d 120, 123 (La. App. 1st Cir. 1991)*, writ denied *582 So. 2d 1311 (La. 1991)*. A practice is unfair when it offends established public policy and when the practice is unethical, oppressive, unscrupulous, or substantially injurious. *Jarrell v. Carter, 577 So. 2d at 123*. What constitutes an unfair trade practice is to be determined on a case-by-case basis. Monroe Medical Clinic, **[**23]** *Inc. v. Hospital Corp. of America, 522 So. 2d 1362, 1365 (La. App. 2nd Cir. 1988)*.

[*793] A trade practice is "deceptive" for purposes of LUTPA when it amounts to fraud, deceit or misrepresentation. *United Group of Nat. Paper Distributors, Inc. v. Vinson, 27,739 (La. App. 2 Cir. 1/25/96), 666 So. 2d 1338, 1346*, writ denied, 96-0714 (La. 9/27/96), *679 So. 2d 1358*.
Plaintiffs contend that Chevron's conduct in discriminatorily charging plaintiffs unreasonably high prices for the gasoline sold them pursuant to the supply contracts is unfair and violative of LUTPA because it offends established [Pg 14] public policy, and is unethical, oppressive, unscrupulous, and caused them substantial injury. Plaintiffs further contend that defendant's practices in setting prices and in preventing them from buying fuel at competitive prices from the jobbers is deceptive and done with the intent to drive them out of business. In fact, plaintiffs show that several of the original named plaintiffs in this case have relinquished their stations to Chevron, allegedly due to Chevron's pricing practices.

Chevron claims that its actions are ordinary business activities, permitted by its contracts with plaintiffs, **[**24]** and that these actions are not violative of LUTPA because Chevron conducts its business with the intent of maximizing its profits and has no intent to put plaintiffs, who are selling Chevron gasoline, out of business.
On these allegations, we hold that plaintiffs are entitled to a trial to determine whether defendant's actions are unfair or deceptive in violation of LUTPA, or whether said actions are simply an exercise of justified business activities. Based on the record before us, we cannot say as a matter of law that Chevron's actions do not constitute unfair trade practices.
OTHER STATE LAW CLAIMS
These claims come before this Court on application of supervisory writ from the trial court's denial of defendant's summary judgment. The trial court stated in its reasons for judgment:

> The Court would be inclined to grant defendant's Motion for Summary Judgment, as it relates to the breach of contract and abuse of rights claims. However, summary judgment may not be used merely to decide an issue. A summary judgment may be partial, but it must grant at least some of the relief prayed for. Partial summary judgments which attack theories of recovery without dismissing a party or **[**25]** granting all or part of the relief sought are improperly granted. *Williams v. Trapolin Law Firm, 641 So. 2d 673 at 676 (La. App. 4th Cir. 1994)*.

[Pg 15] As previously stated herein, the summary judgment law has been recently amended and now provides for the granting of a partial summary judgment. As stated by the trial court, this Court has previously held that a partial summary judgment may not be utilized to dispose of theories of recovery. *Williams v. Trapolin Law Firm, 93-0877 (La. App. 4 Cir. 7/27/94), 641 So. 2d 673, 676*. However, the Williams case was decided prior to the 1997 amendments to *La. C.C.P. art. 966(E)*, and partial summary judgments are now permissible to dispose of a theory of recovery. Thus, the trial court erred in relying on this Court's decision in Williams in light of the recent amendments to the summary judgment article.

Plaintiffs' non-antitrust claims against defendant include breach of contract, abuse of rights, intentional interference with a business relationship, unjust enrichment and misrepresentation. In its reasons for judgment, although the trial court denied the summary judgment, the court addressed the merits of plaintiffs' claims for **[**26]** breach of contract and abuse of rights, but did not address plaintiffs' other state law claims. Plaintiffs answered defendant's appeal based on the statements made in the trial court's reasons for judgment which are in error.

We recognize that reasons for judgment set forth the basis for the court's holding and are not binding. *Melton v. General Electric Co., 625 So. 2d 265, 268 (La. App. 4th Cir. 1993)*. In this case, the trial court found defendant's argument to have merit, but declined to dismiss plaintiffs' claims on the motion for summary judgment based on an erroneous statement of the law. Plaintiffs are correct in their answer to this appeal that the reasons for judgment are not controlling. **[*794]** We find that the trial court's judgment is erroneous, and we are not bound by the trial court's statements in its reasons for judgment regarding the merits of plaintiffs' claims.

[Pg 16] As we have concluded that the trial court erred in failing to apply the new summary judgment law to the facts of the present case, we grant defendant's application for supervisory writs and vacate the ruling of the trial court denying defendant's motion for summary judgment on plaintiffs' non-antitrust claims. **[**27]** Although this Court may conduct its own de novo review of defendant's motion, we find it more appropriate to remand the case for reconsideration under the new law. On remand, the trial court will have an opportunity to consider defendant's motion in light of the amended article. See, *Kaufmann v. Fleet Tire Service of Louisiana, 97-1428, 699 So. 2d 75* (La. 9/5/97); *Young v. Dupre Transport Co., 97-0591 (La. App. 4 Cir. 10/1/97), 700 So. 2d 1156*.

CONCLUSION

Accordingly, for the reasons assigned herein, the judgment of the trial court denying defendant's motion for summary judgment as to plaintiffs' antitrust claims is affirmed. We grant defendant's application for supervisory writs, and vacate the ruling of the trial court denying defendant's motion for summary judgment as to plaintiffs' non-antitrust claims. This case is remanded to the trial court for reconsideration in light of Act 483 of 1997. Each party is to bear its own costs of this appeal.

AFFIRMED IN PART; WRIT GRANTED

IN PART;

JUDGMENT VACATED IN PART;

CASE REMANDED

Giampolo v. Somerset Hosp. Ctr. for Health

United States District Court for the Western District of Pennsylvania

May 29, 1998, Decided

Civil Action No. 95-133J

Reporter

1998 U.S. Dist. LEXIS 14388 *; 1998 WL 608243

ANTHONY M. GIAMPOLO, M.D., Plaintiff, v. SOMERSET HOSPITAL CENTER FOR HEALTH, INC. et al., Defendants.

Disposition: [*1] Defendants' motions for summary judgment granted in their entirety, Giampolo's complaint dismissed with prejudice, and defendants' motions for sanctions denied.

Core Terms

patients, referral, neurological, summary judgment, defendants', conspiracy, neurologist, antitrust, contractual relationship, interpretations, indigent, defamed, deVries, parties, motive, impressions, interfered, physical therapist, consultation, discovery, alleges, genuine, reasons, argues, intentional interference, conditional privilege, tortious interference, exclusive right, nonmoving party, material fact

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Evidence > Burdens of Proof > Allocation

HN1[] **Summary Judgment, Evidentiary Considerations**

Summary judgment is appropriate where admissible evidence fails to demonstrate a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. If the nonmoving party bears the burden of persuasion at trial, the moving party must show that the nonmoving party's evidence is insufficient to carry that burden. The nonmoving party can create a genuine issue of material fact by pointing to evidence in the record sufficient to support a jury verdict in its favor at trial. Alternatively, the burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party's case. Since a complete failure of proof concerning an essential element, on which a party bears the burden of proof at trial establishes that the moving party is entitled to a judgment as a matter of law, the nonmoving party must establish the existence of every element essential to its case. Such evidence must be significantly probative and more than merely colorable.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Summary Judgment, Entitlement as Matter of Law**

The party opposing a motion for summary judgment is afforded the benefit of all reasonable inferences drawn from the record.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3[] **Summary Judgment, Opposing Materials**

On a motion for summary judgment, once the moving party has satisfied its burden, the nonmoving party is required by *Fed. R. Civ. P. 56(e)* to establish that there remains a genuine issue of material fact. The nonmovant may not rest upon mere allegation or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. A fact is material if it might affect the outcome of the suit under the governing law and is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In determining whether a nonmovant has established the existence of a genuine issue of material fact requiring a jury trial, the evidence of the nonmovant must be believed and all justifiable inferences are to be drawn in its favor. An inference based upon conjecture does not create a material factual dispute sufficient to defeat summary judgment. Likewise, simply showing that there is some metaphysical doubt as to the material facts does not establish a genuine issue for trial.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4[] **Private Actions, Standing**

The analysis of whether a party has standing to bring an antitrust action is broken down into two parts: first, whether the plaintiff has suffered an antitrust injury; and second, whether he is the most effective party or efficient enforcer of the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN5[] **Private Actions, Remedies**

Antitrust injury is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Because ***antitrust law*** aims to protect competition, not competitors, a court must analyze the antitrust injury question from the viewpoint of the consumer. An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services, not just his own welfare.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Sherman Act, Claims**

To make out a violation of § 1 of the Sherman Act, the plaintiff must establish: (1) a contract, combination or conspiracy; (2) a restraint of trade; and (3) an effect on interstate commerce.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Sherman Act, Claims**

To prevail on a claim alleging a violation of § of the Sherman Act, the plaintiff must prove concerted action--an agreement--on the part of the defendants. Unilateral action, no matter what its motivation, cannot violate § 1. Moreover, evidence of conduct which is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy, and there must be evidence that tends to exclude the possibility of independent action. Finally, the plaintiff must show that the motive for the alleged conspiracy is a reasonable one that would inure to the defendants' economic benefit. It is not necessary, however, that all of the co-conspirators share the same motive.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Regulated Practices, Market Definition**

To sustain a claim under § 1 of the Sherman Act, the plaintiff is required to prove what market he contends was restrained and that the defendants played enough of a significant role in the relevant market to impair competition generally. The relevant market is further broken down into product and geographic components.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Medical antitrust claims are generally reviewed under a rule of reason analysis. Under this mode of analysis, the plaintiff bears the burden of proving that any concerted action taking place caused an anti-trust injury by imposing an unreasonable restraint on trade; the defendants are not required to prove that the practices are reasonable.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Monopolies & Monopolization, Attempts to Monopolize**

Section 2 of the Sherman Act proscribes monopolization of a market.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Contract Interpretation > Intent

HN11[] **Defenses, Ambiguities & Mistakes**

The interpretation of a contract presents a legal issue to be resolved by the court. The court's task is to give effect to the intentions of the contracting parties, as those intentions are manifested reasonably in the text of the writing. When the words of that writing are unambiguous, the interpretation of the contract must proceed solely from the writing's text. Of course, the mere fact that the parties dispute how their contract should be interpreted does not make the writing ambiguous.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Output & Requirements Contracts

HN12[] **Sales of Goods, Output, Exclusive & Requirements Agreements**

A requirements contract does not impose upon a buyer the necessity to order that any work be done. The buyer has no duty to have a requirement. The seller assumes the risk of all variations in the buyer's requirements, even if the buyer decides to discontinue the business.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN13[] **Contract Interpretation, Parol Evidence**

Course of performance is always relevant in interpreting a writing, even an unambiguous one. The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. Although course of performance is to be given great weight in the interpretation of the agreement, it is merely a guide in the process of interpretation and is used in determining what meanings are reasonably possible as well as in choosing among possible meanings. Conduct, however, must still be weighed in the light of the terms of the agreement itself.

Torts > ... > Commercial Interference > Contracts > General Overview

HN14[] Commercial Interference, Contracts

One who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

HN15[] Intentional Interference, Defenses

To prevail on a claim of intentional interference with existing contractual relations, a plaintiff must prove: (1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's conduct.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN16[] Intentional Interference, Defenses

The four elements of the tort of intentional interference with prospective contractual relations are: (1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN17[] Intentional Interference, Elements

The element of intent for the tort of intentional interference with contractual relations is closely related to the element of privilege or justification and the propriety of the defendant's actions. The propriety of the defendant's actions may be determined by focusing upon the following factors: (a) The nature of the actor's conduct, (b) The actor's motive, (c) The interests of the other with which the actor's conduct interferes, (d) The interests sought to be advanced by the actor, (e) The proximity or remoteness of the actor's conduct to the interference and (f) The relations between the parties.

Torts > ... > Commercial Interference > Contracts > General Overview

HN18[] **Commercial Interference, Contracts**

By definition, there must be at least three parties for a claim of tortious interference with an existing contract to lie.

Torts > Intentional Torts > Defamation > General Overview

HN19[] **Intentional Torts, Defamation**

To sustain a cause of action for defamation, plaintiff must prove: (1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; and (7) abuse of a conditionally privileged occasion.

Torts > ... > Defenses > Privileges > Qualified Privileges

Torts > ... > Defenses > Privileges > General Overview

HN20[] **Privileges, Qualified Privileges**

The conditionally privileged nature of a statement may be lost if the plaintiff proves that it has been abused. Whether or not the privilege has been abused is an issue of fact. Abuse occurs when the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or includes defamatory matter not reasonably believed to be necessary for the accomplishment of the privilege.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN21[] **Civil Procedure, Discovery & Disclosure**

Fed. R. Civ. P. 11(b) provides, in pertinent part: By presenting to the court (whether by signing, filing, submitting or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Torts > ... > Contracts > Intentional Interference > Elements

Civil Procedure > Sanctions > Baseless Filings > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN22[] Summary Judgment, Opposing Materials

Under *Fed. R. Civ. P. 11*, the court determines the reasonableness of an inquiry by applying an objective standard. The court, however, must avoid drawing on the wisdom of hindsight by finding a claim frivolous merely because the plaintiff ultimately did not prevail.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN23[] Pleadings, Amendment of Pleadings

Under *Fed. R. Civ. P. 11*, a litigant's obligations are not measured solely as of the time they are filed or submitted to the court, but include reaffirming to the court and advocating positions contained in the pleadings and motions after learning that they cease to have any merit. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. The does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

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For SOMERSET HOSPITAL CENTER FOR HEALTH, INC., MICHAEL J. FARRELL, V. KRISHNAN NAIR, M.D., WALTER DAVID TRENTON, M.D., JAN R.J. DEVRIES, M.D., defendants: David R. Johnson, G. Jay Habas, Thomson, Rhodes & Cowie, Pittsburgh, PA.

For MARTIN, MCGOUGH & EDDY, INC., JOHN G. EDDY, defendants: William K. Herrington, Marshall, Dennehey, Warner, Coleman & Goggin, Pittsburgh, PA.

For LOUIS CATALANO, M.D., defendant: Edward A. Yurcon, John F. Deasy, Anstandig, McDyer, Burdette & Yurcon, Pittsburgh, PA.

Judges: D. Brooks Smith, United States District Judge.

Opinion by: D. Brooks Smith

Opinion

MEMORANDUM OPINION AND ORDER

D. BROOKS SMITH, District Judge.

This is a suit brought by a neurologist against a hospital at which he holds staff privileges, several doctors affiliated with that hospital, and a group of physical **[*2]** therapists. It centers around a 1992 contract in which plaintiff was granted exclusive rights to interpret certain electrodiagnostic tests performed at the hospital. Plaintiff has alleged that the defendants have restrained trade and attempted to create a monopoly in violation of the Sherman Act, breached his contract, tortiously interfered with his contractual relations and defamed him. Before the court are the motions of all defendants for summary judgment. For the reasons that follow, I will grant summary judgment in favor of all defendants.

I. FACTS and PROCEDURE

Defendant Somerset Hospital is a community hospital located in Somerset, Pennsylvania, a small community in Southwestern Pennsylvania. There are no other hospitals in Somerset or the county within which it is located, and the nearest such facilities are located in Johnstown and Greensburg, Pennsylvania. Between 1977 and 1992, the hospital did not have a neurologist on staff who resided in Somerset. As a result, certain electrodiagnostic tests, most notably electromyograms ("EMGs"), were performed by Martin, McGough & Eddy, Inc. ("MM&E"), a group of physical therapists under contract to the hospital. Eddy dep. **[*3]** 13-15. The therapists' written "impressions" of these diagnostic procedures were furnished to patients' attending physicians without the opinion or interpretation of a medically trained neurologist. If the physician desired such an interpretation, he or she would have to arrange a consultation with a neurologist outside the Somerset area. Under state law, it is unlawful for a physical therapist to render a medical diagnosis. Eddy dep. 42-45; *see* 63 Pa. C.S.A. § 1309 (physical therapist "shall not treat human ailments. . . or practice any branch of the healing arts" except by referral of a licensed physician).

To rectify this situation and improve the level of patient care, the hospital decided to recruit a neurologist to live and practice in Somerset. It ultimately attracted plaintiff Anthony J. Giampolo, M.D., a newly minted neurologist just completing his residency at the University of Pittsburgh Medical Center. The parties entered into a contract on May 27, 1992, two principal provisions of which are significant to this case. *See* dkt. no. 30, exh. A.

First, as a means of facilitating Giampolo's transition into solo private practice, he was provided with a one-year income **[*4]** guarantee of $ 240,000. *Id.* § 2.02. If his practice earned less than this amount, the hospital would make up the difference, but if he made more than $ 240,000, Giampolo was required to turn the excess over to the hospital. This income guarantee provision was automatically renewable in one-year terms, unless notice of termination was given at least ninety days before its scheduled expiration. *Id.* § 4.02. Ultimately, of course, it would be reasonable to conclude that, like any specialist, Giampolo would eventually develop a lucrative practice of treating patients referred by other doctors and would no longer need a subsidy.

Second, Giampolo was granted the exclusive right to interpret electroencephalography ("EEG"), EMG and "Evoked Potential" procedures for a period of five years after the termination of the income guarantee provision. *Id.* § 2.01. The hospital accordingly ceased using the services of MM&E and told its principal, John G. Eddy, that he would have to negotiate with Giampolo if he wished to continue performing the physical procedures themselves (as distinguished from their interpretation) at Somerset Hospital. Although Giampolo initially declined to use **[*5]** Eddy's services, the two eventually struck a bargain and Eddy began performing EMGs on Giampolo's premises and billing him for the service. Eddy dep. 20-22.

Giampolo had some difficulty making the transition to a profitable private practice. Nine months into his tenure at the hospital, his practice was operating at a deficit, requiring a large subsidy from the hospital to meet his income guarantee. There were also indications that other physicians on the staff, although they believed Giampolo to be an excellent neurologist and clinician, had problems with his overall attitude and other non-medical facets of his services. Michael Farrell, the CEO of Somerset Hospital, met with Park, the hospital's chief financial officer, to determine what was to be done, as Giampolo's income guarantee was up for renewal. Park developed four options: (1) terminate the contract and provide no neurology services; (2) terminate the contract and pursue other options for the provision of neurology services; (3) renew the contract with new terms and conditions; and (4) renew the contract under its current terms. Dkt. no. 142, exh. 9. Park preferred option two, and considered option four to be out of the **[*6]** question. *Id.* The hospital ultimately declined to review the income guarantee contract for a second year.

In addition, at some point in his first year of practice, Giampolo began to notice that he was treating a fairly high percentage of indigent patients in his office. Giampolo dep. 29. Apparently, other physicians were referring these, as well as paying, patients to him to have EMGs performed and interpreted. [1] Giampolo approached the hospital and proposed that he be given a stipend to subsidize these patients. He was advised by Farrell that he could limit the number of indigents he treated to a specified percentage of patient base. Giampolo aff. P 7. Under this plan, Giampolo would still see all referral patients but would not treat "self-referred" patients without first receiving payment. *See* Farrell dep. 29, 75; Giampolo dep. 789-92. Giampolo, however, instituted a policy whereby he demanded payment of his customary fee in advance and refused to examine any patient who did not pay. *See* Giampolo dep. 59-64, 69-70, 92-94. [2] Farrell believed this policy hurt Giampolo's referral practice, in that other physicians were not likely to be eager to refer only their paying **[*7]** patients to him while they sent their other patients elsewhere. Farrell dep. 289-90.

Giampolo's decision placed the hospital in a difficult bind. It could either refer the EMGs of only paying patients to Giampolo for interpretation, thus offering two standards of care which varied with ability to pay, or it could cease offering EMG interpretations as a hospital service altogether, leaving the question of whether to obtain **[*8]** an interpretation in the hands of each attending physician. The hospital chose the latter course, essentially reverting to its practice before Giampolo was recruited. By 1995, the hospital was providing EMG services solely through MM&E, which provided its impressions directly to the attending physician with no interpretation by Giampolo. *See* Farrell dep. 160-62.

As a result, even though Giampolo retained the exclusive right to interpret the EMG and other procedures, he soon found that his referral business for such services was drying up. Giampolo dep. at 123-28. Most doctors were not ordering interpretations, even for their paying patients, and Dr. Catalano, a neurologist from Greensburg, was being given referrals for other matters, as well as the occasional interpretation when Giampolo was not available. Eventually Catalano, who had begun practicing in Somerset back in 1990, opened a satellite office there, staffed primarily by his associate, Dr. Felix Brizuela. Giampolo continues, however, to practice neurology in Somerset, sees a few patients at the hospital, Giampolo dep. 7-12, and still receives some referrals from local physicians. *Id.* at 17.

In May 1995, Giampolo **[*9]** filed the instant suit against the hospital and its medical officers, the MM&E group and Dr. Catalano, alleging violations of the state and federal antitrust laws, breach of contract, and tortious interference with contractual relations. Dkt. no. 1. Plaintiff at that time was represented by Attorneys Irving Portnoy and Stan Twardy. The defendants filed motions to dismiss, in response to which plaintiff amended his complaint in October 1995. Dkt. no. 30. This new complaint added claims for defamation and "False Presences" [sic]. In April 1996, after a renewed round of motions to dismiss, I dismissed Giampolo's breach of contract claims against MM&E and Catalano, as well as his claim for false pretenses, but denied the motions as to all other counts and defendants. Dkt. no. 60, at 18-19.

In October 1996, I held a case management conference, dkt. no. 70, and issued an order closing discovery on April 21, 1997, dkt. no. 71. On April 16, Attorneys Portnoy and Twardy filed a motion to withdraw as counsel, dkt. no. 73, which I granted, dkt. no. 75. On May 30, Attorneys David Hughes Harris and Michael J. Beautyman entered an appearance on Giampolo's behalf, dkt. no. 83, and I extended the **[*10]** time for discovery by six months. Dkt. no. 82. At a September 9 hearing on a discovery dispute, dkt. no. 103, it surfaced that Giampolo had allegedly made tapes of his various telephone conversations with other physicians, without their knowledge or consent. Dkt. no 139, at 80. The allegedly surreptitious nature of these recordings apparently caught plaintiff's counsel by surprise, resulting in an off-the-record discussion and a promise to locate and review the tapes, which I ordered

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[1] Although Giampolo believes that he was receiving a disproportionately high percentage of indigent patients because his medical colleagues were referring those with insurance to another facility, he has adduced no evidence to support his subjective impression, except for a letter he himself wrote to the hospital's Board of Directors. *See* dkt. no. 143, exh. 7 to exh. C. That letter cites nothing in support of its assertion.

[2] Giampolo brought his attorney to an October 1993 meeting of the Medical Executive Committee to explain his position, *id.* at 115-16, 119-20, 541-44, 738-39.

accomplished within thirty days. *Id.* at 80-84. Two weeks later, Giampolo's second counsel moved to withdraw, citing undisclosable "professional considerations [under] RPC 1.16 captioned 'Mandatory Withdrawal' . . . ." Dkt. no. 104, at 1-2. I granted that motion. Dkt. no. 106. To date, the tapes still have not been provided.

Plaintiff is now represented by his third set of counsel, Attorneys Jeffrey S. Jacobovitz and Robert S. Canterman. Before me now are the motions of all defendants for summary judgment, dkt. nos. 115, 126, 135, and for sanctions under *Fed. R. Civ. P. 11*, dkt. nos. 113, 124, 137. Also pending are the hospital defendants' motion for sanctions arising from plaintiff's failure to **[*11]** produce the tapes, dkt. no 131, [3] plaintiff's motion to strike supplemental exhibit, dkt. no. 157, and plaintiff's motion to supplement the record, dkt. no. 159.

II. SUMMARY JUDGMENT STANDARD

HN1[] Summary judgment is appropriate where admissible evidence fails to demonstrate a genuine **[*12]** issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. If the nonmoving party bears the burden of persuasion at trial, the moving party must show that the nonmoving party's evidence is insufficient to carry that burden. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The nonmoving party can create a genuine issue of material fact by pointing to evidence in the record sufficient to support a jury verdict in its favor at trial. *Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 330 (3d Cir. 1995)*. Alternatively, "the burden on the moving party may be discharged by showing . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)* (internal quotation marks omitted). "Since a complete failure of proof concerning an essential element," *id. at 323-24*, on which a party bears the burden of proof at trial establishes that the moving party is "entitled to a judgment as a matter of law," the nonmoving party must establish the existence of every element essential to its **[*13]** case. *Id.* Such evidence must be significantly probative and more than "merely colorable." *Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)*. ***HN2***[] The nonmoving party is afforded the benefit of all reasonable inferences drawn from the record. *Id.*

HN3[] Once the moving party has satisfied its burden, the nonmoving party is required by *Fed. R. Civ. P. 56(e)* to establish that there remains a genuine issue of material fact. *Clark v. Clabaugh, 20 F.3d 1290, 1294 (3d Cir. 1994)*. The nonmovant "may not rest upon mere allegation or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. A fact is material if it "might affect the outcome of the suit under the governing law. . ." *id. at 248*, and is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id. at 248, 257*.

In determining whether a nonmovant has established the existence of a genuine issue of material fact requiring a jury trial, the evidence of the nonmovant must "be believed and all justifiable inferences **[*14]** are to be drawn in [its] favor." *Id. at 255*. Whether an inference is justifiable, however, depends on the evidence adduced. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 595-96, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. An inference based upon speculation or conjecture does not create a material factual dispute sufficient to defeat summary judgment. *Robertson v. Allied Signal, Inc., 914 F.2d 360, 382 n.12 (3d Cir. 1990)*. Likewise, "simply showing that there is some metaphysical doubt as to the material facts" does not establish a genuine issue for trial. *Matsushita, 475 U.S. at 586*.

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[3] I will deny the motion for discovery sanctions as moot. Defendants have sought only two forms of relief, both in the form of proposed jury instructions: (1) that making surreptitious tape recordings is a felony under the Pennsylvania Wiretapping and Electronic Surveillance Control Act, *18 Pa. C.S.A. § 5701 et seq.*; and (2) that the trier of fact may infer that, had those recordings been produced, they would have been unfavorable to plaintiff. Dkt. no. 131, at 5-6. While it is inexcusable that Giampolo has failed to obey this court's order and produce either the tapes or a satisfactory explanation of what happened to them, my dismissal of this case on motions for summary judgment makes defendant's proposed relief moot.

III. ANTITRUST CLAIMS

A. STANDING

As a threshold matter, I must determine whether Giampolo has standing to bring his antitrust claims. *Baglio v. Baska, 940 F. Supp. 819, 828 (W.D. Pa. 1996)* (citing *Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983))*. ***HN4***[] This analysis is broken down into two parts: first, whether the plaintiff has suffered an antitrust injury; and second, whether he is the most effective party or efficient enforcer of the antitrust laws. *See Alberta* **[*15]** *Gas Chemicals Ltd. v. E.I. duPont de Nemours & Co., 826 F.2d 1235, 1240 (3d Cir. 1987)*; *Baglio, 940 F. Supp. at 828*.

HN5[] Antitrust injury is "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Mathews v. Lancaster General Hosp., 87 F.3d 624, 641 (3d Cir. 1996)* (citations omitted). As the Third Circuit has said,

> because ***antitrust law*** aims to protect competition, not competitors, a court must analyze the antitrust injury question from the viewpoint of the consumer. An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services, not just his own welfare.

Id. (citations and internal quotation marks omitted). Here, plaintiff alleges that he was damaged when defendants conspired to curtail the referrals he received. Dkt. no. 30 PP 16-44. He alleges the following as his theory of competitive harm:

> Defendant Hospital[,] acting through its administrator, Michael J. Farrell, and with the connivance and in concert with Defendant Louis Catalano[, M.D.] and the individual defendants, embarked on a campaign to *control, monopolize* **[*16]** *and illicitly exploit the practice of neurology* in Somerset County and the adjoining areas.

Dkt. no *30 P 16* (emphasis added); *accord id. PP 17, 24, 28, 30, 33*(c), 34(f), 38, 42, 46(f).

It is important to recognize that this is not the typical "staff privileges" case in which a physician unsuccessfully seeks to "break into" or is driven out of a local market for a particular specialty. *See, e.g., Mathews, 87 F.3d at 628-31*; *Fuentes v. South Hills Cardiology, 946 F.2d 196, 197-98 (3d Cir. 1991)*; *Weiss v. York Hosp., 745 F.2d 786, 791 (3d Cir. 1984)*; *Huhta v. Children's Hosp., 1994 U.S. Dist. LEXIS 7327*, *No. 93-2765, 1994-1 Trade Cas. (CCH) P70,619, 1994 WL 245454* (E.D. Pa. May 31, 1994), *aff'd mem.*, *52 F.3d 315 (3d Cir. 1995)*. In cases of that type, the denial of privileges or a conspiracy not to refer patients to the new doctor could readily have a significant anticompetitive purpose and effect. Here, in contrast, Giampolo was recruited and given a limited monopoly within the hospital specifically because there were no neurologists with office practices in Somerset. Thus, the staff privileges cases have only limited application here.

Giampolo contends that, after the hospital **[*17]** recruited him, it and the other defendants deliberately injured him in his practice by relying on MM&E's "impressions" instead of his EMG interpretations (thus eviscerating the pecuniary value of his monopoly over those interpretations) and by seeing to it that referrals were funneled to other neurologists, namely Drs. Catalano and Brizuela. *See* dkt. no. 30 PP 19, 22-24; Giampolo dep. 250-53. This theory is flawed, for several reasons.

First, it must be noted that the hospital changed its policy regarding interpretations only after Giampolo refused to treat indigent patients in his office practice and placed the hospital in a moral (if not legal) dilemma. Thus, the record suggests that Giampolo's plight arose as an adverse consequence of his own business decision, and not because of any anticompetitive motive of the defendants.

More fundamentally, however, Giampolo ignores the fact that, as a result of the events of which he complains, the availability of neurological services has increased, not lessened. Drs. Catalano and Brizuela have made additional inroads into the practice of neurology in Somerset since Giampolo's fateful decision, while Giampolo continues to practice neurology **[*18]** there. Whatever the defendants may have done--and however negatively it may have affected Giampolo's income--the fact remains that competition in the neurology profession has intensified, and consumers now have more choices than they had previously. This is not the type of harm the antitrust laws were designed to prevent. *See* *Mathews, 87 F.3d at 641* (where denial of surgical staff privileges at one of several hospitals had no material impact on the "large and ever-increasing number of providers[,]" injury was personal to physician and not to competition generally); *Baglio, 940 F. Supp. at 829* (where harm accrued only to individual physician without decrease in available services, there was no antitrust injury); *Huhta*, 1994 WL 245454 (similar, lost referral income from denial of privileges states personal, not antitrust, injury).

Giampolo seeks to escape this conclusion by arguing that the defendants' actions reduced the *quality*, rather than the availability or price, of care at Somerset Hospital. His contention is that when the hospital stopped ordering his medical interpretation of each EMG and began relying only on MM&E's impressions, there occurred "a qualitative **[*19]** decrease in the level of services provided by Somerset Hospital in the relevant market area." Dkt. no. 142, at 39-40. In addition to being totally at variance with the theory advanced in Giampolo's complaint--that defendants monopolized the practice of neurology--Giampolo's theory improperly conflates supply with demand.

It is questionable, as an initial matter, whether the hospital's decision reduced the quality of available care at all. Indigent patients, at least after Giampolo's policy was implemented, stood little opportunity of seeing a neurologist whether or not the hospital made routine referrals to Giampolo. For a paying or insured patient, Giampolo was ready and willing to consult, if his or her attending physician thought it medically indicated.

Yet, even if the hospital's decision did reduce the overall level of care, it did so in a way that did not implicate antitrust concerns. When the hospital recruited Giampolo, granted him exclusive interpretation rights and referred every EMG study to him for interpretation, it simultaneously increased the supply of neurological services and created a larger demand for EMG interpretations. The hospital's subsequent policy change **[*20]** only reduced the *demand* for neurology services in Somerset, in that the interpretation was no longer being bundled in with the EMG procedure itself. Untying the provision of the interpretation and leaving the issue of whether to obtain one to the discretion of each attending physician had no effect on the supply of those services, however, as stated *supra*, and certainly did not reduce the professional competence of either Giampolo or his two competitors. By Giampolo's reasoning, a health insurer could injure competition simply by declining, for reasons of cost control, to reimburse for any given medical procedure. Simply put, a reduction in supply which diminishes competition implicates antitrust policy; a reduction in demand which puts downward pressure on physicians' incomes does not. Thus, Giampolo has not suffered an antitrust injury and hence lacks standing. [4]

[*21] B. SECTION 1 OF THE SHERMAN ACT

Even if Giampolo had antitrust standing, I would still be constrained to hold that he has not demonstrated a violation of § 1 of the Sherman Act. ***HN6***[] To make out a violation of that section, he must establish: (1) a contract, combination or conspiracy; (2) a restraint of trade; and (3) an effect on interstate commerce. *Nanavati v. Burdette Tomlin Mem. Hosp., 857 F.2d 96, 117 (3d Cir. 1988)*. Because interstate commerce is not contested, I will analyze the first two elements *seriatim*.

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[4] I therefore need not decide whether plaintiff is the most "efficient enforcer" of the antitrust laws, which deals with the situation in which "[a] party may have suffered antitrust injury yet not be considered a proper plaintiff for other reasons." *Alberta Gas*, 826 F.2d at 1240. In the cases cited by defendants, efficient enforcer status was denied because other parties, such as health insurers, were better positioned to assert that costs had increased and caused them damage, even though the physician-plaintiff also suffered loss. *See* *Baglio, 940 F. Supp. at 830* (citing *Huhta*, 1994 WL 245454 at *2; *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1455 (11th Cir.1991)*. Here, defendants' policy of no longer referring all EMGs to Giampolo for an interpretation, if anything, reduced costs to patients and the payor community. Because these groups would have no incentive to file an antitrust suit, it appears that plaintiff would be the most efficient enforcer of the antitrust laws. The fact that only Giampolo suffered a pecuniary injury, however, further underscores the conclusion that that injury was to him alone, and not to competition.

1. CONTRACT, COMBINATION OR CONSPIRACY

HN7[] To prevail in a § 1 case, the plaintiff must prove concerted action--an agreement--on the part of the defendants. *Mathews, 87 F.3d at 639*. "Unilateral action, no matter what its motivation, cannot violate section 1." *Id.* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 110 (3d Cir. 1980))*. Moreover, "evidence of conduct[] which is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy[,]" *id.* (quoting *Matsushita, 475 U.S. at 597 n.21*), and "there must be evidence that tends to exclude the possibility **[*22]** of independent action." *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984))*. Finally, plaintiff must show that the motive for the alleged conspiracy is a reasonable "one that would inure to the defendants' economic benefit." *Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 819 (11th Cir. 1990)* (citing *Matsushita, 475 U.S. at 596-97*); *Kerth v. Hamot Health Found., 989 F. Supp. 691, 698 (W.D. Pa. 1997)*. It is not necessary, however, that all of the co-conspirators share the same motive. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1243 (3d Cir. 1993)*.

Instantly, there is no evidence that any of the defendants conspired to drive Giampolo out of his neurology practice or curtail his referrals. Indeed, Giampolo's "proof" is pure post hoc reasoning: he claims that he lost referrals because of a conspiracy and then attempts to use the loss of referrals to prove the existence of that conspiracy, i.e., he lost referral patients so there must have been a conspiracy against him. *See* Giampolo dep. 250-53.

To the contrary, the undisputed evidence indicates that Farrell, the hospital's **[*23]** CEO, had no control over the referral patterns of physicians and did not discuss neurology referrals with any physician or other member of the hospital staff. Farrell dep at 263, 265. Further, each physician defendant testified that he was not involved in any discussions to boycott or get rid of Giampolo. Nair. dep. 11; Trenton dep. 40; deVries dep. 70. There is thus no evidence that tends to exclude the possibility of independent action. [5]

[*24] In an attempt to dispute this, Giampolo cites to a statement made by Farrell to Giampolo's then-attorney after the October 1993 meeting of the Medical Executive Committee to the effect that he had won the battle but lost the war, and that no physician at that meeting would ever refer patients to him again. Farrell dep. 86-87, 289-90. That statement, however, proves nothing; read in context, Farrell merely stated that Giampolo had taken a course that would, for wholly lawful reasons, hurt his practice:

> I said that you have won the battle and lost the war, that you have been successful in alienating everyone [sic] of the private practicing physicians that sat on the medical executive committee, all of which are key referral

[5] Giampolo cites to Eddy's testimony, in which he states that he heard that there was some kind of boycott going on against Giampolo:

> Q. Did you have a conversation with [Giampolo's secretary] where you indicated that Dr. Giampolo was being boycotted?
>
> A. Yes.
>
> Q. Could you tell us about that discussion?
>
> A. Again, it goes back to the information I had given you before about in conversations with other physicians, them relaying to me some of their concerns about him and his practice, and the discussion with [Giampolo's secretary] specifically had to do with the fact that her numbers were starting to drop off.
>
> Q. Did you use the term boycott?
>
> A. I can't tell you if I used that word or not. All I know is that the physicians were sending neurological patients outside of this area.

Eddy dep. 109-10. Eddy does not attribute these statements to any of the defendants under which they could be admitted as the admission of a party opponent under *Fed R. Evid. 801(d)(2)(A)*, or as the statement of a coconspirator of a party during the course and in furtherance of the conspiracy under *Fed. R. Evid. 801(d)(2)(E)*. Accordingly, the statements are hearsay not within any exception, and are hence inadmissible evidence. *Kerth, 989 F. Supp. at 704* (citing *Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 282 (3d Cir. 1988))*.

> sources to Dr. Giampolo. You have told those gentlemen that Dr. Giampolo will not accept low-pay and no-pay patients in his office. Those physicians which are all key referral sources look for consultations and referral sources that accept all patients. It makes no sense for them to refer paying patients to one consulting physician and nonpaying patients to another consulting physician. So I think personally you have alienated every physician on that committee.

[*25] Farrell dep. 289-90. Nothing in this testimony is probative of any present or prospective combination or conspiracy to boycott or otherwise injure Giampolo. [6]

Moreover, none of the physician defendants, with the exception of Dr. Catalano, are neurologists. Thus, they do not compete with Giampolo for business. The hospital, likewise, has no incentive to harm Giampolo's practice, because it cannot bill the patient or insurer for the costs of the interpretation that Giampolo would have provided. *See* Park aff.; Farrell dep. 224-25, 233; *Betkerur v. Aultman* ***[*26]*** *Hosp. Ass'n, 78 F.3d 1079, 1090 (6th Cir. 1996)* (decision of physicians to refer patients to plaintiff's competitor not an actionable boycott where, *inter alia*, those physicians "stood to gain nothing financially by driving [plaintiff] out of her practice[]"); *see generally Matsushita, 475 U.S. at 587, 593* (summary judgment granted where economic factors gave defendant no motive to engage in antitrust conspiracy and made plaintiff's claim implausible); *Kerth, 989 F. Supp. at 700* (under *Matsushita*, where conspiracy theory is economically implausible, plaintiff must adduce "sufficient evidence that reasonably supports the inference that a defendant acted contrary to rational economic self interest" (discussing *Petruzzi's IGA, 998 F.2d at 1232*)).

Defendant MM&E performs the "technical" component of the EMG test, but the evidence is undisputed that Giampolo himself used these physical therapists before the hospital changed its policy and the hospital continued to use them after the change. Because MM&E would have the same business under either alternative, it too would seem to have little incentive to undermine Giampolo in Somerset. In any event, MM&E, as a group **[*27]** of physical therapists, is barred by law from offering medical diagnoses in competition with Giampolo. Eddy dep. 42-45; *see* 63 Pa. C.S.A. § 1309.

As for Dr. Catalano, against whom Giampolo has dropped his antitrust claim in any event, he cannot conspire with himself. Thus, the lack of evidence of his co-defendants' involvement in any conspiracy makes his unilateral motive, whatever it was, [7] irrelevant to the resolution of the antitrust claims against the remaining defendants.

This combination of lack of discussion and lack of motive leads inexorably to the conclusion that, at best, the defendants' actions were as consistent with lawful motives as they were with unlawful conspiracy. Accordingly, Giampolo's antitrust conspiracy claim fails for lack of evidence. [8] *See Friedman* ***[*28]*** *v. Delaware County Mem.*

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[6] Giampolo also cites evidence that his patient referral practices were a topic of discussion among the medical staff, Eddy dep. 51-52, that some physicians were referring their patients outside the county, *id. at 108-10*, and that Dr. Trenton was aware that certain physicians, such as Dr. deVries, chose not to give referrals to Giampolo, Trenton dep. 56-57. None of this evidence points to the existence of any concerted action by the defendants.

[7] By this, I do not imply in any way that his motive was less than proper. Indeed, the record indicates that he was practicing neurology in Somerset, albeit on a part-time basis, before Giampolo was recruited. Catalano dep. 9-10.

[8] Giampolo has moved to supplement the record with the recently taken affidavit of Grace Walsh, one of his patients. *See* dkt. no. 159. Ms. Walsh states that on or about July 1, 1996 she was examined by Dr. Jawad Salameh, a new general practitioner in Somerset. When she mentioned that she was also treating with Giampolo, Salameh told her that he would not continue to be her doctor unless she ended her patient-physician relationship with Giampolo. I will deny the motion. First of all, contrary to the representation made in the motion, *id.* P 5, plaintiff did not "only recently become aware that Ms. Walsh possessed the information set forth in her March 10, 1998 affidavit." Rather, Giampolo's own deposition of January 21, 1997, indicates his full knowledge of this incident at that time. *See* dkt. no. 160, exh. A. Thus, this matter could have been raised in Giampolo's brief in opposition to the motions for summary judgment. In response, Giampolo makes the frivolous argument that, while the nature of Ms. Walsh's testimony was known earlier, the *affidavit* only came into existence in March 1998; thus, the affidavit is newly discovered evidence. *See* dkt. no. *161 P 3*. That simply proves too much: any party could wait until after summary judgment motions are filed and supplement the record on that rationale.

Hosp., 672 F. Supp. 171, 191 (E.D. Pa. 1987) (where physicians were not competitors and never conferred, except in a peer review capacity as agents of the defendant hospital, no conspiracy existed), *aff'd mem.*, *849 F.2d 600, 849 F.2d 603 (3d Cir. 1988)*.

[*29] 2. RESTRAINT OF TRADE

Additionally, ***HN8***[] plaintiff is required to "prove what market he contends was restrained and that the defendants played enough of a significant role in the relevant market to impair competition generally." *Miller v. Indiana Hosp., 814 F. Supp. 1254, 1260* (W.D. Pa.) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*; *Oskanen v. Page Mem. Hosp., 945 F.2d 696, 709 (4th Cir. 1991))*, *aff'd mem.*, *975 F.2d 1550 (3d Cir. 1992)*. The relevant market is further broken down into product and geographic components. *Miller, 814 F. Supp. at 1260*. Plaintiff alleges that the relevant product market is "the practice of neurology," Dkt. no. *30 P 38*, a contention which is not the subject of significant dispute. He further avers two conflicting definitions of the relevant geographic market, a matter that is contested.

Giampolo first defines the relevant geographic market as Somerset County, which he alleges "includes the immediate community within reasonable commuting distances and the large rural area surrounding the town of Somerset and a relatively large county." *Id. P39*. Later in the complaint, he accuses **[*30]** the defendants of conspiring to gain a monopoly "in the relevant markets which include substantial regions of the State of Pennsylvania." *Id. P 46*(f). I will assume that he is pursuing the former definition, as that is consistent with the affidavit of his expert's report. *See* dkt. no. 143, exh. A(2) P 19-20.

HN9[] Medical antitrust claims of the sort raised by physicians such as Giampolo are generally reviewed under a "rule of reason analysis." *Betkerur, 78 F.3d at 1093* & n.9 (citing cases); *Miller, 814 F. Supp. at 1259* & n.3. Under this mode of analysis, "plaintiff bears the burden of proving that any concerted action taking place caused an anti-trust injury by imposing an unreasonable restraint on trade; the defendants are not required to prove that the practices are reasonable." *Miller, 814 F. Supp. at 1259-60*.

Unfortunately for Giampolo, he has adduced no evidence whatsoever that defendants even restrained trade, much less that the restraint was unreasonable. First, there has been an increase, not a decrease, in the availability of neurological services in Somerset. Giampolo continues in practice, and Drs. Catalano and Brizuela have increased their presence there. **[*31]** *See* *Betkerur, 78 F.3d at 1091, 1093-94* (where plaintiff continued to practice her specialty and consumer choice was increased by defendants' actions, no antitrust violation under rule of reason, even if a conspiracy and boycott did exist). Second, Giampolo has not shown that the price of those services has increased, nor does it appear that such a showing could be made, given the increase in competition. Finally, Giampolo has produced no evidence of a decline in the quality of the services provided by the neurologists, including himself, who practice in Somerset. For these reasons, I conclude that the defendants simply did not restrain trade.

Accordingly, I will dismiss Giampolo's claim under § 1 of the Sherman Act with prejudice. [9]

[*32] C. SECTION 2 OF THE SHERMAN ACT

In any event, Ms. Walsh's affidavit proves nothing. Dr. Salameh is not a defendant in this case, and there is no evidence that suggests that any defendant induced him to malign Giampolo or that Salameh's actions were anything other than unilateral. Indeed, Giampolo testified that Ms. Walsh told him only that Dr. Salameh disagreed with Giampolo's medical diagnosis of her condition, and that Ms. Walsh continues to be Giampolo's patient. Dkt. no. 160, Exh. A.

[9] Giampolo also asserts a cause of action under state ***antitrust law***. It is not clear from the complaint, however, precisely what relief he seeks or where he demands it. In any event, his sole argument in opposition to summary judgment is that, if the federal antitrust claim survives, the state claim does as well. Dkt. no. 142, at 46. Because I am dismissing Giampolo's federal claims, I will also dismiss his state antitrust cause of action, with prejudice.

Giampolo also alleges that defendants have violated **HN10**[] § 2 of the Sherman Act, which proscribes monopolization of a market. Defendants have moved for summary judgment on this claim, and although he has not explicitly conceded the point, Giampolo offers no argument in response. Hence, I deem the issue waived and will dismiss this claim with prejudice. [10]

[*33] ***IV. CONTRACT CLAIMS***

Giampolo alleges that the hospital breached the contract giving him the exclusive right to interpret EMG procedures by "allowing and encouraging Defendant John G. Eddy, a physical therapist, and his company, [MM&E], to substitute their 'impressions' from neurological tests for Plaintiff's professional medical neurological diagnosis and interpretation." Dkt. no. *30 P 35*. Essentially, Giampolo contends that the hospital ceased routinely sending EMGs to him for interpretation and relied instead on Eddy's impressions, thus eviscerating the exclusive EMG interpretation right for which he bargained. The contract between Giampolo and the hospital recites, in pertinent part:

> 2.01 Exclusive Agreement: During the term of this Agreement and for a period of five years thereafter ("Exclusivity Period"). [sic] Hospital agrees to grant Physician or physicians employed by Physician the exclusive right to *interpret* all [EEGs, EMGs] and all Evoked potential [sic] procedures. During Exclusivity period, no *Neurologist* other than the physicians employed by or under contract to Physician, [sic] shall be granted the right to interpret these identified **[*34]** procedures. . . .

Id. exh. A (emphasis added).

HN11[] The interpretation of a contract presents a legal issue to be resolved by the court. *Katzeff v. Fazio, 427 Pa. Super. 55, 628 A.2d 425, 428 (Pa. Super. 1993)*. My task is to give effect to the intentions of the contracting parties, as those intentions are manifested reasonably in the text of the writing. *Halpin v. La Salle Univ., 432 Pa. Super. 476, 639 A.2d 37, 39 (Pa. Super. 1994)*. When the words of that writing are unambiguous, the interpretation of the contract must proceed solely from the writing's text. *Id.* Of course, the mere fact that, as here, the parties dispute how their contract should be interpreted does not make the writing ambiguous. *Katzeff, 628 A.2d at 430*.

Giampolo argues that the contractual term "interpret" is ambiguous and could reasonably mean either strictly a medical diagnosis or, more broadly, any sort of impressions or findings from the raw EMG data. [11] Thus, he asserts that parol evidence should be admitted to clarify the ambiguity, *see Langer v. Monarch Life Ins. Co., 879 F.2d 75, 81 (3d Cir. 1989)*, evidence he contends raises a disputed issue of material fact sufficient to avoid summary judgment. **[*35]** I will assume, without deciding, that Giampolo's claim of ambiguity is correct as to the first sentence of section 2.01.

Any ambiguity, however, is quickly resolved by reference to the very next sentence of the provision, which recites that "no *Neurologist* other than the physicians employed by or under contract to Physician, [sic] shall be granted the right to interpret these identified procedures." (Emphasis added.) *See Restatement (Second) of Contracts § 202* (1981) ("A writing is interpreted as a whole. . . ."); *id.* comment d. Significantly, the parties did not specify that "no person" could provide EMG interpretations, but chose instead to limit the exclusivity to a particular class of *physicians*, specifically Giampolo and those employed by him. Accordingly, the only reasonable interpretation of the

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[10] Giampolo's § 2 claim lacks merit in any event. He simply has not shown that the hospital or the physician defendants, singly or in combination, possess any significant market power over neurology services in Somerset. *See, e.g., Pontius v. Children's Hosp., 552 F. Supp. 1352, 1376-77 (W.D. Pa. 1982)* (market power required to make out § 2 claim) (citing cases). None of these defendants competes with Giampolo, and the hospital has done nothing to restrict staff privileges or otherwise limit the number of neurologists who can practice in that region (with the possible exception of the exclusivity agreement which benefitted only Giampolo). Thus, it cannot seriously be maintained that defendants monopolized, or attempted to monopolize, the market.

[11] His position, of course, is that the latter definition should prevail, as this would forbid the hospital from obtaining Eddy's impressions instead of Giampolo's medical interpretations.

exclusivity **[*36]** provision is simply that if a neurological interpretation is ordered for a patient's EMG test, Giampolo must be consulted to provide it. This contractual language will not bear Giampolo's construction that anytime an EMG is performed a full neurological interpretation by Giampolo *must* be ordered.

At best, then, Giampolo is a party to a requirements contract, under which the hospital has agreed to have all neurological interpretations of EMGs done by him. ***HN12***[] Such a contract "does not impose upon a buyer the necessity to order that any work be done. The buyer has no duty to have a requirement." *Welded Tube Co. v. Phoenix Steel Corp., 377 F. Supp. 74, 79 (E.D. Pa. 1974)*, *aff'd in relevant part*, *512 F.2d 342 (3d Cir. 1975)*. The seller, in this case Giampolo, assumes the risk of all variations in the buyer's requirements, even if the buyer decides to discontinue the business. [12] **[*38]** *Id.* (citing *HML Corp. v. General Foods Corp., 365 F.2d 77 (3d Cir. 1966)*. Thus, in the absence of bad faith, *see, e.g., Advent Sys., Ltd. v. Unisys Corp., 925 F.2d 670, 678 (3d Cir. 1991)*, something not present on this record, [13] the hospital was fully within its rights when it decided to **[*37]** stop ordering a neurological interpretation with every EMG.

Giampolo argues, nevertheless, that the parties' course of performance is admissible and indicates that the hospital believed that it was required to submit all EMGs to Giampolo for interpretation. Thus, he asserts, trial is warranted to determine the actual intent of the parties. I reject this contention.

It is true that ***HN13***[] "course of performance is always relevant in interpreting a writing." *Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736, 741 n.6 (1978)*, even an unambiguous one, *id.; Langer, 879 F.2d at 81*. As the *Razumic* court stated, "the parties to an agreement know best what they **[*39]** meant, and their action under it is often the strongest evidence of their meaning." *390 A.2d at 741 n.6* (quoting *Restatement (Second) of Contracts § [202*] comment g [1981]).

Giampolo argues that the hospital's initial policy, in effect before the controversy over his treatment of indigent patients, of submitting all EMGs to him for interpretation indicates that the hospital believed it was obligated under the contract to do that. What Giampolo ignores, however, is that the hospital's change of policy came about only after he decided he would no longer see indigent patients in his office. While it is true that no express term in the contract required Giampolo to treat the indigent, the fact that the hospital stopped submitting all EMGs for neurological interpretation in response to Giampolo's decision tends to indicate, not a sudden breach of an acknowledged obligation, but a legitimate change in requirements based on the actions of the "seller." Inasmuch as the hospital did not desire to have two standards of care, one for paying patients and another for the indigent, its decision to stop *offering* routine neurological interpretations after initially providing them does not **[*40]** tend to prove that it believed it was contractually *bound* to order them for every patient. [14]

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[12] Giampolo contends, however, that this interpretation should be rejected because it renders the contract illusory or meaningless, relying on *Jamison v. Concepts Plus, Inc., 380 Pa. Super. 431, 552 A.2d 265 (Pa. Super. 1988)*. This reliance is misplaced. Jamison involved, not a requirements contract, but a contract for the sale of land under which the buyer was responsible for obtaining permits to subdivide it. *552 A.2d at 266*. If approval could not be obtained, the down payment was to be returned with interest. *Id.* The buyer, however, failed to pursue the subdivision application with diligence and sued to recover his money. *Id. at 266-67*. The court, to avoid a situation in which the entire contract would fail for want of consideration because the buyer obligated himself to nothing, interpreted the contract to require return of the down payment only if it was objectively impossible to obtain approval of the subdivision plan and ruled for the defendant. The *Jamison* court did not hold that a requirements contract like this one fails for lack of mutuality.

[13] Giampolo asserts that bad faith can be found from the fact that "the Hospital has not simply 'refrained' from requiring all EMGs to be interpreted: it has *prohibited* physicians practicing at Somerset Hospital from directing that EMG results be provided to Dr. Giampolo. . . ." Dkt. no.142, at 15 (emphasis added). No citation to the record accompanies this allegation, nor does my review of the record support it. Hence, I will ignore it as an unsubstantiated, self-serving assertion.

[14] Even if I accepted this argument, Giampolo might quickly find himself hoisted by his own petard. Giampolo, after all, performed EMG interpretations for indigent patients for some period of time; thus, it could well be argued that he believed that treating the indigent was one of *his* contractual obligations, which he breached when he began demanding payment in advance. Given that a

Although course of performance is to be given "great weight in the interpretation of the agreement[,]" *see Restatement (Second) of Contracts § 202(4)* (1981), it is "merely [a] guide[] in the process of interpretation[,]" *id.* comment a, and is "used in determining what meanings are reasonably possible as well as in choosing among possible **[*41]** meanings." *Id.* Conduct, however, must still be weighed in the light of the terms of the agreement itself. *Id.* comment g. Where, as here, nothing about the defendant hospital's conduct is inconsistent with the requirements contract unambiguously set forth in the text of the writing, plaintiff's attempt to prove a contrary course of performance must fail. Accordingly, I will dismiss Giampolo's contract claim with prejudice.

V. TORTIOUS INTERFERENCE

Giampolo has alleged that defendants have tortiously interfered with his "contractual and business rights." Dkt. no. 30, count three. In his First Amended Complaint, he alleged that they "knowingly and intentionally interfered with existing patient referral patterns with the specific purpose of adversely affecting Plaintiff's business. . . ." *Id. P 56*. He further averred that his professional reputation and economic status "have been and will continue to be damaged as a result of the defendants' interference with plaintiff's business and contractual relations with patients and interference with prospective patients." *Id. P 58*. Consequently, Giampolo has asserted claims for the intentional interference of both existing **[*42]** contractual relations and prospective contractual relations. These two claims have been asserted against all of the "defendants."

Giampolo's opposition to the defendants' motions for summary judgment fails to pursue his theory that the defendants interfered with the existing contractual relations he has with his patients. Now, having shifted ground, he theorizes that the defendants have tortiously facilitated the *hospital's* breach of his exclusivity agreement and that the defendants have caused him to lose prospective patients. [15]

In *Birl v. Philadelphia Electric Co., 402 Pa. 297, 167 A.2d 472 (Pa. 1961)*, the Pennsylvania **[*43]** Supreme Court "adopted Section 766 of Restatement of Torts and its definition of the right of action for intentional interference with existing contractual relations." *Adler, Barish v. Epstein, 482 Pa. 416, 393 A.2d 1175, 1181-82 (Pa. 1978)* (citing *Birl*). Subsequently, in *Adler, Barish*, the Court embraced the analysis "fashioned by the Restatement (Second)." *393 A.2d at 1183*. *Section 766 of the Restatement (Second) of Torts* provides:

> **HN14**[] One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

HN15[] To prevail on a claim of intentional interference with existing contractual relations, a plaintiff must prove: "(1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's **[*44]** conduct." *Triffin v. Janssen, 426 Pa. Super. 57, 626 A.2d 571, 574 (Pa.Super. 1993)*; *see also* *Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1387-88 (3d Cir. 1991)*; *Silver v. Mendel, 894 F.2d 598, 604-05 (3d Cir. 1990)*.

HN16[] The four elements of the tort of intentional interference with prospective contractual relations are: "(1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from

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significant portion of the hospital's patients are indigent, Giampolo's "breach" would likely be deemed material, excusing the hospital from the exclusivity provision entirely.

[15] As a means of avoiding summary judgment, this is a questionable tactic. *See* *Fort Washington Resources, Inc. v. Tannen, 846 F. Supp. 354, 364 (E.D. Pa. 1994)* ("Plaintiff cannot now expand its claim beyond its pleadings simply to avoid a motion for summary judgment."). Nevertheless, I will analyze plaintiff's argument on the existing contractual relations claim on the merits.

occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct." *Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 471 (Pa. 1979)* (citing *Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895 (Pa. 1958))*.

HN17[] The element of intent for both torts is closely related to the element of privilege or justification and the propriety of the defendant's actions. *Glenn, 272 A.2d at 899*. The propriety of the defendant's actions may be determined by focusing upon the following factors:

> (a) The nature of the actor's conduct, (b) The actor's motive, (c) The interests of the other with which the actor's **[*45]** conduct interferes, (d) The interests sought to be advanced by the actor, (e) The proximity or remoteness of the actor's conduct to the interference and (f) The relations between the parties.

Adler, Barish, 393 A.2d at 1184 (quoting Restatement (Second of Tort's § 767 (1979)).

To the extent Giampolo argues that he has a viable claim for the intentional interference with his exclusivity agreement against Somerset Hospital, that claim must fall as a matter of law. ***HN18***[] By definition, there must be at least three parties for a claim of tortious interference with an existing contract to lie. *Daniel Adams Assocs. v. Rimbach Publ. Co., 360 Pa. Super. 72, 519 A.2d 997, 1000 (Pa.Super. 1987)*.

Giampolo's claims against defendants Farrell, Nair, Trenton, and DeVries must also fail. As the party with the burden of proof, Giampolo is obligated to produce evidence of every element of his claim to defeat summary judgment. *Celotex, 477 U.S. at 324*. Because Giampolo has failed to adduce any evidence that these individual defendants interfered in any manner with his exclusivity agreement, summary judgment must be granted in their favor.

Giampolo claims that the fact that Eddy continued **[*46]** to perform neurological testing and to render his impressions, is evidence that he interfered with Giampolo's exclusivity agreement. Such conduct, however, as I concluded *supra*, did not infringe upon Giampolo's exclusive right to interpret the electrodiagnostic testing performed at the hospital. *See supra*, § IV. As a result, Giampolo has failed to produce any evidence of interference and his claim cannot survive.

Giampolo has also adduced evidence that Dr. Catalano performed EEG interpretations on a few hospital patients in violation of the exclusivity agreement. Specifically, Catalano or his associate, Dr. Rastogr, saw Rosemary Harmon on Monday, April 14, 1997, and Eugene Fitzgerald on Saturday, April 12 of that year. [16] *See* dkt. no. 143, exh. 7. This was a time period, however, when Giampolo was unavailable to review the EEGs, and the interpretation was necessary "so that the patient's management and anticipated discharge could proceed without further delay. [17] **[*48]** Giampolo, for his part, has stated his belief that another physician may interpret tests under such circumstances without it being professionally wrongful or inappropriate. Giampolo dep. 115-21. Accordingly, **[*47]**

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[16] Interestingly, these events allegedly occurred almost eighteen months after the First Amended complaint was filed.

[17] *See* dkt. no. 146, at 5 & n. 2. Dr. Catalano initially made this representation in his reply brief, unaccompanied by a citation to the record or an affidavit. He promised that a corresponding affidavit would be filed "shortly after Dr. Catalano's return from vacation[,]" *id.*, and indeed, that affidavit was filed on January 26, 1998. Giampolo does not dispute in his surreply brief that he was unavailable on these dates, *see* dkt. no. 149, choosing instead to move that the affidavit be stricken as untimely, or, in the alternative, to redepose Dr. Catalano. *See* dkt. no. 157. I will deny that motion. Giampolo raised these allegations against Dr. Catalano for the first time in his brief in opposition to summary judgment. It is only equitable to permit Dr. Catalano to submit an affidavit refuting Giampolo's newly raised theory of liability. Nor does Giampolo have a legitimate need to redepose Dr. Catalano, as he had every opportunity to ask the doctor earlier whether he had performed any interpretive procedures at the hospital or, alternatively, to move to re-open deposition discovery at the time he first became aware of the medical records of these patients.

there is no evidence that Dr. Catalano ever performed an interpretation which would have interfered with Giampolo's exclusivity contract, and this claim against Catalano must fail. [18]

Giampolo's attempt to escape summary judgment on his claim for intentional interference with prospective contractual relations fares no better. Once again Giampolo contends that the defendants, without specification as to which ones, have caused him to lose prospective patients. His entire argument on this point consists of the following:

> Dr. Giampolo has shown that his referrals have declined precipitously over the course of the last four years. The defendants' actions clearly deprived Dr. **[*49]** Giampolo of obtaining patients through the network of referral and/or consultation patterns at the hospital. *See Restatement (Second) of Torts § 766B, comment c* (included is interference with a continuing business or other customary relationship not amounting to a formal contract"). Since questions of fact exist concerning the reasonableness of plaintiff's expectation of gaining prospective patients through referrals from other physicians at Somerset, defendants' motion on this issue should be denied. *Posner v. Lankenau Hospital, 645 F. Supp. 1102 (E.D.Pa. 1986)*.

Dkt.no. 142, at 46.

In *Posner*, the principal case on which Giampolo relies, a physician's staff privileges were terminated and he alleged that various physicians on the medical staff caused him to lose prospective patients, business he would have received through the network of referrals and consultations. *645 F. Supp. at 1111-12*. The court denied a defense motion for summary judgment because questions of fact remained regarding the referral and consultation patterns. The court cautioned that the plaintiff would have to prove at trial the existence of "specific patients which other doctors would have **[*50]** referred to him if he had remained at Lankenau. A bare assertion that, but for defendants' actions, Posner would have been able to obtain more patients is an insufficient basis [to support the] claim." *Id.* n. 6.

Here, Giampolo has not identified a single patient who would have been referred to him absent the conduct of the defendants, let alone developed any evidence of any referral and/or consultation patterns at Somerset. Instead, in tautological fashion, he attempts to use the loss in referral business as evidence that there must have been tortious interference. That is insufficient and I must reject Giampolo's claim for tortious interference with prospective relations.

VI. DEFAMATION

In his complaint, Giampolo averred that the defendants, with the exception of Dr. Catalano, falsely represented "that he was a non-caring physician, insensitive to the needs of indigent patients." Dkt. no. *30 P 61*. In response to the defendants' motions for summary judgment on his defamation claim, Giampolo does not even attempt to argue that Mr. Eddy, Dr. Nair, Dr. Trenton, Mr. Farrell or the hospital defamed him. Accordingly, I deem these claims waived and abandoned. [19]

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[18] Giampolo contended that Catalano also interpreted a third electrodiagnostic test in violation of the exclusivity agreement. The evidence in support of that contention, however, consists of several pre-printed forms captioned "SOMERSET HOSPITAL PHYSICIAN'S ORDERS" which include a directive by an attending physician whose name is illegible that a patient was to make an appointment to be seen by Dr. Catalano. This evidence fails to establish that Dr. Catalano either saw this patient, a fact he denies, or interpreted any electrodiagnostic test performed on this patient. *See* dkt. no. 143, n. 16

[19] Those claims lack merit in any event. Giampolo *admitted* that he ceased treating indigent patients in his office, Giampolo dep. 82, making any statement to that effect true and nondefamatory as a matter of law. *See Badami v. Dimson, 226 Pa. Super. 75, 310 A.2d 298, 299-300 (Pa. Super. 1973)*. At his deposition, Giampolo further identified alleged defamatory remarks made by Doctors Nair and Trenton. These remarks, however, expressed professional differences of opinion regarding patient treatment and hospital policy. They did not imply that Giampolo was not a competent physician, but only that these defendants had different philosophies regarding what type of information should appear on a neurologist's medical report, what procedures were

[*51] What Giampolo's response does assert is that Dr. deVries defamed him in a single letter dated January 11, 1994. This correspondence, addressed to Giampolo but copied to Drs. Trenton and Brennan as well as the patient's chart, expressed dismay that Giampolo first was unavailable to see an indigent patient in the hospital, then essentially refused to see the patient at his office because he could not pay the examination fee. Dkt. no. 143, exh. 17. Three days later, Dr. deVries apologized to Giampolo in another letter copied to the same recipients. Dr. deVries admitted that Giampolo had in fact seen the patient in the hospital, although the patient declined to make a follow-up office appointment for financial reasons. *Id.* exh. 18.

HN19[] To sustain a cause of action for defamation, plaintiff must prove: "(1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; and (7) abuse of a conditionally privileged occasion." *Maier v. Maretti, 448 Pa. Super. 276, 671 A.2d 701, 704 (Pa.* ***[*52]*** *Super. 1995)*. Here, defendant argues that the first letter is not actionable because it was made subject to a conditional privilege, specifically Dr. deVries legitimate professional concern about a matter of patient care. Dkt. no. 116, at 65; *see* *Miketic v. Baron, 450 Pa. Super. 91, 675 A.2d 324, 329 (Pa. Super. 1996)* (conditional privilege exists when some legitimate interest of the defendant, the recipient or the public is involved).

Giampolo does not dispute the applicability of the conditional privilege, but argues instead that it was lost because deVries abused it. Dkt. no. 142, at 48. As Giampolo puts it, "Dr. deVries had no privilege to publicize statements about Dr. Giampolo that had no basis in fact and could only harm his reputation as a physician. Regardless of whether Dr. deVries is entitled to claim any privilege, the question of his abuse of privilege is a question of fact for the jury." *Id.*

HN20[] The conditionally privileged nature of a statement may be lost if the plaintiff proves that it has been abused. *42 Pa. C.S.A § 8343(7)* (burden is on plaintiff); *Miketic, 675 A.2d at 329*; *see Agriss v. Roadway Express, Inc., 334 Pa. Super. 295, 483 A.2d 456, 463* ***[*53]*** *(Pa. Super. 1984)* (absolute privilege may be lost if publisher exceeds its scope). Whether or not the privilege has been abused is an issue of fact. *Agriss, 483 A.2d at 463*. Abuse occurs when

> the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or includes defamatory matter not reasonably believed to be necessary for the accomplishment of the privilege.

Miketic, 675 A.2d at 329 (quoting *Beckman v. Dunn, 276 Pa. Super. 527, 419 A.2d 583, 588 (Pa.Super. 1980)* (citations omitted)).

Here, Giampolo argues only that the statements were (1) false and (2) damaging, but fails to address any of the indicia of abuse set forth in *Miketic*. In other words, he asserts that because the letter contained incorrect and unfavorable information about him, its publisher must have abused the conditional privilege. This conclusory argument, if accepted, would essentially reduce the doctrine of conditional privilege to nought, because the gravamen of *every* defamation claim is the publication **[*54]** of damaging falsehoods. In the absence of any evidence that the conditional privilege was abused, I will dismiss Giampolo's defamation claims with prejudice.

VII. RULE 11 SANCTIONS

All defendants have filed motions for sanctions under *Fed. R. Civ. P. 11*, arguing that the factual basis for this lawsuit was virtually nonexistent, that a proper investigation would have revealed this deficiency and that plaintiff's

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appropriate to perform at Somerset Hospital, and whether certain patients actually suffered from the conditions that Giampolo diagnosed. As statements of opinion, they were not defamatory as a matter of law. *See* *Parano v. O'Connor, 433 Pa. Super. 570, 641 A.2d 607, 609 (Pa. Super. 1994)*; *Gordon v. Lancaster Osteopathic Hosp., 340 Pa. Super. 253, 489 A.2d 1364, 1369 (Pa. Super. 1985)*.

counsel failed to undertake an adequate investigation, or, alternatively, failed to dismiss the claims after discovery showed them to be baseless. ***HN21***[] *Rule 11 (b)* provides, in pertinent part:

> By presenting to the court (whether by signing, filing, submitting or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--… (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

HN22[] Under *Rule 11*, "the court determines **[*55]** the reasonableness of an inquiry by applying an objective standard." *Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1278*. The court, however, must "avoid drawing on the wisdom of hindsight" by finding a claim frivolous merely because the plaintiff ultimately did not prevail. *Id. at 1279*. Here, I decline to find Giampolo's antitrust, contract or tortious interference claims frivolous. Although none of those claims survives summary judgment, the factual record Giampolo adduced was sufficient to raise substantial legal issues which required careful consideration and analysis of both plaintiffs and defendants arguments.

Giampolo's defamation claims stand on a different footing, however. Although he sued every defendant for defamation, Giampolo utterly failed at his deposition to come up with any reasonably coherent theory of how he was defamed, and by whom. What little he did present out of his own mouth consisted of professional disagreements which were nondefamatory expressions of opinion, statements that were protected by privilege, or truthful statements to the effect that he refused to see indigent patients in his office. None of these were even remotely actionable, as should **[*56]** have been obvious from a very early stage of this litigation. Significantly, Giampolo does not even attempt to argue in his brief in opposition to summary judgment that he was defamed by any of these individuals, although he does not explicitly concede the claims, either. Yet he never dismissed his defamation claims against these defendants, despite their warnings that they intended to file *Rule 11* motions.

I recognize that it may have been consistent with current legal practice to name as defendants in an initial complaint parties against whom Giampolo then had no evidence. Nevertheless, when it became apparent that no defamatory statements were made by any of them, it was incumbent on Giampolo to acknowledge that fact and cease pursuing these claims against them:

> ***HN23***[] [A] litigant's obligations . . . are not measured solely as of the time they are filed or submitted to the court, but include reaffirming to the court and advocating positions contained in [the] pleadings and motions after learning that they cease to have any merit. . . . Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty **[*57]** under the rule not to persist with that contention. [This rule] does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

Fed. R. Civ. P. 11, Advisory Committee Notes, 1993 Amendments.

In *Zuk v. EPPI of the Med. Coll. of Pennsylvania, 103 F.3d 294*, plaintiff's counsel failed to conduct an adequate factual investigation into the time period during which defendant was renting out plaintiff's films. *Id. at 298*. Had a proper investigation been undertaken, it would have quickly revealed that none of the allegedly illegal rentals took place within the statute of limitations. *Id.* Nevertheless, plaintiff advocated his claims all the way to resolution on their merits. The court held that, under these circumstances, the lack of a sufficient investigation by counsel was sanctionable under *Rule 11*. *Id.*

The conduct in the case at bar falls very close to being sanctionable. Rather than dismiss the claims against these four defendants when it became evident they had not defamed Giampolo, plaintiff took no action whatsoever. Thus, Messrs. Eddy and Farrell, **[*58]** as well as Drs. Nair and Trenton, were forced to endure the financial costs and psychological stress of defending claims that never had merit. Nevertheless, Giampolo did not affirmatively continue to advocate his defamation case against them in arguments to this court. Accordingly, his tactics, however questionable, appear not to fall directly within *Rule 11*'s ambit. I will therefore deny defendants' motions for *Rule 11* sanctions.

VIII. CONCLUSION

For the reasons discussed *supra*, I will grant all defendants' motions for summary judgment in their entirety, dismiss Giampolo's complaint with prejudice, and deny all defendants' motions for sanctions. An appropriate order follows.

ORDER

AND NOW, this 29th day of May 1998, upon consideration of the defendants' motions for summary judgment, dkt. nos. 115, 126, 135, plaintiff's motion to strike supplemental exhibit, dkt. no. 157, plaintiff's motion to supplement the record, dkt. no. 159, defendants' motions for sanctions, dkt. nos. 113, 124, 131, 137, and the arguments relative thereto, it is hereby ORDERED and DIRECTED that:

1. the motion of the Hospital Defendants for summary judgment, dkt. no. 115, is GRANTED;

[*59] 2. the motion of the Eddy Defendants for summary judgment, dkt. no. 126, is GRANTED;

3. the motion of Dr. Louis Catalano for summary judgment, dkt. no. 135, is GRANTED;

4. plaintiff's complaint is DISMISSED WITH PREJUDICE;

5. plaintiff's motion to strike supplemental exhibit, dkt. no. 157, is DENIED;

6. plaintiff's motion to supplement the record, dkt. no. 159, is DENIED;

7. the hospital defendants' motion for discovery sanctions, dkt. no. 131, is DENIED AS MOOT;

8. defendants' motions for *Rule 11* sanctions, dkt.nos. 113, 124, 137, are DENIED; and

9. the Clerk of Court shall mark the above-captioned case CLOSED.

BY THE COURT,

D. Brooks Smith

United States District Judge

Porous Media Corp. v. Pall Corp.

United States District Court for the District of Minnesota, Fourth Division

June 3, 1998, Decided

Civ. No. 97-880 (ADM/AJB); Civ. No. 97-2084 (ADM/AJB)

Reporter
1998 U.S. Dist. LEXIS 23651 *

Porous Media Corporation, Plaintiff, vs. Pall Corporation, Defendant.

Subsequent History: Related proceeding at *Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1999 U.S. App. LEXIS 6653 (8th Cir. Minn., 1999)*

Prior History: *Porous Media Corp. v. Pall Corp., 1997 U.S. App. LEXIS 13191 (8th Cir. Minn., June 5, 1997)*

Core Terms

press release, counterclaims, pleadings, probable cause, infringement, matter of law, promotion, alleges, instant case, Lanham Act, sanctions, recusal, oil, commercial speech, baseless, immunity, sham, malicious prosecution claim, commercial advertising, malicious prosecution, motion to dismiss, trade dress, advertising, trademark, products, parties, directed verdict, articulated, contends, lawsuit

Counsel: [*1] For Porous Media Corporation (0:97-cv-00880-ADM-AJB), Plaintiff: Alfred H Edwall, Jr, LEAD ATTORNEY, Law Firm Unknown.

For Pall Corporation, Defendant: Felicia J Boyd, John H Hinderaker, LEAD ATTORNEYS, Faegre & Benson LLP, Mpls, MN.

For Porous Media Corporation (0:97-cv-02084-ADM-AJB), Plaintiff: Robert J Tansey, Jr, LEAD ATTORNEY, Anthony Ostlund & Baer, Mpls, MN.

For Pall Corporation, Defendant: Felicia J Boyd, James J Hartnett, IV, John H Hinderaker, LEAD ATTORNEYS, Faegre & Benson LLP, Mpls, MN.

Judges: Ann D. Montgomery, UNITED STATES DISTRICT JUDGE.

Opinion by: Ann D. Montgomery

Opinion

MEMORANDUM OPINION AND ORDER

INTRODUCTION

The above-entitled matters came on for hearing on March 23, 1998, pursuant to Defendant's motion for judgment on the pleadings in one action (Civ. No. 97-880) and Plaintiff's motion for recusal, Defendant's motion to dismiss, and Defendant's motion for sanctions in another, related action (Civ. No. 97-2084). Because the cases are related, the Court will address all of the motions in this combined Order.

BACKGROUND

The parties are both manufacturers of industrial filters for use in various industries including the oil and gas markets, the paper and power markets, and certain applications in **[*2]** the medical market. The parties have a long history of rancorous conflict including at least five lawsuits since 1990. In 1990, Plaintiff Porous Media Corporation ("Porous") initiated a lawsuit *(Porous I)* against Defendant Pall Corporation ("Pall") alleging, *inter alia,* violation of the Lanham Act, *15 U.S.C. § 1125(a)*. Pall subsequently filed counterclaims against Porous alleging trade dress and trademark infringement. In 1995, *Porous I* resulted in a jury verdict in favor of Porous and against Pall on each of its counterclaims. In one of the instant cases, (Civ. No. 97-880), [1] Porous alleges that Pall engaged in malicious prosecution by asserting those counterclaims.

In a second lawsuit, *Porous II,* Porous obtained a jury verdict against Pall in 1997. As **[*3]** in *Porous I,* Pall asserted counterclaims against Porous and lost on the counterclaims at trial. Porous now alleges that Pall's assertion of the counterclaims in *Porous II* constituted malicious prosecution. Porous' second malicious prosecution claim, which arose from *Porous II,* prompted Pall's motion to dismiss in the other case at hand, (Civ. No. 97-2084).

In relation to the two pending cases, Civ. No. 97-880 and Civ. No. 97-2084; Porous filed a motion seeking recusal of the undersigned United States District Judge. For reasons stated on the record, the Court denied this motion. In response to Porous' motion for recusal, Pall filed a motion for Rule 11 sanctions.

DISCUSSION

I. Standard for Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure provides, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." *Fed. R. Civ. P. 12(c)*: Judgment on the pleadings is proper "if the moving party clearly establishes that there are no material issues of fact and that he is entitled to judgment as a matter of law." *Lion Oil Co., Inc. v. Tosco Corp., 90 F.3d 268, 270 (8th Cir. 1996)* (citing *National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 428 (8th Cir.)*, **[*4]** cert. denied, *510 U.S. 861, 114 S. Ct. 176, 126 L. Ed. 2d 136 (1993))*. In analyzing the pleadings under this standard, a court must accept as true all facts pled by the non-moving party and draw all reasonable inferences in favor of that party. Id.

On a motion for judgment on the pleadings, a court generally must not examine extra-pleading material submitted by the parties unless the material is referred to in the Complaint or "necessarily embraced by the pleadings." *Piper Jaffray Companies, Inc. v. National Union Fire Ins. Co. of Pittsburgh, P.A., 967 F.Supp. 1148, 1152 (D.Minn. 1997)*; *Vizenor v. Babbitt, 927 F. Supp. 1193, 1197 (D.Minn. 1996)*. In the instant case, the Court may therefore consider extra-pleading material which is necessarily embraced by the pleadings such as transcripts of the underlying proceedings and other matters of public record.

II. Malicious Prosecution -- *Porous I*

Porous' Complaint alleges that "Pall's counterclaims . . . were all made without probable cause, and were made maliciously and as a sham, in order to injure Porous and benefit Pall in its trade war that it has conducted against Porous through unfair competition and through sham litigation." To state a claim for malicious **[*5]** prosecution, a

[1] Although Defendant refers to one of the instant cases, Civ. No. 97-880, as *Porous IV,* Plaintiff appears to refer to Civ. No. 97-880 as *Porous III.* Plaintiff adds to the confusion by referring to *Porous III* as Civ. No. 97-800. Similarly, Defendant refers to Civ. No. 97-2084 as *Porous V,* and Plaintiff refers to that case as *Porous IV.* To avoid further confusion, the Court will refer to the pending cases by the appropriate docket number.

plaintiff must satisfy the following three elements: (1) the suit must be brought without probable cause and with no reasonable ground on which to base a belief that the plaintiff would ultimately prevail on the merits; (2) the suit must be instituted and prosecuted with malicious intent; and (3) the suit must ultimately terminate in favor of the defendant. *First Nat'l Bank of Omaha v. Marquette Nat'l Bank of Minneapolis, 482 F.Supp. 514, 522-23 (D.Minn. 1979)*.

The *first amendment* protects the right to bring suit in state and federal courts, and the act of filing a lawsuit is generally immune from tort liability, under the Noerr-Pennington doctrine. *Surgidev Corp. v. Eye Technology, Inc., 625 F.Supp. 800, 803 (D.Minn. 1986)* (citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L. Ed. 2d 626 (1965))*. Although it originated in the context of ***antitrust law***, courts have often extended the Noerr-Pennington doctrine to other substantive areas such as torts in a business context. See e.g., *Hufsmith v. Weaver, 817 F.2d 455, 458 (8th Cir. 1987)* ("Although the Supreme **[*6]** Court has never decided whether the Noerr-Pennington doctrine is applicable outside the antitrust area, . . . this court has long indicated that the doctrine may be so extended").

The one well-recognized exception to the Noerr-Pennington doctrine of immunity is for "sham" litigation. In characterizing the "sham" exception, the Eighth Circuit Court of Appeals observed, "It is only where a defendant's resort to the courts is accompanied or characterized by illegal and reprehensible practices such as perjury, fraud, conspiracy with or bribery of government decision makers, or misrepresentation, or is so clearly baseless as to amount to an abuse of process, that the Noerr-Pennington cloak of immunity provides no protection." *Razorback Ready Mix Concrete Co., Inc. v. Weaver, 761 F.2d 484, 487 (8th Cir. 1985)*. More recently the Supreme Court has articulated a two-part test for the sham exception to the Noerr-Pennington doctrine. The sham exception requires proof that the underlying lawsuit is: (1) "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits;" and (2) subjectively motivated by bad faith. **[*7]** *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 113 S.Ct. 1920, 1928-29, 123 L. Ed. 2d 611 (1993)* (addressing Noerr-Pennington immunity in the antitrust context). A court may not examine the subjective motivation of the litigant unless it first concludes that the relevant claims are objectively baseless. Id.

Pall filed counterclaims in *Porous I* alleging trade dress and trademark infringement. Porous moved for a directed verdict at the end of the case-in-chief. Boyd Aff., Ex. A. After hearing counsel's arguments in favor of a directed verdict on the counterclaims, Judge Davis denied the motion but invited counsel to renew the motion at the conclusion of the case. Counsel for Porous failed to renew the motion at the end of the trial, and the case was submitted to the jury. The jury awarded Porous $ 7 million in compensatory damages, and Pall lost on each of its counterclaims.

Rule 50 (a) of the Federal Rules of Civil Procedure provides, "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law." *Fed. R. Civ. P. 50(a)*. In denying **[*8]** Porous' *Rule 50(a)* motion for judgment as a matter of law, Judge Davis implicitly determined that there was a "legally sufficient evidentiary basis for a reasonable jury to find for [Pall] on [its counterclaims]." Id. Porous subsequently failed to renew its motion. In light of Judge Davis' denial of its motion for judgment as a matter of law, Porous' allegation that the counterclaims were "objectively baseless" is without merit. [2] If the claims were "objectively baseless," Judge Davis would have granted Porous' motion for judgment as a matter of law.

Moreover, even if the Noerr-Pennington doctrine did not apply to the instant case, Pall's motion for judgment on the pleadings would be granted. **[*9]** Porous cannot, as a matter of law, establish that Pall lacked probable cause in

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[2] Porous also argues that Judge Davis' denial of Pall's post trial motions indicates that the counterclaims were baseless. The mere fact that Judge Davis found there was insufficient evidence to grant Pall's post-trial *Rule 50(a)* motions, does not suggest that the counterclaims were meritless and should not have been brought. As Pall argues, however, Judge Davis' denial of Porous' motion for judgment as a matter of law does indicate that there was sufficient evidence for those claims to go to the jury.

asserting its counterclaims. Because the absence of probable cause is an essential element of a malicious prosecution claim, Pall's motion for judgment on the pleadings will be granted.

Where there is no factual dispute involving the underlying legal proceeding, the issue of probable cause is a matter of law for the court to decide. *First Nat'l Bank of Omaha, 482 F.Supp. at 522* (citing *Eastman v. Leiser Co., 148 Minn. 96, 181 N.W. 109 (1921))*. Probable cause consists of "such facts and circumstances as will warrant a cautious, reasonable and prudent person in the honest belief that his action and the means taken in prosecution of it are just, legal and proper." Id. (citation omitted). The Supreme Court has more recently articulated the standard for probable cause in the context of civil proceedings: "Probable cause to institute civil proceedings requires no more than a 'reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.'" *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 62-63, 113 S. Ct. 1920, 1929, 123 L. Ed. 2d 611 (1993)* (internal citations **[*10]** omitted).

In the instant case, Pall had a reasonable belief that there was a chance that its claims would be validated at trial. Indeed, in denying Porous' motion for judgment as a matter of law on Pall's counterclaims, Judge Davis indicated that there was sufficient evidence to allow the claim to go to the factfinder. In so doing, Judge Davis reaffirmed that Pall had a reasonable belief that it might succeed on those claims. Porous cites several cases in support of the proposition that a directed verdict motion is irrelevant to the determination of probable cause. The cases cited by Porous, however, are distinguishable from the instant case. [3] In *Bredehorst v. Robson Fuel Co., 195 Minn. 595, 263 N.W. 609 (Minn. 1935)*, for example, the court held that "the termination of the case [by directed verdict] in plaintiff's favor does not make but a prima facie case of want of probable cause." *Id. at 609*. This conclusion is quite different from the one advocated by Pall; Pall contends that because it presented sufficient evidence to defeat Porous' motion for a directed verdict, there can be no conclusion that Pall lacked a reasonable belief in a chance of success at trial. This Court agrees. As such, Pall's **[*11]** motion for judgment on the pleadings will be granted.

III. Malicious Prosecution -- *Porous II*

In the second of the two instant cases (Civ. No. 97-2084), Porous also alleges that the counterclaims asserted by Pall in *Porous II* (Civ. No. 4-95-740) constitute malicious prosecution. Porous contends that Pall's counterclaims in *Porous II* were asserted "without probable cause and were made maliciously and as a sham . . . ." Porous also alleges that the press releases issued by Pall after the *Porous II* verdict violate the Lanham Act, *15 U.S.C. § 1125(a)*, and the Minnesota Deceptive Trade Practices Act ("MDTPA"), *Minn. Stat. § 325D.44, et seq.* The jury in *Porous II* returned a verdict in favor of Porous on its claims of libel and violations of the Lanham Act and awarded Porous $ 1.72 million in damages. Pall voluntarily dismissed its trademark infringement counterclaim for tactical reasons prior to submission to the jury, and the jury rejected Pall's counterclaim for trade dress infringement.

This Court addressed **[*12]** the sufficiency of Pall's counterclaims for trademark and trade dress infringement in its January 31, 1997 Order. The Court held that "[g]enuine issues of fact regarding a likelihood of confusion preclude summary judgment on Pall's trademark and trade dress claims." Memorandum Opinion and Order, January 31, 1997, at 22. Although Pall withdrew its trademark infringement claim, this Court also denied Porous' motion for a directed verdict on Pall's trade dress infringement claim.

While continuing to fight an acrimonious court battle, the parties engaged in a media fracas in the summer of 1997. On July 30, 1997, prior to entry of judgment in *Porous II,* Porous fired the first volley by issuing a press release alleging that certain divisions within Pall "did not tell the truth about Porous and the performance of its products." Pall responded in a press release issued on August 1, 1997, in which Pall asserted that: "the jury rejected the vast majority of Porous Media's claims;" "[t]he jury completely absolved Pall of disparaging Porous Media's products;" and the Swalgen letter was sent "without any involvement of Pall management or Pall's SLS Laboratory." Porous, in turn, purchased a half-page **[*13]** advertisement in the *Wall Street Journal* on August 18, 1997, in an effort to counter Pall's assertions. Two days later, Pall issued another press release responding to Porous' paid advertisement. This August 20, 1997, press release stated, *inter alia,* that "the jury in *Porous I* was prevented from

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[3] Among the cases cited by Porous, one case involves Rule 11 sanctions, which makes it distinguishable from the case at hand. Other cases involve lower court opinions in other jurisdictions.

seeing data and testimony for procedural reasons;" and that Porous' continued litigation against Pall was "an abomination."

Porous' Complaint alleges that Pall's *Porous II* counterclaims constitute malicious prosecution and that Pall's August 1, 1997 press release and its August 20, 1997 press release violated the Lanham Act and the Minnesota Deceptive Trade Practices Act. Pall now seeks dismissal of these claims under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief may be granted.

IV. Standard for a *Rule 12(b)(6)* Motion to Dismiss

In considering a motion to dismiss, the pleadings are construed in a light most favorable to the nonmovant, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994)*; *Ossman v. Diana Corp., 825 F.Supp. 870, 879-80 (D. Minn. 1993)*. Any ambiguities concerning the sufficiency of **[*14]** the claims must be resolved in favor of the nonmovant. *Ossman, 825 F.Supp. at 880*. A complaint should be dismissed "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." *Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995)* (citations omitted); *Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir. 1996)*. "A motion to dismiss should be granted as a practical matter . . . only in the unusual case in which the nonmovant includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey, 44 F.3d at 671*.

V. Porous' Claim for Malicious Prosecution

In its January 31, 1997 Order, this Court held that Pall's counterclaims were sufficiently viable to survive Porous' motion for summary judgment. The Court held that genuine issues of material fact remained to be determined at trial. Implicit in such a ruling is the determination that the claims are not "objectively baseless" or "without probable cause." Based upon the analysis articulated above in connection with the counterclaims in *Porous I* and the case law cited therein, this Court finds, as a matter of law, that Porous cannot **[*15]** satisfy an essential element of its malicious prosecution claim. As such, that claim is dismissed with prejudice.

VI. Press Releases

Porous alleges that Pall's press releases violated the Lanham Act and the MDTPA. Pall counters that the Noerr-Pennington doctrine immunizes not only Pall's counterclaims in *Porous II* but also Pall's press releases. In support of this proposition, Pall cites *Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983)*, in which the Fifth Circuit Court of Appeals stated: "Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning." *Id. at 1367*. Coastal States Marketing involved an antitrust action initiated against former Libyan oil concession owners and counterclaims for conversion of oil asserted by the owners. The court held that the former Libyan oil concession owners' publicity and threats of litigation concerning title to the oil were protected under the Noerr-Pennington doctrine. The activity in question included a "well-publicized threat to litigate **[*16]** wherever and whenever necessary to assert their claim to [oil]. . . ." Id. For example, one notice, which was sent to hundreds of crude oil users, explained that the author of the notice owned legal title to the oil and would assert his legal rights against "those who would infringe them." *Id. at 1360 n.6*. The "worldwide campaign" was intended to prevent infringement of property rights and was directly related to potential litigation which would stem from such infringement.

In contrast, the instant case involves two press releases that were designed to impact public perceptions about the outcome of the litigation. Although the content of the press releases focused on litigation between the parties, the intent of the press releases was not to provide notice of potential litigation. The releases were superfluous and do not constitute acts "reasonably and normally attendant upon effective litigation." See *Id. at 1367*.

Similarly, Pall cites Supervalu, Inc. v. Stowe, Civ. No. 3-93-55, Slip Op. at 6-7 (D.Minn. May 6, 1994), in support of the proposition that Noerr-Pennington immunity should extend to Pall's press releases. In Supervalu, the plaintiff's attorney wrote a letter to the owner **[*17]** of several grocery stores threatening that "Supervalu would sue to enforce its contractual rights unless the parties resolved the dispute within two weeks." Id. at 3. The court held that the pre-litigation "threatening" letters were "reasonably and normally attendant upon effective litigation" and, as such, were protected under Noerr-Pennington. The press releases in this case, however, cannot be characterized as providing any notice or performing any function that is "reasonably and normally attendant upon effective litigation." Accordingly, the Noerr-Pennington doctrine provides no protection for Pall's press releases.

Pall contends that the Court must nevertheless dismiss Porous' Lanham Act claim because the press releases are outside the purview of the Lanham Act. The Lanham Act provides:

> (1) Any person who, on or in connection with any goods or services, uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which --
>
> * * *
>
> (b) In commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities
>
> shall be **[*18]** liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

15 U.S.C. § 1125(a). Pall contends that the press releases were not issued "in connection with any goods or services" and do not constitute "commercial advertising or promotion." Although the press releases do not overtly mention Porous' or Pall's products, they were issued "in connection with" the goods or products produced by these companies. The connection between the press releases and the competitive products of Porous and Pall is palpable.

The question whether the press releases amount to "commercial advertising or promotion" requires closer examination. The terms "advertising" and "promotion" are not defined in the Act, and the legislative history offers little guidance on this issue. *Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 (5th Cir. 1996)*. Pall relies on *Gordon and Breach Science Publishers v. American Institute of Physics, 859 F.Supp. 1521 (S.D.N.Y. 1994)*, in support of the proposition that the press releases do not constitute commercial advertising or promotion. In Gordon and Breach, the court concluded that an article in a journal operated by the non-profit defendant **[*19]** that disparaged the journal operated by the for-profit plaintiff was not commercial advertising or promotion. Id. The court expressly limited its holding, however, stating "we do not consider whether we would reach a different result if the articles in question were authored by a commercial entity . . . or if they were published in the trade journal of a commercial enterprise or industry." Id; at 1542. In the instant case, the press releases were issued by a commercial entity engaged in vigorous competition with the subject entity. Neither party purports to offer controlling authority in this circuit that specifically addresses this issue.

Most courts that have examined the issue have concluded that the Act's reach is broader than the "classic advertising campaign" and have identified the following four factors to be considered in determining whether a communication constitutes "commercial advertising or promotion:" (1) the representations must be commercial speech; (2) they must be made by a defendant who is in commercial competition with the plaintiff; (3) they must be made for the purpose of influencing consumers to buy defendant's goods or services; and (4) they must be disseminated **[*20]** sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry. See e.g., *Gordon and Breach Science Publishers, 859 F.Supp. at 1534-36*; *Medical Graphics Corp. v. Sensormedics Corp., 872 F.Supp. 643, 650 (D.Minn. 1994)*; *Seven-Up Co., 86 F.3d at 1384*.

The Supreme Court has recognized "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, 113 S. Ct. 1505, 1511, 123 L. Ed. 2d 99 (1993)*. At a minimum, commercial speech is speech "proposing a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760, 96 S.Ct. 1817, 1825, 48 L. Ed. 2d 346 (1976)*. In *Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L. Ed. 2d 469 (1983)*, however, the Court recognized that such a rigid definition is often too narrow to embrace the entire universe of "commercial speech." Id. (articulating a more fluid definition of commercial speech that takes into account, *inter alia,* the motive behind the speech); see also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561, 100 S. Ct. 2343, 2348, 65 L. Ed. 2d 341 (1980)* (defining commercial **[*21]** speech as "expression solely related to the economic interests of the speaker and its audience"). Pall's motive in issuing the press releases may have been, in part, to influence the public's perception about the outcome of litigation, but this perception is inextricably linked to Pall's business reputation and, concomitantly, its ability to sell its products. Accordingly, the press releases fall within the category of commercial speech.

Under the four factor test articulated in *Gordon and Breach*, however, the representations must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry. Examination of the scope of the press releases, however, would require this Court to look beyond the pleadings and could involve disputed factual issues. The inquiry is more appropriate on a motion for summary judgment. Similarly, Pall asks this Court to determine, on its motion to dismiss, whether the relevant statements are nonactionable statements of opinion or are indisputably true. Because the Court may be required to determine whether the statements are true, false, or misleading, the question is more appropriately discussed **[*22]** in the summary judgment context. Accordingly, Pall's motion to dismiss the Lanham Act and MDTPA [4] claims will be denied.

VII. Pall's Motion for Sanctions

Pall requests that the Court impose Rule 11 sanctions on Porous for asserting a motion for recusal. Pall contends, and this Court agrees, that the recusal motion was a baseless, improper attempt to manipulate the judicial process. After a careful review of *Rule 11*, the affidavit detailing fees charged by Pall's counsel, and the relevant case law, this Court concludes that sanctions are appropriate. Accordingly, Porous and attorney Alfred Edwall are hereby ordered to pay Pall's costs and attorney's fees in connection with their efforts to defend the recusal motion and assert the motion for sanctions.

CONCLUSION

Based on the foregoing, and all of the files, records and proceedings herein **IT IS HEREBY ORDERED** that:

1. Defendant's motion for judgment on the **[*23]** pleadings in Civ. No. 97-880 is **GRANTED;**

2. Defendant's motion to dismiss in Civ. No. 97-2084 is **GRANTED IN PART AND DENIED IN PART.** Defendant's motion to dismiss is granted as to Plaintiff's malicious prosecution claim but denied as to the Lanham Act and MDTPA claims.

3. Plaintiff's motion for recusal is **DENIED;**

4. Defendant's motion for Rule 11 sanctions is **GRANTED.** Porous and attorney Edwall are required to pay $ 10,167.00 for fees incurred in responding to Porous' recusal motion and $ 3,570.00 in fees for filing the related motion for sanctions.

LET JUDGMENT BE ENTERED ACCORDINGLY IN CIV. NO. 97-880.

/s/ Ann D. Montgomery

Ann D. Montgomery

UNITED STATES DISTRICT JUDGE

Dated: June 3, 1998

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[4] "Minnesota federal district courts have found that 'the Minnesota Deceptive Trade Practices Act mirrors the Lanham Act' and thus use the same analysis to evaluate false advertising claims that are simultaneously under the federal and state statutes." *Medical Graphics, 872 F.Supp. at 649*.

Serpa Corp. v. McWane, Inc.

United States District Court for the District of Massachusetts

June 10, 1998, Decided

Civil Action No. 97-11515-NG

Reporter

14 F. Supp. 2d 147 *; 1998 U.S. Dist. LEXIS 10764 **; 1998-1 Trade Cas. (CCH) P72,199

SERPA CORPORATION, Plaintiff, v. McWANE, INC., ANACO, formerly known as ANAHEIM FOUNDRY COMPANY and, TYLER PIPE INDUSTRIES, INC., Defendants.

Disposition: [1]** Defendants' motion to dismiss ALLOWED as to Counts One and Two and DENIED as to counts Three, Four, Five and Six.

Core Terms

distributor, antitrust, prices, antitrust violation, damages, terminated, competitor, products, anti trust law, intermediary, manufacturer, conspiracy, piping, motion to dismiss, defendants', elimination, merger, remote

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Inferences & Presumptions > General Overview

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In considering a motion to dismiss, the court must accept the well-pleaded factual averments and allegations of the non-moving party as true. All reasonable inferences are made in favor of the non-moving party.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Standing, Clayton Act**

Section 4 of the Clayton Act, specifically *15 U.S.C.S. § 15*, grants a private cause of action for damages to any person injured in business or property by reason of anything forbidden in the antitrust laws. An injured person may sue and recover treble damages and the costs of the suit, including reasonable attorney's fees. Notwithstanding the broad language of the statute, however, Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. The idea that any person whose injury was causally related to an antitrust violation has standing is incorrect; indeed, only certain classes of plaintiffs may arrogate to themselves the enforcement powers once reserved for the Attorney General.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN3[] **Clayton Act, Claims**

Plaintiffs bringing suit under the Clayton Act must meet certain standing requirements, including: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiffs alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws (antitrust injury); (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages, and (6) the risk of duplicative recovery and complex apportionment of damages. There is also a streamlined three-part standing inquiry focused on i) antitrust injury, ii) the directness of injury and causal nexus, and iii) the speculative nature of damages, duplicative recovery and complex apportionment of damages.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN4[] **Regulated Practices, Private Actions**

In order to prevail under the Sherman Act, a plaintiff must show actual injury, "caused" by the antitrust violation. Simply asserting a place on the chain of causation, or losses owing to a merger, is not enough; the plaintiff's injury must amount to a restraint on trade in the relevant market. In other words, a plaintiff must prove he or she is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry and be the target against which anticompetitive activity is directed.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Regulated Practices, Private Actions**

There is a pecking order of plaintiffs under the Sherman Act, favoring "competitors" and "consumers" as the preferred, though not exclusive, plaintiffs to allege antitrust injury.Cases brought by distributors, suppliers and commercial intermediaries are presumptively disfavored because such parties are held not to have suffered directly because of the lessening of competition.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

Clearly lacking antitrust injury, and thus having no standing, is the firm whose injury is caused merely by the efficiency effects of a vertical merger. For example, once a firm has integrated vertically into distribution by acquiring one or more existing distributors, it may reduce costs by dealing only with its wholly-owned distributors. A distributor terminated for this reason might certainly suffer injury-in-fact, but it would not suffer antitrust injury as long as there were alternative sources of the product.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN7[] **Private Actions, Standing**

An intermediary distributor may only bring antitrust claims when it: i) is injured by the direct antitrust violation of a rival; ii) suffers directly as a result of illegal distribution restraints or, iii) qualifies as an exception.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN8[] **Private Actions, Standing**

The mere fact that a plaintiff's rivals merge to the detriment of a competitor does not alone grant the competitor standing. While a merger that actually causes prices to rise along a given distribution chain may occasionally confer standing on those in the chain, the distributor's injuries are usually secondary to those of customers, who have suffered directly from the threat posed by increased prices or reduced selection.

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > Remedies > General Overview

Business & Corporate Law > ... > Remedies > Equitable Relief > Injunctions

HN9[] **Distributorships & Franchises, Termination**

A distributor may have standing to sue a manufacturer in the context of illegal distribution restraints. Distribution restraints directly limit the freedom of dealers to choose their own resale prices, territories, or customers, and may involve forcing intermediaries to participate in illegal conduct. A dealer terminated for failing to comply with the illegal restraint has standing to seek an injunction against the restraint or damages. Within this category, only those distributors whose prices are actually restrained have standing to sue.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN10[] **Private Actions, Standing**

In certain circumstances, the elimination of an intermediary effectively destroys competition. In such cases, the distributor's knowledge or authority makes it an integral part of the competitive structure and its injury is heavily intertwined with the core injury perpetrated by antitrust violators. To deny standing to the intermediary is to sanction the diminution of competition where it matters the most.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Private Actions, Standing**

The private plaintiff must show that the injury is not unduly remote from the violation, or duplicative of injury suffered by another. The "remoteness" of one plaintiff suggests the existence of a "superior" plaintiff for whom the antitrust injury was more direct. The principle is simple: if the superior plaintiff has sued, additional suit by the remote plaintiff may be unnecessary, duplicative, or "excessive." If the "superior" plaintiff has not sued, one may doubt the existence of any antitrust violation at all. Even if a distributor would otherwise qualify as a plaintiff under an exception, it will be denied standing when and if a preferred plaintiff is available to enforce the principles behind the Sherman Act.

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Judges: NANCY GERTNER, U.S.D.J.

Opinion by: NANCY GERTNER

Opinion

[*148] ***MEMORANDUM AND ORDER***

June 10, 1998

I. ***INTRODUCTION***

Plaintiff Serpa Corporation ("Serpa") brings this action against defendant corporations McWane ("McWane"), Anaco ("Anaco") and Tyler ("Tyler") alleging antitrust violations and injury stemming from the consolidation of several piping companies. The complaint charges the defendants with: violations **[*149]** of *15 U.S.C. § 15*, *Section 7* of the Clayton Act (Count One); violations of Section Two of the Sherman Act (Count Two); tortious interference with business advantage (Count Three); breach **[**2]** of the implied covenant of good faith and fair dealing (Count Four); tortious interference with contracts (Count Five); violations of M.G.L. ch. 93A (Count Six); and, breach of contract (Count Seven). Defendants have moved this court to dismiss Counts One through Six. Defendants' motion to dismiss is **ALLOWED** as to Counts One and Two and **DENIED** as to counts Three, Four, Five and Six.

II. ***FACTS***

Serpa is a manufacturer's representative for plumbing supplies. Between 1976 and 1996, Serpa was the exclusive distributor for certain Anaco plumbing supplies in New England. Anaco is a manufacturer of cast iron soil pipes ("CISP") and stainless steel no-hub joints known as "Fittings" and "Couplings." In combination, the products are used to transport human waste from buildings to sewer lines. Sales of the products were once made through exclusive sales representative firms, like Serpa. Sales representatives then sold the products to plumbing supply wholesalers.

Defendant Tyler was a former competitor of Anaco's in the CISP, Couplings and Fittings business. As both parties have noted, CISP, Couplings and Fittings are made to industry specifications and are virtually **[**3]** identical across companies; building supply wholesalers therefore select the piping products almost entirely on the basis of price. Serpa sold Anaco Couplings and Fittings and used its position as a regional representative to offer discounts to wholesalers within guidelines set by Anaco.

Serpa's complaint alleges that between November 1995 and August 1996, McWane acquired both its competitor, Tyler, and its supplier, Anaco. [1] McWane subsequently placed the marketing of Anaco products under the management of Tyler; on October 30, 1996, Anaco terminated Serpa as its New England sales representative. The plaintiff now argues that by terminating Serpa, defendants eliminated price competition in the Couplings and Fittings market and positioned themselves to raise prices in violation of state and federal laws designed to ensure competitive pricing and fair business practices. Defendants respond by arguing that Serpa lacks standing to assert federal antitrust protection and that further, plaintiff's state law claims should fail because they pivot on the federal antitrust action.

[4] III. *MOTION TO DISMISS STANDARD***

HN1[] In considering a motion to dismiss, this Court must accept the well-pleaded factual averments and allegations of the non-moving party as true. *Fleming v. Lind-Waldock & Co., 922 F.2d 20, 23 (1st Cir. 1990)*. All reasonable inferences are made in favor of the non-moving party. *Washington Legal Foundation v. Massachusetts Bar Foundation, 993 F.2d 962, 971 (1st Cir. 1993)*.

IV. *ANTITRUST STANDING DISCUSSION*

HN2[] Section 4 of the Clayton Act, *15 U.S.C. § 15*, grants a private cause of action for damages to "any person . . . injured in business or property by reason of anything forbidden in the antitrust laws." An injured person may sue and recover treble damages and the costs of the suit, including reasonable attorney's fees. Notwithstanding the broad language of the statute, however, "the lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*. The Supreme Court has rejected **[**5]** the idea that any person whose injury was causally related to an antitrust violation has standing; indeed, only certain classes of plaintiffs may arrogate to themselves the enforcement powers once reserved for the Attorney General. *See* Julian O. von Kalinowski, *Antitrust Laws* **[*150]** *and Trade Regulation*, § 160.02, 2d ed., (1997).

HN3[] Plaintiffs bringing suit under the Clayton Act must meet the standing requirements announced in *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* and *Sullivan v. Tagliabue, 25 F.3d 43, 45 (1st Cir. 1994)*. The enumerated requirements include: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiffs alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws ("antitrust injury"); (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages, and (6) the risk of duplicative recovery and complex apportionment of damages. *Sullivan, 25 F.3d at* ***[**6]*** *46*, *citing* *Associated General, 459 U.S. at 537-45*. The *Associated General* factors were further defined in *Gallant v. BOC Group Inc., 886 F. Supp. 202 (D.Mass. 1995)* which adopted a streamlined three-part standing inquiry focused on i) antitrust injury, ii) the directness of injury and causal nexus, and iii) the speculative nature of damages, duplicative recovery and complex

[1] According to the defendants' answer, McWane is itself the majority shareholder of Ransom Industries, Inc. ("Ransom"). Tyler pipe is an unincorporated division of Ransom which owns certain assets of Tyler and 100% of the stock of Anaco.

apportionment of damages. [2] In this case, the plaintiff has failed to meet both the first and second factors, obviating the need to discuss the third prong of antitrust standing inquiry.

1. *Antitrust Injury*

HN4[] In order to prevail under the Sherman Act, a plaintiff must show actual injury, "caused" by the antitrust violation. Simply asserting a place on the chain of causation -- or losses owing to a merger -- is not enough; the plaintiff's injury must amount to a restraint on trade in the relevant market. "In other words, a plaintiff must prove **[**7]** he [or she] is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry and be the target against which anticompetitive activity is directed." *Florida Seed Company, Inc. v. Monsanto Company, 915 F. Supp. 1167 (M.D. Ala. 1995)* (internal citations omitted).

In addition, the case law indicates ***HN5***[] a pecking order of plaintiffs, favoring "competitors" and "consumers" as the preferred, though not exclusive, plaintiffs to allege antitrust injury. *See* *SAS of Puerto Rico, Inc. v. Puerto Rico Telephone Co., 48 F.3d 39, 45*. Cases brought by distributors, suppliers and commercial intermediaries (collectively referred to as "distributors") are presumptively disfavored because such parties are held not to have suffered directly because of the lessening of competition. *Id. at 44*. A leading treatise on the subject notes:

> ***HN6***[] Clearly lacking antitrust injury, and thus having no standing, is the firm whose injury is caused merely by the efficiency effects of a vertical merger. For example, once a firm has integrated vertically into distribution by acquiring one or more existing distributors, it may reduce costs by dealing **[**8]** only with its wholly-owned distributors. A distributor terminated for this reason might certainly suffer injury-in-fact, but it would not suffer antitrust injury as long as there were alternative sources of the product.

Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** 432-33 (1997 Supp.), *citing* *Alberta Gas Chems. V. E.I. Dupont, 826 F.2d 1235, 1244-1246 (3d Cir. 1987)*, *cert. denied*, *486 U.S. 1059, 100 L. Ed. 2d 930, 108 S. Ct. 2830 (1988)*; *Bayou Bottling v. Dr. Pepper, 543 F. Supp. 1255 (W.D. La. 1982)*, *aff'd*, *725 F.2d 300 (5th Cir. 1984)* (plaintiff soft drink distributor did not suffer antitrust injury when it was prevented from acquiring a franchise due to defendant distributor's acquisition of franchise from defendant manufacturer); *Florida Seed, 915 F. Supp. 1167* (plaintiff distributor of lawn and garden products did not have standing to sue manufacturer who acquired plaintiff's competitor and subsequently terminated plaintiff as distributor).

HN7[] An intermediary distributor may only bring antitrust claims when it: i) is injured by the direct antitrust violation of a rival; ii) suffers directly as a result of illegal distribution restraints or, **[**9]** iii) qualifies as an exception.

[*151] a. *Direct antitrust violation of a rival*

The paradigmatic case of distributor standing is that of a plaintiff-distributor who operates at the same level of production as the defendant and is injured by a boycott or discriminatory pricing program aimed at driving the plaintiff out of the market, such as a car dealer denied parts by a parent or co-dealer. *See generally,* *Jay Edwards Inc. v. New England Toyota Distributor, Inc., 708 F.2d 814 (1st Cir. 1983)*, *cert. denied*, *464 U.S. 894, 78 L. Ed. 2d 231, 104 S. Ct. 241 (1983)*. [3] **[**10]** ***HN8***[] The mere fact that a plaintiff's rivals merge to the detriment of a competitor does not alone grant the competitor standing. *Cargill v. Monfort of Colo., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*. [4] **[**11]** While a merger that actually causes prices to rise along a given distribution

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[2] The same tripartite analysis is applied in *Sullivan, 25 F.3d at 47-51*.

[3] In the automobile industry, such practices are regrettably so common that they have led to the Automobile Dealers' Day in Court Act, *15 U.S.C.A. § 1222*.

[4] As some commentators have remarked, however, "standing should generally be denied when the plaintiff does not operate at the same level as the defendant unless (i) their interests are very proximate, as demonstrated by the necessity of a market response by the plaintiff to the defendant's violation, (ii) the plaintiff is the injured party whose interest will most likely lead to a vindication of the public interest, and (iii) duplicative recoveries can be avoided." Phillip E. Areeda & Herbert Hovenkamp,

chain may occasionally confer standing on those in the chain, see infra section 1(c), the distributor's injuries are usually secondary to those of customers, who have suffered directly from the threat posed by increased prices or reduced selection. [5]

b. *Illegal Distribution Restraints*

HN9[] A distributor may also have standing to sue a manufacturer in the context of illegal distribution restraints. Distribution restraints directly limit the freedom of dealers to choose their own resale prices, territories, or customers, and may involve forcing intermediaries to participate in illegal conduct. A dealer terminated for failing to comply with the illegal restraint has standing to seek an injunction against the restraint or damages. *See Caribe BMW, Inc. v. BMW Aktiengesellschaft, 19 F.3d 745 (1st Cir. 1994)* (car retailer's lost profits resulting from a maximum price fixing agreement between the retailer and its supplier constituted antitrust injury and provided the retailer with the requisite standing). Significantly, **[**12]** within this category, only those distributors whose prices are actually restrained have standing to sue. [6]

c. *McCready*

A final exception to the bar against distributor standing may be available under *Blue* **[*152]** *Shield of Virginia v. McCready, 457 U.S.* ***[**13]*** *465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. There, a health plan subscriber who was denied psychotherapy benefits provided by psychologists sued her insurer alleging a conspiracy to restrain competition in the psychotherapy market. Prior to McCready's challenge, it was the policy of Blue Shield of Virginia to refuse reimbursement of psychotherapy services provided by a psychologist while covering similar services offered by psychiatrists and physicians. McCready claimed that she had "been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers." *McCready, 457 U.S. at 479*. The Court eschewed the defendant's claim that standing should be limited to psychologists, the targets of the alleged conspiracy. Instead, the Court held that the plaintiff had standing because denying reimbursement for the costs of the treatment was "the very means by which it is alleged that Blue Shield sought to achieve its illegal ends." *Id.*

Antitrust Law, (Volume II), P 360h(2), 207 (1995). *See e.g., Fischer v. NWA, Inc., 883 F.2d 594 (8th Cir. 1989)*, *cert. denied*, ***495 U.S. 947, 109 L. Ed. 2d 531, 110 S. Ct. 2205 (1990)*** (regional airline, which had an exclusive regional service agreement with a commercial airline, did not suffer antitrust injury when terminated because commercial airline acquired another airline and no longer needed regional airline's services); *Alberta Gas, 826 F.2d 1235*, (methanol producer had not suffered antitrust injury when a competitor acquired another corporation); *John Lenore v. Olympia Brewing Co., 550 F.2d 495 (9th Cir. 1977)* (beer distributor did not have standing to sue after the acquisition of one brewer by another, and the subsequent termination by the latter of the distributor; *G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762 (2d Cir. 1995)*, *cert. denied*, ***516 U.S. 944, 133 L. Ed. 2d 304, 116 S. Ct. 381 (1995)*** (plaintiff soft drink distributor did not suffer antitrust injury when its contract with bottler was terminated because bottler was driven out of business by defendant soft drink manufacturer).

[5] *See Brian Clewer v. Pan Am. World Airways, 674 F. Supp. 782 (C.D.Cal. 1986)*, aff'd ***811 F.2d 1507*** (9th Cir.), *cert. denied*, ***484 U.S. 925, 98 L. Ed. 2d 248, 108 S. Ct. 288 (1987)*** (where an airline was ruined by an alleged predatory pricing scheme, ticketing suppliers to the victim do not have standing to sue the predators).

[6] *See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)* (denying standing to distributor that challenged a maximum resale price maintenance scheme that ARCO imposed on its dealers because the distributor was not a dealer whole prices were restrained). As the First Circuit recognized in *SAS*:

> . . . there are patterns in the antitrust standing cases that offer considerable guidance. In general, such a supplier (including an employee who supplies labor) is held not to have suffered "antitrust injury"; while there may be a violation and causal harm to the supplier, the failed business is the immediate victim and the preferred plaintiff. *SAS, 48 F.3d at 44* (internal citations omitted).

McCready recognized that ***HN10***[] in certain circumstances, the elimination of an intermediary effectively destroys competition. In such cases, the distributor's **[**14]** knowledge or authority makes it an integral part of the competitive structure and its injury is heavily intertwined with the core injury perpetrated by antitrust violators. To deny standing to the intermediary is to sanction the diminution of competition where it matters the most.

The Court in *McCready* acknowledged that if an end-user is not the best protector of choice and price in the relevant market, competition may be effectively preserved by another kind of plaintiff. As the Court observed in *SAS*, "The most obvious reason for conferring standing on a second-best plaintiff is that, in some general category of cases, there may be no first best with the incentive or ability to sue." *SAS of Puerto Rico, 48 F.3d at 45*, *citing Associated General, 459 U.S. at 542*.

Whether or not *McCready* created a bona fide test of standing is the subject of some debate, *see Gallant, 886 F. Supp. at 208*, but it is largely irrelevant. *McCready*-like standing only applies when the flash point of competition lies outside of the customer or consumer. *McCready*, as well as the other vertical distributor exceptions, affirm that the intermediary must either be a damaged participant **[**15]** in the very market in which competition is diminished (that is, it must share characteristics of parties injured by horizontal conspiracies) or stand in the shoes of end-users who cannot or will not sue.

2. *Remoteness of Injury and Causal Nexus*

HN11[] The private plaintiff must also show that the injury is not unduly remote from the violation, or duplicative of injury suffered by another. The "remoteness" of one plaintiff suggests the existence of a "superior" plaintiff for whom the antitrust injury was more direct. The principle is simple: "If the superior plaintiff has sued, additional suit by the remote plaintiff may be unnecessary, duplicative, or "excessive." If the "superior" plaintiff has not sued, one may doubt the existence of any antitrust violation at all." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, (Volume II), P 360c(3), 196 (1995). Even if a distributor would otherwise qualify as a plaintiff under an exception, it will be denied standing when and if a preferred plaintiff is available to enforce the principles behind the Sherman Act.

V. *APPLICATION TO SERPA*

The crux of the plaintiff's complaint is that its termination, as well as the **[**16]** merger of Anaco and Tyler, enabled defendants to set anticompetitive prices for Couplings and Fittings.

Ultimately, there is no dispute that the defendants' merger effectively reorganized Serpa out of the Couplings and Fittings market. Serpa was a classic distributor within a two company market that has been made redundant by McWane's restructuring. [7] As **[*153]** a consequence, Serpa's business has been diminished or eliminated because of the defendants' decision. The only question is how to characterize the role Serpa played as a distributor and the significance of its termination in order to determine whether it has standing.

I find that Serpa's alleged injuries are not antitrust injuries within the meaning of the phrase and are too remote to allow it to pursue its claims.

First, Serpa is plainly a "downsized" distributor. It is not challenging the practices of a rival, but rather the actions of an entity **[**17]** at a different level in the distribution chain in merging with another manufacturer and Serpa's competitor distributor.

Second, apart from the vague allegation of price increases, Serpa alleges no specific illegal restraint of trade.

Third, no exception applies. Nothing in the consolidation of Tyler and Anaco's piping distributors suggests that Serpa's termination was integrally related to an antitrust violation. Despite the fact that Serpa's business is threatened, its elimination was not a necessary instrument to effectuate the alleged conspiracy. [8] *McCready*

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[7] The streamlining of the two-party New England piping trade is not, of itself, a violation of the Sherman Act.

exception is only available where the distributor is the flashpoint of competition and does not apply here because the plaintiff had only marginal pricing discretion prior to its elimination.

[18]** Finally, and most importantly, to the extent Serpa alleges an antitrust conspiracy exists resulting in higher prices, [9] the injured parties -- those paying higher prices for standard piping products -- can themselves sue to enforce the statute. Here, piping wholesalers have both the incentive and the opportunity to bring their own antitrust claims. If prices have in fact risen due to monopolistic practices in this market, we may expect relevant consumers to seek the protection of the statute by bringing their own suit.

Defendants' motion with respect to Count I is **ALLOWED**. Serpa's allegation of a "conspiracy" under Section 2 of the Sherman Act also fails because nothing in the record before **[**19]** me points to the existence of an illegal reorganization in violation of antitrust laws. Accordingly, defendants' motion with respect to Count II is **ALLOWED**.

Defendants have not met their burden on a motion to dismiss with respect to the state law claims. Plaintiff's complaint survives a motion to dismiss because it has sufficiently alleged each of the requisite elements of the state law cause of actions for tortious interference with business advantage, breach of the implied covenant of good faith and fair dealing, tortious interference with contracts and violations of Mass. General Law 93A. Since there is complete diversity among the parties and in light of the amount in controversy, Counts Three, Four, Five and Six are **DENIED**.

A status conference will be held on the remaining claims on Tuesday, June 9, 1998, at 3:30 p.m. in courtroom 4 on the 12th floor.

SO ORDERED.

Dated: June 10, 1998

NANCY GERTNER, U.S.D.J.

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[8] Plaintiff points to *Engine Specialties, Inc. v. Bombardier Limited, 605 F.2d 1 (1st Cir. 1979)* (Italian minicycle manufacture had standing to assert that anticompetitive scheme between world's largest minicycle maker and a local distributor violated plaintiffs rights) to suggest that exclusive distributors have standing to sue under Section 4 of the Clayton Act. I find, however, that the plaintiff has misconstrued *Bombadier* which provides that sub-distributors lack standing. In the instant case, Serpa's place on a vertical chain makes it more akin to a sub-distributor than a competitor.

[9] Even accepting plaintiff's allegation that prices for Couplings have risen 7% (see *Plaintiff's Memorandum of Law in Support of Its Opposition to Defendants' Motion to Dismiss* at 3), the price change amounts to a de minimus increase and is not evidence of above-market pricing sufficient to show antitrust injury.

City of Pittsburgh v. West Penn Power Co.

United States Court of Appeals for the Third Circuit

March 20, 1998, Argued ; June 12, 1998, Filed

No. 98-3014

Reporter

147 F.3d 256 *; 1998 U.S. App. LEXIS 12703 **; 1998-1 Trade Cas. (CCH) P72,178

CITY OF PITTSBURGH, Appellant v. WEST PENN POWER COMP., d/b/a ALLEGHENY POWER; ALLEGHENY POWER SYSTEM, INCORPORATED; DUQUESNE LIGHT COMPANY; DQE, INC.

Prior History: **[**1]** On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. No. 97-1772).

Disposition: Affirmed.

Core Terms

antitrust, Redevelopment, electricity, electric service, certificate, anti trust law, district court, damages, retail, Clayton Act, regulated, proposed merger, lessen, causal connection, injunctive relief, electric utility, antitrust violation, Sherman Act, allegations, defendants', merger, rates, motion to dismiss, speculative, monopolies, compete, bids, anticompetitive, proceedings, permission

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 18*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3[] **Defenses, Demurrers & Objections, Motions to Dismiss**

When deciding a motion to dismiss, it is the usual practice for a court to consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN4[] **Energy & Utilities, State Regulation**

In Pennsylvania, the regulation of electric service distribution traditionally affords utility companies natural monopolies. The industry operates in a comprehensive regulatory structure supervised by the Pennsylvania Public Utility Commission (PUC), which is an independent administrative agency authorized by the state to regulate public utility companies doing business in Pennsylvania. *66 Pa. Cons. Stat. Ann. §§ 301* and *501*.

Energy & Utilities Law > Utility Companies > Contracts for Service

Transportation Law > Carrier Duties & Liabilities > Certificates of Public Convenience > Amendment, Cancellation & Suspension

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Utility Companies > General Overview

Transportation Law > Carrier Duties & Liabilities > Certificates of Public Convenience > General Overview

Transportation Law > Carrier Duties & Liabilities > Certificates of Public Convenience > Issuance

HN5[] **Utility Companies, Contracts for Service**

The Pennsylvania Public Utility Code gives the Public Utility Commission (PUC) broad power to "supervise and regulate" public utilities. *66 Pa. Cons. Stat. Ann. § 501(b)*. The PUC is mandated to act in the public interest in overseeing public utilities. A utility company must obtain a certificate of public convenience from the PUC in order to provide retail electric service to a particular area. *66 Pa. Cons. Stat. Ann. § 1101*. Each certificate describes the geographic territory in which the holder is permitted to supply electric service. A certificate may be amended only with permission from the PUC, pursuant to *66 Pa. Cons. Stat. Ann. § 1102*. A utility is able to enter another's service area only if it demonstrates that the area's certificated utility is providing inadequate service in the proposed new territory. Generally, the retail rates that a utility charges must be approved by the PUC. *66 Pa. Cons. Stat. Ann. § 1303*. Further, the PUC reviews all proposed utility mergers. *66 Pa. Cons. Stat. Ann. §§ 1102* and *2811*.

Energy & Utilities Law > Utility Companies > Contracts for Service

HN6[] **Utility Companies, Contracts for Service**

A certificate of public convenience makes it lawful for a public utility to provide service within a defined territory, and imposes on the public utility an obligation to provide service in that territory.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

HN7[] **Costs & Attorney Fees, Clayton Act**

Section 4 of the Clayton Act, codified at 5 U.S.C.S. § 15, which provides for treble damages based on antitrust violations, states that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN8[] **Remedies, Injunctions**

Section 16 of the Clayton Act, codified at *15 U.S.C.S. § 26*, which provides for injunctive relief, states, in pertinent part that any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN9[] **Appeals, Standards of Review**

The circuit court exercises plenary review over the district court's grant of motions to dismiss. In so doing, the circuit court accepts as true all factual allegations in the complaint and will not affirm the motion to dismiss unless it is certain that no relief can be granted under any set of facts which could be proved.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN10[] **Clayton Act, Claims**

The courts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable. The courts do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner.

Antitrust & Trade Law > Regulated Industries > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN11[] **Antitrust & Trade Law, Regulated Industries**

Full price regulation dramatically alters the calculus of antitrust harms and benefits.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN12[] **Antitrust & Trade Law, Exemptions & Immunities**

Regulated industries, even those that historically have been treated as natural monopolies, are not exempt from the antitrust laws.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > The Judiciary > Case or Controversy > Advisory Opinions

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN13[] **Justiciability, Standing**

The question of standing is a threshold inquiry in all actions. However, the constitutional and prudential requirements of standing take on particular significance in the context of the antitrust laws, where a balance must be struck between encouraging private actions and deterring legitimate competitive activity through overly vigorous enforcement. Thus, in undertaking this standing analysis, the court must remain mindful of the purposes and goals of the antitrust laws -- to preserve and promote competition. The constitutional standing inquiry -- namely, whether there is a "case" or "controversy" within the meaning of *U.S. Const. art. III, § 2* -- is augmented by consideration of prudential limitations. Without these prudential considerations, the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent and judicial intervention may be unnecessary to protect individual rights.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Civil Procedure > ... > Justiciability > Standing > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN14[] **Standing, Requirements**

The Supreme Court outlines the factors that courts should consider when determining whether a party has standing to bring a private action under the antitrust laws. The factors the courts are to examine are (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN15[] **Clayton Act, Claims**

The antitrust standing inquiry is essentially the same under both §§ 4 and 7 of the Clayton Act, codified at 5 U.S.C.S. §§ 15 and 18, except that when seeking injunctive relief, the complainant need only demonstrate a significant threat of injury from an impending violation of the antitrust laws. Furthermore, this court has emphasized that the antitrust standing inquiry is not a black-letter rule, but rather, is essentially a balancing test comprised of many constant and variable factors.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN16[] **Private Actions, Standing**

A showing of antitrust injury is a necessary but insufficient condition of antitrust standing. The district court should first address the issue of whether the plaintiff suffered an antitrust injury. If antitrust injury is not found, further inquiry is unnecessary. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN17[] **Private Actions, Remedies**

The question of whether the plaintiff has experienced antitrust injury depends in part on its source -- did the injury flow from that which makes the defined acts unlawful. To answer this question, the court must examine the causal connection between the purportedly unlawful conduct and the injury.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN18[] **Private Actions, Remedies**

Without demonstrating that there was competition, a plaintiff cannot show that the defendants' actions have had or will have anticompetitive effects.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

HN19[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act prohibits contracts, combinations or conspiracies "in restraint of trade." *15 U.S.C.S. § 1*. Under the Sherman Act agreements can only restrain that which has occurred, is occurring, or is reasonably likely to occur.

Energy & Utilities Law > Antitrust Issues > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN20[] **Energy & Utilities Law, Antitrust Issues**

Section 7 of the Clayton Act, codified at *15 U.S.C.S. § 18*, prohibits all mergers where in any line of commerce, or in any activity affecting commerce in any section of the country, the effect may be substantially to lessen competition, or to tend to create a monopoly.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN21[] **Remedies, Damages**

Section 16 of the Clayton Act, codified at *15 U.S.C.S. § 26*, does permit injunctive relief against threatened loss or damage.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN22[] **Private Actions, Remedies**

Antitrust injury must be caused by the antitrust violation -- not a mere causal link, but a direct effect.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN23[] **Private Actions, Remedies**

A plaintiff cannot be injured in fact by private conduct excluding him from the market when a statute prevents him from entering that market in any event.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN24[] Clayton Act, Claims

The plaintiff in an action under § 4 of the Clayton Act, codified at 5 U.S.C.S. § 15, must establish that he actually "sustained" injury-in-fact to "business or property," and the "by reason of"' language of § 15 insists that such injury be caused by the violation. The requirements for injunctive relief are similar except that the statutory language of Section 16 of the Clayton Act, codified at 5 U.S.C.S. § 26, permits relief upon a showing of "threatened loss." However, the plaintiff must still demonstrate that this threatened injury would be caused by the alleged antitrust violation.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Energy & Utilities Law > Utility Companies > Liability

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

HN25[] Private Actions, Remedies

A consumer alleging antitrust violations cannot obtain damages without showing that he actually paid more than he would have paid in the absence of the violation.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN26[] Remedies, Damages

The proper measure of damages for a price-fixing violation under the Sherman Act is the difference between the prices actually paid and those that would have been paid absent the conspiracy.

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Judges: BEFORE: BECKER, Chief Judge, RENDELL, and HEANEY, * Circuit Judges. HEANEY, Senior Circuit Judge, dissenting.

Opinion by: RENDELL

Opinion

[*258] OPINION OF THE COURT

RENDELL, Circuit Judge.

Appellant, the City of Pittsburgh, filed this antitrust action **[**2]** against West Penn Power Company, d/b/a Allegheny Power, and Duquesne Light Company alleging that the two companies entered into a pre-merger agreement in restraint of trade and that their proposed merger would substantially lessen competition or tend to create a monopoly. The City claims that an agreement between Allegheny Power and Duquesne Light to withdraw Allegheny Power's application before the Public Utility Commission to provide electric service to two Redevelopment Zones within the City violated *Section 1* of the Sherman Act. [1] The City also seeks injunctive relief against the proposed merger between the two utilities arguing that it violates *Section 7* of the Clayton Act. [2]

[3] [*259]** The district court granted the utility companies' motions to dismiss, finding that given the allegations of the complaint, the City lacked standing because it had not experienced an antitrust injury. Because we agree that the City has failed to allege that it meets the prudential requirements of antitrust standing, we will affirm the decision of the district court.

I.

FACTUAL BACKGROUND AND ALLEGATIONS

As an initial matter, we must determine the extent of our consideration of the materials submitted by the parties. ***HN3***[] When deciding a motion to dismiss, it is the usual practice for a court to consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record. See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990). However, the parties here have provided the court with numerous documents pertaining to the regulatory proceedings that are at the heart of the instant controversy. We note -- as did the district court -- that it can be, and is in this instance, proper to consider these documents in reviewing a motion to dismiss. See *Pension Benefit Guar. Corp. v. White Consol.* ***[**4]*** *Indus., 998 F.2d 1192, 1196 (3d Cir. 1993)* (finding that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff 's claims are based on the document. Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied."). Our recounting of the averments of the complaint, therefore, is informed

* The Honorable Gerald W. Heaney, Senior United States Circuit Judge for the Eighth Circuit sitting by designation.

[1] ***HN1***[] *Section 1* of the Sherman Act provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*.

[2] ***HN2***[] *Section 7* of the Clayton Act, *15 U.S.C. § 18*, states the following:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

by the context provided by these documents and other public records of which we can take judicial notice. [3] Our factual recitation will also include a short discussion of the nature of the utility industry in Pennsylvania which provides the regulatory context of this case.

The City of Pittsburgh, located in Allegheny County, is currently embarking on a plan to revitalize several urban areas, called the Redevelopment ***[**5]*** Zones, which were formerly industrial sites. [4] According to the City's plans, these currently vacant sites will eventually be home to industrial, commercial and residential activity. Compl. PP 12, 13. The City believes that competition for retail electric service would facilitate economic development in these areas. Id. P 14. This desire for competition comes at a time when the regulatory landscape for utilities in Pennsylvania is undergoing significant change. ***HN4***[] In Pennsylvania, the regulation of electric service distribution has traditionally afforded utility companies natural monopolies. See *Barasch v. Pennsylvania Pub. Util. Comm'n, 119 Pa. Commw. 81, 546 A.2d 1296, 1298 (Pa. Commw. Ct. 1988)*. The industry operates in a comprehesive regulatory structure supervised by the Pennsylvania Public Utility Commission ("PUC"), which is an independent administrative agency authorized by the state to regulate public utility companies doing business in Pennsylvania. *66 Pa. C.S.A. §§ 301*, *501*. ***HN5***[] The Pennsylvania Public Utility Code gives the PUC broad power to "supervise and regulate" public utilities. Id. *§ 501(b)*. The PUC is mandated to act in the public interest in overseeing public ***[**6]*** utilities. A utility company must obtain a certificate of public convenience from the PUC in order to provide retail electric service to a particular area. Id. *§ 1101*. [5] Each certificate describes the geographic territory in which the holder is permitted to supply electric service. Id. A **[*260]** certificate may be amended only with permission from the PUC, pursuant to *66 Pa.C.S.A. § 1102*. Historically, a utility is able to enter another's service area only if it demonstrates that the area's certificated utility is providing inadequate service to customers in the proposed new territory. See *Lansberry, Inc. v. Pennsylvania Pub. Util. Comm'n, 66 Pa. Commw. 381, 444 A.2d 832, 834-35 (Pa. Commw. Ct. 1982)* (discussing requirement of demonstrating inadequacy of service in context of PUC certificate to transport). In addition, generally, the retail rates that a utility charges must be approved by the PUC. *66 Pa. C.S.A. § 1303*. For example, the rates of both Allegheny Power and Duquesne Light are now, and have always been, subject to regulatory approval by the PUC. Further, the PUC reviews all proposed utility mergers. Id. *§§ 1102*, *2811*. [6]

[**7]

Recently, the Pennsylvania legislature passed the Electricity Generation Customer Choice and Competition Act. Id. *§ 2801 et seq*. The Competition Act sets forth a plan that will gradually introduce competition within the retail generation function of the electric utility industry. [7] This legislation envisions a transition from an industry which is largely regulated to one where there is a competitive market. This statute recognizes continued PUC oversight of electricity ***[**8]*** generation during the "transition" period from January 1, 1997 to January 1, 2001. Id. §§ 2804, 2806. While the Competition Act will introduce some competition among electric service providers in Pennsylvania,

[3] Neither party contests the authenticity of these documents and all were submitted by the parties as the joint appendix in this case.

[4] The two areas to be redeveloped are the 123 acre "South Side Works" and the 233 acre "Nine Mile Run." Compl. P 12.

[5] ***HN6***[] A certificate of public convenience "makes it lawful for [a] public utility to provide service within a defined territory, and imposes on the public utility an obligation to provide service in that territory." *Lukens Steel Co. v. Pennsylvania Pub. Util. Comm'n, 92 Pa. Commw. 530, 499 A.2d 1134, 1136 n.1 (Pa. Commw. Ct. 1985)*.

[6] During the pendency of this litigation, the Allegheny Power and Duquesne Light merger was conditionally approved by the PUC. See 66 U.S.L.W. 2689, 2696-97 (U.S. May 19, 1998) (discussing PUC decision In Re Joint Application of DQE Inc., Pa. P.U.C., No. A-110150F.0015, 4/30/98).

[7] In its plans for the restructuring of the electric utility industry in Pennsylvania, the legislature distinguishes between the functions of generation, transmission, and distribution of electricity. Under the new statutory provisions, the transmission and distribution of electricity will continue to be treated as a natural monopoly and will still be subject to the supervision of the PUC. *66 Pa. C.S.A. § 2801 et seq*.

it does not entirely displace the regulatory function of the PUC. Because the Competition Act did not alter the statutory requirement that Allegheny Power petition the PUC to amend its certificate, that Act's passage does not alter our analysis of this case. At all times relevant to the events recounted in the City's complaint, Allegheny Power and Duquesne Light were operating under the regulated industry conditions. [8]

[**9]

In the summer of 1996, Allegheny Power and Duquesne Light were the only electric utilities possessing certificates of public convenience from the PUC to provide electric service in Allegheny County. Compl. P 17. It is uncontested that Allegheny Power's certificate does not permit it to provide electric service to the area of the City in which the Redevelopment Zones are located. JA at 197 (P 11). Duquesne Light is the only utility with a certificate to provide electric service to this area of the City. JA at 195 (P 1). Duquesne Light claims that its certificate grants it the exclusive right to provide power to the Redevelopment Zones. Compl. P 28. Because of its belief that competition for retail electric power was "essential" to the success of this redevelopment effort, and because Allegheny Power's tariff rates are substantially lower than those of Duquesne Light, the City entered into discussions with Allegheny Power regarding the possibility of having Allegheny Power submit a proposal to provide electric service to the Redevelopment Zones. Id. PP 18, 20, 26. In furtherance of its goal of obtaining competitive utilities for the area, the City filed a "Petition in Support of ***[**10]*** Choice for Retail Electric Service Within Certain Redevelopment Zones Within the City of Pittsburgh" with the PUC in September of 1996. Id. P 22. Allegheny Power intervened in support of this petition and also filed a separate application with the PUC for permission to supply electrical service to the Redevelopment Zones. Id. PP 24, 30. Duquesne Light opposed both of these petitions. Id. PP 27, 32.

In their petitions before the PUC both the City and Allegheny Power contested Duquesne **[*261]** Light's assertion of exclusive rights. A review of the applications made to the PUC is useful to clarify exactly what the City and Allegheny Power were seeking with respect to Allegheny Power's ability to offer electric service in the Redevelopment Zones. In its filing, the City requested that the PUC "take actions necessary to allow choice and competition for retail electric service in two discrete areas in the City undergoing redevelopment . . . wherein Duquesne Light Company .. . and [Allegheny Power Company] . . . would compete for new customers and new electric load." JA at 194 (emphasis added). Further, the City stated in this petition that "to the best of the City's knowledge, ***[**11]*** Duquesne is at the present the only electric utility possessing a certificate of public convenience ("certificate") from the Commission to serve the City and its citizens." JA at 195 (P 1). In its reply to Duquesne Light's Answer to the City's Petition, the City states that it is requesting that the "two utilities, Duquesne and [Allegheny Power], upon the latter's application and grant therefor, hold overlapping certificates to provide retail electric service in the two discrete Redevelopment Zones . . ." JA at 223 (P 24).

In its filing to intervene in support of the City's petition, Allegheny Power asserted that it would "apply for authority to provide retail electric service in the Redevelopment Areas and that subject to approval of the Commission, [Allegheny Power] will provide retail electric service to the Redevelopment Areas pursuant to [Allegheny Power's] tariff rates and terms." JA at 200 (P 3). In its own application to the PUC, Allegheny Power requested approval for the utility "to begin to offer, render, furnish or supply electric service in two specific additional territories within the boundaries of the City of Pittsburgh." JA at 235 (emphasis added). These ***[**12]*** documents make clear that both the City and Allegheny Power were applying to the PUC so that Allegheny Power would be given the regulatory permission to begin to supply electric power in the area of the Redevelopment Zones.

In November of 1996, the Urban Redevelopment Authority of Pittsburgh [9] issued a Request for Proposals ("RFP") soliciting bids for the provision of the "electric utility infrastructure development" of the Redevelopment Zones. Compl. P 33. Both Allegheny Power and Duquesne Light responded to the RFP with significantly different bids,

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[8] While the statute authorizes the initiation of "pilot programs" in 1997, the parties in the present case have not contended that they were participants in this program. *66 Pa. C.S.A. § 2806 et seq*.

[9] According to the City, the Redevelopment Authority "works closely with the City to implement redevelopment plans that support and are consistent with the City's economic development objectives." Compl. P 33.

Allegheny Power's being the lower of the two. Id. P 35. On February 25, 1997, an Administrative Law Judge ("ALJ") held a prehearing conference on Allegheny Power's PUC application. At this hearing the ALJ set a schedule for the submission of testimony regarding Allegheny Power's application and scheduled further hearings for the week of June 9, 1997. Id. P 39. In March of 1997, the PUC consolidated the proceedings involving the City's petition with those of Allegheny Power's application. Id. P 40.

[**13]

On April 7, 1997, Duquesne Light and Allegheny Power announced their intention to merge. Id. P 42. The City alleges that under the terms of the premerger agreement, the two utilities agreed that they would not file any applications with the government without prior consultation and would not make any changes with respect to rates without first consulting each other. Id. P 45. The City avers that these agreements constitute impermissible premerger coordination. Id. P 46. Later in April, Duquesne Light requested a stay of the PUC proceedings before the ALJ, which was denied. Id. P 48, 50. On June 6, 1997, Allegheny Power filed a petition to withdraw its PUC application and to withdraw as an intervenor in the City's pending PUC petition. Id. P 52. The ALJ granted these petitions. Id. P 54. After filing this complaint in federal court, the City petitioned the PUC for a stay of the regulatory proceedings. JA at 445. When this petition was denied, the City withdrew its petition seeking choice for retail electric service. JA at 523-28. Because the City's petition and Allegheny Power's application were withdrawn, the PUC never made a determination as to whether Duquesne ***[**14]*** Light's certificate gave it exclusive rights to serve the Redevelopment Zones or whether **[*262]** the Commission could or would amend Allegheny Power's certificate in order to permit it to provide electric service in these areas.

In its complaint, the City contends that the actions of Allegheny Power and Duquesne Light violated *15 U.S.C. § 1* ("the Sherman Act") and *15 U.S.C. § 18* ("the Clayton Act"). The City asserts that it has suffered the following damage as a result of the alleged Sherman Act violations: "expending significant efforts to bring competition to the Redevelopment Zones; paying higher, non-competitive rates for electric utility service generally; and losing the opportunity to have lower electric service charges .. . ." Compl. P 59. The City seeks treble damages for the alleged Sherman Act violation. [10] The City further argues that a merger between the two utility companies violates the Clayton Act in that it would have anticompetitive effects, and thus seeks injunctive relief to prevent the proposed merger. [11] Id. P 66. The City also raises the related state law claims of restraint of trade, civil conspiracy, breach of contract, tortious interference, breach of good ***[**15]*** faith and fair dealing, and detrimental reliance.

[**16]

Allegheny Power and Duquesne Light each moved to dismiss the City's complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*. This motion was referred to a Magistrate Judge who issued a report recommending that the motions be granted. On January 6, 1998, the district court adopted this report thereby granting defendants' motions to dismiss

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[10] ***HN7***[] Section 4 of the Clayton Act, which provides for treble damages based on antitrust violations, states as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15.

[11] ***HN8***[] Section 16, which provides for injunctive relief, states, in pertinent part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . . *15 U.S.C. § 26*.

and declining to exercise jurisdiction over the City's state law claims. The City filed this timely appeal. Our jurisdiction is founded on *28 U.S.C. § 1291*. [12]

II.

THE DISTRICT COURT'S RULING

The district ***[**17]*** court granted the defendants' motions to dismiss because the City lacked standing to bring an antitrust claim. It reasoned that there had been no antitrust injury to the City for two reasons:

First, since Allegheny Power and Duquesne Light had not engaged in competition in light of their regulated provision of services, the agreement between Duquesne Light and Allegheny Power to withdraw Allegheny Power's bid, as well as the proposed merger, did not lessen competition. *City of Pittsburgh v. West Penn Power Co., 993 F. Supp. 332, 1998 WL 64074*, at *4 (W.D. Pa. 1998). As to the City's claim that the proposed merger would eliminate prospective competition, the court found this claim to be too speculative to be actionable. Id.

Second, the court found that the City was denied an opportunity that was contingent on the decision of the PUC and thus, the fact that no competition existed was the result of the regulatory structure. Id. at *5. The district court found that as the City's alleged damages were not the result of harm to competition, they did not constitute the type of injury the antitrust laws were intended to prevent. Id. at *4-5. The district court ***[**18]*** therefore concluded that, because any injury that was **[*263]** experienced or threatened was not an antitrust injury, the City lacked standing to pursue its claims under the Sherman and Clayton Acts. Id. at *5.

III.

ISSUES ON APPEAL

The City contests the district court's conclusion, arguing that the allegations of the complaint regarding the loss of competition are sufficient to allege the type of injury the antitrust laws are designed to prevent. It contends that the district court's ruling that the City did not have standing due to lack of antitrust injury fails to properly consider not only its allegations but also the applicable law regarding antitrust injury. We review plaintiff 's complaint not to determine whether the City has averred harm to competition -- which it has -- but, rather, to determine whether the injury the City alleges can legally form the basis for relief under the antitrust laws.

The City contends that the district court ignored the allegations of the elimination of competition, arguing that the court should have taken the allegations of its complaint at face value. Yet ***HN10***[] our courts have an obligation in matters before them to view the complaint as a whole ***[**19]*** and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable. We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner. [13] In scrutinizing plaintiff's claim in this way at the outset, we are mindful of the balance that must be struck in assessing antitrust claims. As the Supreme Court stated, referring to standing in the context of § 4 of the Clayton Act:

> Neither the statutory language nor the legislative history of § 4 offers any focused guidance on the question of which injuries are too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under § 4; indeed, the unrestrictive language of the section, and the avowed breadth of the congressional

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[12] ***HN9***[] We exercise plenary review over the district court's grant of defendants' motions to dismiss. *Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 277 (3d Cir. 1996)*. In so doing, we accept as true all factual allegations in the complaint and will not affirm the motion to dismiss "unless it is certain that no relief can be granted under any set of facts which could be proved." *Fuentes v. South Hills Cardiology, 946 F.2d 196, 201 (3d Cir. 1991)* (citation omitted).

[13] For example, we need not accept as true "unsupported conclusions and unwarranted inferences." *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 417* (3d Cir.), cert. denied, ***139 L. Ed. 2d 335, 118 S. Ct. 435 (1997)***. Nor can we "assume that the [plaintiff] can prove facts that it has not alleged . . . ." *Associated Gen. Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*.

> purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application.

Blue Shield of Virginia v. McCready, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982).

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Regulatory Framework

The present case arises in a factual context which is substantially different from that of most antitrust cases. The plaintiff has alleged anticompetitive behavior in an industry which is highly regulated: those who wish to compete to provide their services must obtain a certificate from the PUC to do so. As the First Circuit has explained, ***HN11***[] "full price regulation dramatically alters the calculus of antitrust harms and benefits." *Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990)* (holding that alleged price squeeze did not violate Sherman Act because utility's rates were regulated). Similarly, here, the regulation which frames the issue is the statutory requirement that a utility obtain permission from the PUC, in the form of a certificate, in order to provide electric service to a particular geographic region.

The Supreme Court has made clear that ***HN12***[] regulated industries -- even those that historically have been treated as natural monopolies -- are not exempt from the antitrust laws. See *Otter Tail Power Co. v. United States , 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*. However, in this case, the comprehensive ***[**21]*** regulatory framework significantly restricts the nature of the competition which is permitted. While it is true that the regulatory landscape of the electric power industry is in the process of changing, even the Competition Act does not anticipate a completely **[*264]** "free market" for electric services. Rather, the changes will result in a form of regulated competition. Further, in the words of the Schuylkill Energy court, "We will not attempt to predict the future of competitive retail access in Pennsylvania." *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 416* (3d Cir.), cert. denied, *139 L. Ed. 2d 335, 118 S. Ct. 435 (1997)*. We cannot know whether these two utilities will ever be permitted to compete for retail customers in a particular geographic region.

Antitrust Standing

HN13[] The question of standing is a threshold inquiry in all actions. However, the constitutional and prudential requirements of standing take on particular significance in the context of the antitrust laws, where a balance must be struck between encouraging private actions and deterring legitimate competitive activity through overly vigorous enforcement. See, ***[**22]*** e.g., *Capital Imaging Assoc. v. Mohawk Valley Med. Assoc., 996 F.2d 537, 539 (2d Cir. 1993)* (cautioning that were the "heavy power [of ***antitrust law***] brought into play too readily it would not safeguard competition, but destroy it"). Thus, in undertaking this standing analysis, we must remain mindful of the purposes and goals of the antitrust laws at issue -- to preserve and promote competition.

The constitutional standing inquiry -- namely, whether there is a "case" or "controversy" within the meaning of Article III, § 2 of the Constitution -- is augmented by consideration of prudential limitations. Without these prudential considerations, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent . . . and judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin, 422 U.S. 490, 500, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)*.

Thus, the crux of the issue in this case is whether the City satisfies the "prudential" requirements of standing; that is, does the City have "antitrust standing," and is the plaintiff a proper party to bring a private ***[**23]*** antitrust action? In Associated General, ***HN14***[] the Supreme Court outlined the factors that courts should consider when determining whether a party has standing to bring a private action under the antitrust laws. *Associated Gen. Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 537-45, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. Its approach to the standing inquiry has been interpreted as requiring a narrowing view, as opposed to the broad remedial purpose approach of cases that preceded it. See *Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 181 (3d Cir. 1997)*. The Associated General test has been regularly and consistently applied as the passageway through which antitrust plaintiffs must advance, and we have recently restated the factors we are to examine:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; [14] (3) the directness of the injury, which addresses the concerns ***[**24]*** that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Barton & Pittinos, 118 F.3d at 181 (citing *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir. 1993))*. ***HN15***[] The antitrust standing inquiry is essentially the same under both § 4 and *§ 7* of the Clayton Act, except that when seeking injunctive relief, "the complainant need only demonstrate a significant threat of injury from an impending violation of the antitrust laws." *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 591 (3d Cir. 1979)* (quotation omitted); see also *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 111-112, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*. Furthermore, this court has emphasized that the antitrust standing inquiry **[*265]** is not a black-letter rule, but rather, is "essentially a balancing test comprised of many constant and variable factors . . . ." *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964-65 (3d Cir. 1983)* (citing *Bravman* ***[**25]*** *v. Bassett Furniture Indus., 552 F.2d 90, 99 (3d Cir. 1977))*.

We conclude that, balancing all of the relevant facts in the instant case, the City's claims fail to meet the standing requirements we have set forth, due to the lack of causal connection between the defendants' actions and the alleged harm and because of the absence of antitrust injury. We will combine our discussion of causation and injury as the two issues are inextricable in this case. Further, we find that because there is no causal connection and no antitrust injury, we need not examine the other Associated General standing factors.

IV.

CAUSAL CONNECTION AND ANTITRUST INJURY

In evaluating the factors necessary for standing, we have stated that ***HN16***[] a showing of "antitrust injury is a necessary but insufficient condition of antitrust standing." *Barton & Pittinos, 118 F.3d at 182*. By this we mean that the district court should first address the issue of ***[**26]*** whether the plaintiff suffered an antitrust injury. If antitrust injury is not found, further inquiry is unnecessary.

In explaining its reasoning, the district court cited the following passage from Brunswick, which defines "antitrust injury":

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetive acts made possible by the violation.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). From the Court's description of antitrust injury, we learn that ***HN17***[] the question of whether the plaintiff has experienced antitrust injury depends in part on its source -- did the injury flow from that which makes the defined acts unlawful. To answer this question, we must examine the causal connection between the purportedly unlawful conduct and the injury. [15] In this case, we find that determining whether antitrust injury is present necessarily involves examining whether there is a causal connection between ***[**27]*** the violation alleged and the injury.

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[14] This element of the standing test is the "antitrust injury" requirement.

[15] As many commentators and courts have noted, the questions of antitrust injury and antitrust standing are difficult to disentangle. We believe that, similarly, in the present case, there is no bright line distinction between the two concepts. See, e.g., *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 394-95 (7th Cir. 1993)*; *Triple M Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 247 (2d Cir. 1985)*; see also Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 360(e), at

Accordingly, rather than trying ***[**28]*** to separate these two factors of causation and injury, we will treat them together. The facts which form the basis for the district court's conclusion, and ours as well, are central to both tests. These facts include the following: Allegheny Power and Duquesne Light were never competitors; the regulatory scheme mandated that they not compete; attempts by the City and Allegheny Power to bring about competition were no more than attempts, with no assurance that competition would be permitted; and any injury suffered by the City did not flow from the defendants' conduct, but, rather, from the realities of the regulated environment in which all three were actors. Here, both the lack of any antitrust injury -- in the sense of its total absence as defined by the district court -- and the attenuated nature of the causation, defeat the City's standing.

We should note at the outset that we disagree with the City's argument that Brunswick and the other cases discussing antitrust injury cited by the district court are inapposite **[*266]** because they involved suits by competitors, not by consumers. [16] The City urges that as long as the City is a consumer -- as it contends it is -- harm to it constitutes ***[**29]*** antitrust injury. [17] However, we do not find the City's status as a consumer to be dispositive. We read the cited passage from Brunswick, and the opinion itself, to have broader application. Brunswick tells us to intensify our focus and consider not only the fact that there may be an agreement which is harming others in the marketplace, but to also ask first whether the alleged injury is really of the type that the antitrust laws were intended to prevent, and, as part of that assessment, whether the injury flows from that which makes defendants' acts unlawful.

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The key sentence in Brunswick, cited above, is the last: "The injury should reflect the . . . anticompetitive acts made possible by the violation." *429 U.S. at 489*. It directs us to look back from the vantagepoint of the injury to test the nature of the cause, rather than to presume antitrust injury wherever there is an agreement or merger that results in harm. This inquiry led to a conclusion of that the plaintiff lacked standing in Brunswick. Although the analysis is slightly different, the same result follows on the facts of this case. The purported lessening of competition was not caused by the premerger agreement and proposed merger between Allegheny Power and Duquesne Light. The City's inability to choose to buy from either Allegheny Power or Duquesne Light for the Redevelopment Zones is an injury visited upon it by the regulated nature of utility services, not caused by an agreement between Duquesne Light and Allegheny Power to withdraw Allegheny Power's application to be able to compete.

The City's position that it has suffered an antitrust injury is an attempt to equate the submission of bids and filing of petitions with actual competition. The City's complaint states ***[**31]*** that the City engaged in "negotiations with Allegheny Power for the provision of electric utility service to the Redevelopment Zones, subject to Allegheny Power obtaining a certificate from the PUC." Compl. P 41. The City acknowledges that competition was not possible without PUC approval when it requested that the PUC "take actions necessary to allow choice and competition for retail electric service" in the Redevelopment Zones. JA at 194. Thus, we need not resolve the issue of whether Duquesne Light's certificate to provide electricity to the Redevelopment Zones was exclusive. Rather, it is sufficient that we can determine from the face of the complaint that Allegheny Power never had the certificate from the PUC necessary to permit it to provide power in the Redevelopment Zones. It never did compete, and, therefore, any

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200 (1995); William Page, The Scope of Liability for Antitrust Violations, *37 Stan. L. Rev. 1445, 1484-85 (1985)*; Nat Stern & Kevin Getzendanner, Comment, Gauging the Impact of Associated General Contractors on Antitrust Standing Under Section 4 of the Clayton Act, 20 U.C. Davis L. Rev. 159, 175-179 (1986); Daniel Richman, Note, Antitrust Standing, Antitrust Injury, and the Per Se Standard, *93 Yale L.J. 1309 (1984)*.

[16] In Brunswick, several smaller operators of bowling alleys sued a larger operator who was also a bowling equipment manufacturer. According to the plaintiffs, Brunswick's activity of acquiring failing alleys and providing cash to keep them afloat violated *Section 7* of the Clayton Act. They argued this continued competition reduced their profits. Using the test set forth above, the Supreme Court held these lost profits did not constitute "antitrust injury." *Brunswick, 429 U.S. at 489*.

[17] In its complaint, the City alleged that it was bringing this action "on its own behalf as a purchaser of electric utility service" and "on behalf of its citizens and to protect the economy of Pittsburgh." Compl. P 4. Defendants contest the City's ability to bring this action on behalf of its citizens. It is, however, uncontested that the City will be a purchaser of electricity -- for streets, public works, and other infrastructure -- in the Redevelopment Zones though it is not now a purchaser in these areas.

injury to the City did not result from a lessening of competition. In fact, as the district court correctly points out, the actions of the utilities merely maintained the status quo. Thus, the utilities' purported antitrust violation can only be said to have been competition-neutral and as such, is not actionable. See *Atlantic Richfield Co. v. USA Petroleum Co.* ***[**32]*** *, 495 U.S. 328, 344, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)* (stating that "the antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior").

The district court concluded that because neither the agreement nor the proposed merger had brought about the lessening of competition in a "marketplace" where there was no competition, there was no antitrust **[*267]** injury. We find this conclusion of the district court to be well founded, notwithstanding the City's bold averments as to loss of competition. ***HN18***[] Without demonstrating that there was competition, a plaintiff cannot show that the defendants' actions have had or will have anticompetitive effects. See, e.g., *Continental Cablevision of Ohio, Inc. v. American Elec. Power Co., 715 F.2d 1115, 1119-20 (6th Cir. 1983)* (finding that without competition, there can be no injury to competition).

It is telling that nowhere in the complaint does the City directly aver that there had ever been competition between Duquesne Light and Allegheny Power. [18] The City argues that it is the competitive process that antitrust laws are designed ***[**33]*** to protect -- and that the submission of bids in response to the RFP constitutes a "competitive process." However, this argument does little to further the City's position because, in the present case, the competitive process does not even exist because of regulatory restraints.

The City's first claim is brought under ***HN19***[] the Sherman Act, which prohibits contracts, combinations or conspiracies "in restraint of trade." *15 U.S.C. § 1*. However, under the Sherman Act agreements can only restrain that which has occurred, is occurring, or is reasonably likely to occur. Since the realization of competition is in the hands of regulators there is no way that the City can show that competition would have occurred absent the concerted activity ***[**34]*** between the two utilities. The City's Clayton Act claim fails under a similar analysis. ***HN20***[] *Section 7* of the Clayton Act prohibits all mergers "where in any line of commerce, or in any activity affecting commerce in any section of the country, the effect may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*. The complaint avers that the relevant "line of commerce" for the Clayton Act claim is the "provision of retail electric utility service in the Redevelopment Zones." Compl. P 62. The City argues that the proposed merger will lessen competition by "eliminating actual and prospective competition between Allegheny Power and Duquesne Light in the relevant line of commerce . . ." *Id. P 66*(a). The only "actual competition" that the City alleges in its complaint is the competition to be able to provide electric power to the Redevelopment Zones, which does not constitute actual competition.

HN21[] Section 16 of the Clayton Act does permit injunctive relief "against threatened loss or damage." *15 U.S.C. § 26*; see *Mid-West Paper Products Co., 596 F.2d at 590-91*. [19] The City argues that the fact that the proposed merger will lessen "prospective competition" ***[**35]*** should be sufficient to state a claim. However, we agree with the reasoning of the district court that the threatened loss "is contingent on the PUC permitting competition within the City in the first instance." Thus, with respect to the "prospective injury" argument, the issue turns not on whether Allegheny Power and Duquesne Light did compete -- but whether they were going to compete for the ability to provide power in the Redevelopment Zones. Allegheny Power was not legally able to provide power in the Redevelopment Zones and we do not know whether the PUC would ever have granted the permission for it to do so. Thus, as a matter of law, the court cannot conclude that the loss of potential competition was causally related to

[18] Paragraphs 9 & 10 of the City's complaint contain nearly identical statements regarding the business of each utility, but contains no averment that the two companies compete. Elsewhere in the complaint, harm to competition is averred in broad, conclusory terms. See Compl. P 66.

[19] The City has not explicitly argued this case under a "potential competition" theory and therefore we will not address that issue here. We do note, however, that the cases articulating this theory would be of doubtful support to the City. See, e.g. , *United States v. El Paso Natural Gas Co., 376 U.S. 651, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964)*; *United States v. Falstaff Brewing Corp., 410 U.S. 526, 35 L. Ed. 2d 475, 93 S. Ct. 1096 (1973)*.

the decision of the two power companies to merge. The City is really claiming that it would have benefited from competition it hoped would occur. However, the appellants cannot foist their version of what might have been on the court under the rubric of antitrust injury. The presence of the regulatory scheme and need for approval in connection with the choice of utilities to **[*268]** serve the Redevelopment Zones cuts the causal chain and converts what might have ***[**36]*** been deemed antitrust injury in a free market into only a speculative exercise.

There are no facts averred in the complaint which even permit us to speculate as to the likelihood of the PUC granting certification to Allegheny Power. Further, the City does not allege, and there is nothing in the record to indicate, that any parties considered these applications to be mere administrative formalities. To the contrary, the PUC applications filed by the City and Allegheny Power -- and the responses to them by Duquesne Light -- make clear that PUC proceedings ***[**37]*** to amend Allegheny Power's certificate were already being vigorously contested. See, e.g., JA at 267-287. Thus, we simply cannot know whether there is any causal connection between the harm which has arguably been suffered by the City and the alleged Sherman Act violation.

As the Supreme Court stated in Brunswick, ***HN22***[] antitrust injury must be caused by the antitrust violation-- not a mere causal link, but a direct effect. *429 U.S. at 489*. Here, the interposition of the regulatory scheme and actions of the parties -- both defendants and plaintiff -- interferes with the chain of causation. The statutory scheme precluded competition without the requisite regulatory permission. As Professors Areeda & Hovenkamp describe, ***HN23***[] "a plaintiff cannot be injured in fact by private conduct excluding him from the market when a statute prevents him from entering that market in any event." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 363(b), at 222 (1995) (citing *Axis S.p.A. v. Micafil, Inc., 870 F.2d 1105 (6th Cir. 1989))*.

As Areeda & Hovenkamp explain, ***HN24***[] the Section 4 plaintiff "must establish that he actually 'sustained' injury-in-fact to 'business or property,' and the ***[**38]*** 'by reason of ' language [of § 4] insists that such injury be caused by the violation." *Id. P 360, at 192*. The requirements for injunctive relief are similar except that the statutory language of Section 16 permits relief upon a showing of "threatened loss." However, the plaintiff must still demonstrate that this "threatened injury would be caused by the alleged antitrust violation . . . ." *Id. P 360*(b), at 193 (emphasis added). Thus, the City will never be able to prove a direct link between the alleged antitrust violation and their purported injury. The absence of antitrust injury and causal connection clearly defeat the City's standing.

The lack of causal connection between the violation alleged and the City's injuries is further demonstrated when we examine the damages alleged by the City. The injury is not only "speculative" because it is difficult to measure; rather, it is speculative because the injury claimed may never occur. An examination of the following damages listed in the City's complaint reveals no direct link between the purported antitrust violations and the harm alleged to have been suffered by the City: "expending significant efforts to bring competition ***[**39]*** to the Redevelopment Zones; paying higher, non-competitive rates for electric utility service generally; and losing the opportunity to have lower electric service charges in the Redevelopment Zones necessary to attract the maximum intended economic development to the Zones and foster full economic growth." Compl. P 59. The City has failed to offer any support for the proposition that the first alleged harm -- the fact that the City spent money to bring competition to the Redevelopment Zones -- is a cognizable antitrust injury. [20] The other damages are precisely the **[*269]** type which cannot be directly connected to the alleged agreement. There is no way to determine whether the rates the City will pay for electric service are or will be affected by the alleged actions of Allegheny Power and Duquesne Light. ***HN25***[

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[20] ***HN26***[] The proper measure of damages for a price-fixing violation under the Sherman Act is the difference between the prices actually paid and those that would have been paid absent the conspiracy. See, e.g., *State of N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1077 (2d Cir. 1988)*; see also Robert Blair & William Page, "Speculative" Antitrust Damages, *70 Wash. L. Rev. 423, 426 (1995)* (Plaintiff must project a "hypothetical or 'but-for' condition that excludes only the effects of the defendant's illegal conduct." Damages are measured by "the difference between that projected condition and the plaintiff's actual condition."). The injury alleged by the City here is purportedly separate from the injury of having to pay higher prices for electric service. In fact, the language of this claim merely underscores the fact that no competition existed between the two utilities. When a market participant expends resources to encourage competition, the participant risks that such expenditure will not result in lower prices. Despite this risk, the City chose to pursue its "efforts" with Allegheny Power.

] A consumer alleging antitrust violations "cannot obtain damages without showing that he actually paid more than he would have paid in the absence of the violation." Areeda & Hovenkamp, supra, P 370, at 253.

[**40]

In its complaint, the City alleges a violation of *Section 1* of the Sherman Act and requests that "defendants be ordered to pay the City damages sustained by it and the citizens it represents, trebled . . ." Compl. P 93. However, there is no way for the court to determine what "damages" were sustained. We cannot assume the existence of a PUC certificate for the purposes of assessing damages. Thus, the damages alleged by the City are not simply difficult to measure, but their occurrence would, in fact, be impossible to prove. The injury averred by the City is simply too speculative to permit relief under the antitrust laws.

With respect to injunctive relief, the City cannot show a significant threat of injury from an impending antitrust violation. The City cannot prove that harm is threatened because it cannot demonstrate that it has lost anything -- namely, competition among electric utilities -- that would have existed but for the actions of the defendants. Further, now that all parties, including the City, have withdrawn from the regulatory proceedings, an injunction would not alter the City's current situation. That is, the question of whether the PUC would amend Allegheny Power's ***[**41]*** certificate and permit it to provide electric service to the Redevelopment Zones would remain unresolved.

We affirm the district court's conclusion that because there had previously been no competition in the market for electricity, "neither the proposed merger nor the withdrawal of Allegheny Power's application has lessened the competition within the City or the choices of utility companies available to the City." *City of Pittsburgh, 993 F. Supp. 332, 1998 WL 64074*, at *4. Thus, as the district court notes, it is the structure of the regulated industry, not the defendants' conduct, which creates the lack of competition -- and under these facts -- the lack of antitrust standing. That does not mean that utilities are immune from antitrust liability. [21] However, in the present case, the remedy that appellant seeks would require this court to assume the existence of a competitive situation. This we cannot do.

[**42]

The City argues that if the antitrust laws are not diligently enforced during the transition to deregulation under the Competition Act, there is a risk that regulated electric utility monopolies will simply be replaced by unregulated ones who would also enjoy immunity from the antitrust laws. We make clear that this ruling is fact-specific to the current climate in which the instant facts developed, namely, in the era of "regulated electric utility monopolies" as the City terms it. The very essence of our ruling is that the advent of deregulation will likely remove the break in the causal chain so that future utility arrangements in the free market atmosphere may well pass muster for purposes of standing under the antitrust laws. Had the ability of the utilities to serve various customers in various regions not been subject to approval of the PUC, our standing analysis would be radically different.

In conclusion, because we believe that the City cannot establish the necessary antitrust injury and causal connection between the alleged antitrust violation and its injury, we will affirm the district court's grant of defendants' motions to dismiss.

Dissent by: GERALD W. HEANEY

Dissent

HEANEY, **[**43]** Senior Circuit Judge, dissenting.

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[21] Further, this decision does not affect the City's ability to proceed in state court on its state law claims for restraint of trade, civil conspiracy, breach of contract, tortious interference, breach of good faith and fair dealing, and detrimental reliance.

I cannot agree with the majority that there is no antitrust injury or no causal connection between the City's injury and the defendants' conduct. The defendants conspired to deprive the City of the opportunity to obtain less expensive electricity to assist in bringing new jobs to the City. In my view, the majority **[*270]** opinion opens the door for similar anti-competitive practices to go unpunished.

I accept the statement of facts set forth by the majority, but supplement it in order to underscore the bad faith exhibited by Allegheny Power and Duquesne Light Company. [1] Attempting to create new jobs in the Redevelopment Zones, the City recognized that high-cost electricity was a detriment to attracting new businesses. Estimating that the Redevelopment Zones would support up to 7,300 new jobs and approximately 1,400 new residences, the City began negotiating with Allegheny Power to provide less expensive electricity.

[44]** The City and Allegheny Power negotiated for several months and Allegheny Power assured the City that it would provide less expensive electricity than Duquesne Light Company to the Redevelopment Zones. Both Allegheny Power and the City knew that the permission of the PUC was required before Allegheny Power could furnish electricity. In July 1996, both the City and Allegheny Power agreed to apply to the PUC for the latter to provide electricity to the Redevelopment Zones. On September 4, 1996, the City filed a petition supporting Allegheny Power's provision of electricity to the Redevelopment Zones. On September 9, 1996, Allegheny Power filed its own petition in this matter and represented to the PUC that an "alternative electric supply would attract economic development to the Redevelopment Areas and would foster economic growth[.]" (J.A. at 6.)

Claiming that it had the exclusive right to provide electricity to the City, Duquesne Light Company intervened on September 27, 1996, opposing the petitions filed by the City and Allegheny Power. On October 21, 1996, Allegheny Power filed an answer, claiming that it also had the right to provide electricity to the Redevelopment Zones. After **[**45]** these preliminary matters had been addressed, on October 28, 1996, Allegheny Power formally applied for a certificate of need, which would enable it to provide electricity to the Redevelopment Zones. In its application, Allegheny Power claimed that its prices would be substantially lower than Duquesne Light Company's, stating: "It is certain that the potential for developing new, incremental electrical load in the Redevelopment Zones will be enhanced substantially if electricity prices therein are as low as possible." (Id.)

On November 18, 1996, the City solicited bids from Allegheny Power and Duquesne Light Company to provide power to the Redevelopment Zones. As the majority points out, Allegheny Power significantly under-bid Duquesne Light Company. While the ALJ received testimony on the application in late March 1997, further hearings were scheduled for June 9, 1997.

Less than two weeks later, on April 7, 1997, Duquesne Light Company and Allegheny Power announced that they had agreed to merge. Two days earlier, on April 5, 1997, Allegheny Power and Duquesne Light Company agreed not to make any filings with governmental entities until they consulted with each other; not to **[**46]** change their regulated charges or rates without first discussing it with each other; and not to make any agreement or filing with respect to a rate change or charge without first consulting each other.

After deciding to merge, on April 28, 1997, Allegheny Power and Duquesne Light Company requested a stay of the proceedings on Allegheny Power's application for a certificate of need. The ALJ denied the stay, noting the need for an expeditious decision. On June 6, 1997, Allegheny Power petitioned the ALJ for leave to withdraw its application. The ALJ granted the petition on June 24, 1997. The City then commenced this action alleging, in substance, that Allegheny Power and Duquesne Light Company conspired to deprive the City of the opportunity to obtain less expensive electricity in violation of *Section 1* of the Sherman Act and *Section 7* of the Clayton Act.

The facts alleged by the City are sufficient to show that Allegheny Power and Duquesne Light Company conspired to deprive the City of an opportunity to obtain less expensive electricity. In my view, this conspiracy violated both the Sherman and Clayton Acts. **[*271]** Unlike the majority, I am not persuaded that the PUC's failure to act

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[1] We accept all of the City's allegations as true in reviewing the motion to dismiss. *Fuentes v. South Hills Cardiology, 946 F.2d 196, 201 (3d Cir. 1991)* (citation omitted).

on **[**47]** Allegheny Power's application immunizes these conspirators from antitrust liability. After all, the conspiracy deprived the PUC of an opportunity to review the application. [2] As the Seventh Circuit aptly pointed out, "we know of no rule that states that the parties must be in head-to-head competition in the relevant market (as opposed to head-to-head competition for the relevant market) before the antitrust laws will apply." *Fishman v. Estate of Wirtz, 807 F.2d 520, 531 (7th Cir. 1986)* (emphasis in original).

[48]** The Clayton Act prohibits mergers that substantially lessen competition or tend to create monopolies in any line of commerce in any section of the country. There can be no doubt that the proposed merger in this case violates the Clayton Act. Allegheny Power and Duquesne Light Company are the only utility companies that could feasibly provide electricity to the Redevelopment Zones. Consequently, the proposed merger substantially lessens competition and creates a monopoly in the relevant market.

The Sherman Act addresses agreements in restraint of trade. In this case, there was such a restraint. The merger agreement destroyed the City's opportunity to obtain less expensive electricity. In this case, the City's allegations support the view that there was such a restraint. According to these allegations, the merger agreement destroyed the opportunity to obtain less expensive electricity. A factfinder might well determine that this opportunity was more than speculative; it was real enough to cause Allegheny Power to file its application; it was real enough to cause Duquesne Light Company to oppose the application; and it was real enough to convince Allegheny Power and Duquesne Light **[**49]** Company that a merger was the most effective way of avoiding cost competition. [3] In short, "the injury alleged by [the City] was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*.

I am concerned that today's decision sends the wrong message that similarly situated conspirators will not be held accountable for their anti-competitive activities. After submitting bids, both Allegheny Power and Duquesne Light Company knew the price at which each company would provide electricity to the City. When Allegheny Power withdrew its bid, Duquesne Light Company was assured that competition would **[**50]** be lessened and that its higher price would prevail.

In my view, the majority does not sufficiently distinguish between the City's § 4 and § 16 claims under the Clayton Act. Even if one concedes that the claim for monetary damages under the Clayton and Sherman Acts presents a close question, there can be no doubt that the City has standing to pursue its requested injunctive relief under § 16 of the Clayton Act. It is well settled in the Third Circuit that, unlike a claim under § 4 of the Clayton Act for monetary damages, "a claim for injunctive relief does not present the countervailing considerations--such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with **[*272]** complex and conjectural economic analyses--that the Supreme Court emphasized when limiting the availability of treble damages" in a § 4 Clayton Act claim. *Mid-West Paper Prods. Co. v. Continental Group, 596 F.2d 573, 591 (3d Cir. 1979)*. Consequently,

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[2] The majority, however, argues "now that all parties, including the City, have withdrawn from the regulatory proceedings, an injunction would not alter the City's current situation." In essence, the majority argues that because the City withdrew from the PUC proceedings, the issue is moot as to whether an injunction should be granted. However, once Allegheny withdrew its application, there was no point for the City to continue with its application. As the appellees point out themselves, Allegheny had to obtain approval from the PUC to enlarge its certificate of convenience. See *Makovsky Bros., Inc. v. Pennsylvania Public Utility Comm., 55 Pa. Commw. 435, 423 A.2d 1089, 1092 (Pa. Commw. 1980)*. The City alone, as the consumer, could not petition the PUC to obtain lower utility prices. *Lukens Steel Co. v. Pennsylvania Public Utility Comm., 92 Pa. Commw. 530, 499 A.2d 1134, 1140 (Pa. Commw. 1985)*. Thus, once Allegheny withdrew, under Pennsylvania law, there was no point for the City to continue with its application. Instead, the City filed suit in federal district court. Although the law is changing in Pennsylvania as utility competition becomes a reality, there is no indication that the City could have proceeded ex parte before the PUC to ensure that Allegheny provide lower electricity rates.

[3] Certainly the amount of damages that the City might recover may be limited by the fact that the PUC would not have approved the application, but this fact goes to the amount of damages that can be recovered rather than whether an antitrust violation has been committed.

> In contradistinction to § 4, § 16 does not ground injunctive relief upon a showing that "injury" has been already sustained, but instead makes it available "against threatened loss or damage." Furthermore, § 16 does not **[**51]** state that the threat must be to the plaintiff's "business or property," and courts accordingly have held that non-commercial interests are also protected. . . . Courts have held that for purposes of § 16 the complainant "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur," and that a person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. Indeed, the test for standing under § 16 has been framed in terms of a proximate cause standard that is "less constrained" than that under § 4 and which might in fact be no more rigorous than the general rule of standing.

Mid-West Paper Prod. Co. v. Continental Group, 596 F.2d 573, 591-92 (3d Cir. 1979) (emphasis in original) (footnotes omitted). Therefore, the district court can still fashion injunctive relief that will bar the merger, require Allegheny Power to reinstate its application to the PUC to furnish power to the City's Redevelopment Zones, even if the merger is permitted to go through, [4] or alternatively, to give such other relief as will ensure that the **[**52]** City obtains the advantage of competitive pricing.

For the reasons stated above, I respectfully dissent.

End of Document

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[4] In an October 17, 1997 letter from Allegheny Power's president, Alan Noia, to Pittsburgh Mayor Thomas Murphy, Noia states: "I am, therefore, committing to you that, if the . . . PUC grants the City's request . . . to allow utilities other than Duquesne Light Company to provide electric service to the two economic development zones, subject to PUC approval, . . . [Allegheny Power] will expand its service territory to include the economic development zones." (J.A. at 499a.) This letter was sent **after** the proposed merger.

United States v. Tucor Int'l, Inc.

United States District Court for the Northern District of California

June 15, 1998, Decided ; June 15, 1998, Filed

No. CR-92-0425 DLJ

Reporter

35 F. Supp. 2d 1172 *; 1998 U.S. Dist. LEXIS 21951 **; 1998 AMC 2585

UNITED STATES OF AMERICA, Plaintiff, v. TUCOR INTERNATIONAL, INC., et al., Defendants.

Disposition: [1]** Defendant Tucor's petition for writ of error coram nobis GRANTED. Judgment entered on June 22, 1993 and amended on June 25, 1993 VACATED. Luzon defendants' motion to dismiss indictment GRANTED.

Core Terms

indictment, transportation, exemption, immunity, ocean, common carrier, Shipping, guilty plea, carriers, inland, defendants', shipments, foreign country, military, segment, motion to dismiss, argues, anti trust law, legislative history, motor carrier, plain meaning, prosecute, forwarders, appears, waived, writ of error coram nobis, selective prosecution, antitrust liability, antitrust immunity, household goods

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

HN1[] **Summary Judgment, Evidentiary Considerations**

Under *Fed. R. Crim. P. 12(b)*, any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by a motion. In considering a pretrial motion to dismiss an indictment, the court must presume the truth of the allegations in the charging instrument. The court should not consider evidence that does not appear on the face of the indictment. To grant a motion to dismiss based on evidence outside the indictment would be tantamount to granting summary judgment for a criminal defendant. Unlike in civil cases, there is no such summary judgment procedure in a criminal case.

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

HN2[] **Postconviction Proceedings, Coram Nobis**

The writ of error coram nobis affords a remedy to attack a conviction when the defendant has served his sentence and is no longer in custody. Specifically, the writ provides a remedy for those suffering from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact and egregious legal errors.

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence

HN3[] **Postconviction Proceedings, Coram Nobis**

A convicted defendant in federal custody may petition to have a sentence of conviction vacated, set aside or corrected under the federal habeas corpus statute. *28 U.S.C.S. § 2255*. If, however, the sentence has been served, there is no statutory basis to remedy the lingering collateral consequences of the unlawful conviction. Recognizing this gap, the Supreme Court has held that the common law petition for writ of error coram nobis is available in such situations, even though the procedure authorizing the issuance of the writ was abolished in civil cases by *Fed. R. Civ. P. 60(b)*. District courts are therefore authorized to issue the writ in federal criminal matters pursuant to the All Writs Act, *28 U.S.C.S. § 1651(a)*, but may not entertain a petition for the writ with respect to challenges to state convictions.

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

HN4[] **Postconviction Proceedings, Coram Nobis**

A request for a writ of error coram nobis should be filed as a motion in the criminal case, rather than as a separate case. It is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

HN5[] **Justiciability, Case & Controversy Requirements**

To qualify for coram nobis relief, four requirements must be satisfied: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case and controversy requirement of Article III; and (4) the error is of the most fundamental character.

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

Criminal Law & Procedure > ... > Custody Requirement > Noncustody Determinations > General Overview

HN6[] **Postconviction Proceedings, Coram Nobis**

Coram nobis relief is not limited to individuals. A corporation, not in custody and thus without access to *28 U.S.C.S. § 2255* relief, can use the writ to attack an unconstitutional conviction.

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

International Trade Law > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

HN7[] **Regulations & Statutes, Shipping Act**

Section 7(a)(4) of the Shipping Act of 1984, 46 U.S.C.S. app. § 1706(a)(4), provides that the antitrust laws do not apply to any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

Governments > Legislation > Interpretation

Governments > Legislation > Interpretation > Rule of Lenity

HN8[] **Legislation, Interpretation**

When interpreting a statute, the court must look first to the plain meaning of the statute's language. If the plain language appears to settle the question, the court looks to legislative history only to determine whether there is clearly expressed legislative intent that is contrary to the plain language. Only in rare or exceptional circumstances will the plain language not control if the statute is unambiguous. If the plain language does not settle the question, then the Court looks to other sources, such as the legislative history, to decipher the meaning of the ambiguous language. In a criminal case, ambiguous language must be interpreted in defendant's favor under the rule of lenity.

Governments > Legislation > Interpretation

HN9[] **Legislation, Interpretation**

The plain meaning to be discerned is not the plain meaning of an isolated provision, but instead the plain meaning of the whole statute.

Admiralty & Maritime Law > Maritime Contracts > General Overview

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Transportation Law > Carrier Duties & Liabilities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

HN10[] **Admiralty & Maritime Law, Maritime Contracts**

Section 4 of the Shipping Act of 1984, 46 U.S.C.S. app. § 1702 states that the Act applies to certain agreements by or among ocean common carriers, and among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers. 46 U.S.C.S. app. § 1702(a), (b). No other agreements are mentioned in that section.

Admiralty & Maritime Law > Maritime Contracts > General Overview

International Trade Law > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

HN11[] **Admiralty & Maritime Law, Maritime Contracts**

Section 7 of the Shipping Act of 1984, 46 U.S.C.S. app. § 1706, provides six exemptions from antitrust liability. The antitrust laws do not apply to(1) any agreement that has been filed under § 1704 of the act and is effective under § 1704(d) or § 1705 of the act, or is exempt under § 1715 of the act from any requirement of this chapter; (2) any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Federal Maritime Commission and in effect when the activity took place, or (B) it is exempt under § 1715 of the act from any filing requirement of this chapter; or (3) any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States, unless that agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States. 46 U.S.C.S. app. § 1706.

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

International Trade Law > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

HN12[] **Regulations & Statutes, Shipping Act**

Section 7 of the Shipping Act of 1984, 46 U.S.C.S. app. § 1706, provides six exemptions from antitrust liability. The antitrust laws do not apply to(4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade; (5) any agreement or activity to provide or furnish wharfage, dock, warehouse, or other terminal facilities outside the United States; or (6) subject to § 1719(e)(2) of the act, any agreement, modification, or cancellation approved by the Commission before the effective date of this chapter under 46 U.S.C.S.C app. § 814, or permitted under 46 U.S.C.S.C app. § 813a, and any properly published tariff, rate, fare, or charge, classification, rule or regulation explanatory thereof implementing that agreement, modification or cancellation. 46 U.S.C.S. app. § 1706.

Admiralty & Maritime Law > Maritime Contracts > General Overview

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Output & Requirements Contracts

Transportation Law > Carrier Duties & Liabilities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

HN13[] **Admiralty & Maritime Law, Maritime Contracts**

Section 5(a) of the Shipping Act of 1984 exempts from the filing requirements agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. 46 U.S.C.S. app. § 1704(a).

Admiralty & Maritime Law > Practice & Procedure > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

Admiralty & Maritime Law > Maritime Contracts > General Overview

Admiralty & Maritime Law > Maritime Contracts > Types of Contracts

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Transportation Law > Carrier Duties & Liabilities > General Overview

Transportation Law > Carrier Duties & Liabilities > Definitions

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

Transportation Law > Water Transportation > General Overview

HN14[] **Admiralty & Maritime Law, Practice & Procedure**

Ocean carriers who operate between foreign ports do not fall within the Shipping Act of 1984's definition of "ocean common carrier" and can not benefit from 46 U.S.C.S. app. § 1706(a)(1) immunity by filing their foreign-to-foreign agreements with the Federal Maritime Commission. A carrier is an "ocean common carrier" within the meaning of the Act only to the extent that it holds itself out to provide transportation between the United States and a foreign country.

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Antitrust & Trade Law > Regulated Industries > General Overview

Transportation Law > Carrier Duties & Liabilities > Water Carriers

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

HN15[] **Regulations & Statutes, Shipping Act**

Section 7(b)(1) of the Shipping Act of 1984 provides that this chapter does not extend antitrust immunity to any agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water not subject to this chapter with respect to transportation within the United States. 46 U.S.C.S. app. § 1706(b)(1).

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

International Trade Law > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

Transportation Law > Water Transportation > General Overview

HN16[] Regulations & Statutes, Shipping Act

Section 7(a)(4) of the Shipping Act of 1984, 46 U.S.C.S. app. § 1706(a)(4), is not limited to agreements involving ocean common carriers. The statutory immunity is available for agreements among non-ocean common carriers so long as those agreements concern the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade. 46 U.S.C.S. app. § 1706(a)(4).

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Transportation Law > Carrier Duties & Liabilities > Through Rates

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

HN17[] Regulations & Statutes, Shipping Act

The Shipping Act of 1984 defines "through transportation" as continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or point. 46 U.S.C.S. app. § 1702(26). The Act defines "through rate" as the single amount charged by a common carrier in connection with through transportation. 46 U.S.C.S. app. § 1702(25).

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

Transportation Law > Carrier Duties & Liabilities > General Overview

Transportation Law > Carrier Duties & Liabilities > Through Rates

Transportation Law > Water Transportation > General Overview

HN18[] Regulations & Statutes, Shipping Act

Section 1702(17) of the Shipping Act of 1984 provides that "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier. 46 U.S.C.S. app. § 1702(7).

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > Interpretation > Rule of Lenity

HN19[] Defenses, Ambiguities & Mistakes

In criminal prosecutions the rule of lenity requires that ambiguities in the statute be resolved in the defendant's favor. Where a criminal law is ambiguous, courts are wary of imposing criminal liability for conduct that the law does not clearly prohibit. The fact that the ambiguity is contained in a statutory exemption, rather than the statutory definition of the criminal conduct, does not preclude application of this rule.

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > Sentencing > Fines

HN20[] Postconviction Proceedings, Coram Nobis

A corporation that has been sentenced only to a fine can employ a writ of error coram nobis to attack an unconstitutional conviction.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN21[] Water Transportation, Rates & Tariffs

While an indictment must ordinarily charge every essential element of an offense, it need not negate every applicable statutory exception.

Criminal Law & Procedure > ... > Entry of Pleas > Types of Pleas > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Guilty Pleas > Allocution & Colloquy > Waiver of Defenses

HN22[] Entry of Pleas, Types of Pleas

A defendant may attack a guilty plea by asserting jurisdictional claims that the applicable statute is unconstitutional or that the indictment fails to state an offense. Although a guilty plea generally waives all claims of constitutional violation occurring before the plea, jurisdictional claims are an exception to this rule. Although the dividing line between constitutional claims waived by a plea of guilty and those that survive the plea is not always clear, claims that the applicable statute is unconstitutional or that the indictment fails to state an offense are jurisdictional claims not waived by the guilty plea.

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Guilty Pleas > Allocution & Colloquy > Waiver of Defenses

HN23[] **Accusatory Instruments, Indictments**

By pleading guilty, a defendant waives its right to contest the facts to which it admits. However, the defendant does not waive its right to assert that the conduct alleged in the indictment, accepted as true, does not constitute a crime.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN24[] **Brady Materials, Brady Claims**

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of good faith or bad faith of the prosecution. This obligation by its own terms reaches evidence. The focus of the obligation is on providing defendants access to exculpatory evidence to which they otherwise would not have access. This logic does not apply to published legal authority, particularly where defendant is represented by counsel who undoubtedly has access to the materials in question.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Role of Court

Legal Ethics > Professional Conduct > Tribunals

HN25[] **Entry of Pleas, Role of Court**

Attorneys have a continuing duty to inform the court of any development which may conceivably affect the outcome of the litigation. Furthermore, an United States Attorney has an even greater obligation than a private litigant to see that justice is done.

Criminal Law & Procedure > Defenses > Selective Prosecution

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Guilty Pleas > Allocution & Colloquy > Waiver of Defenses

Criminal Law & Procedure > Defenses > General Overview

HN26[] **Defenses, Selective Prosecution**

A selective prosecution claim is foreclosed once a defendant pleads guilty.

Counsel: For United States, Plaintiff: Reginald K. Tom, Esq., Roger W. Fones, Esq., Department of Justice, Washington, D.C.

For Luzon Moving and Storage, Philippine-American Moving and Storage, George Schulze, Sr., George Schulze, Jr., Defendants: Warren L. Dean, Jr., Esq., DYER ELLIS & JOSEPH, Washington, D.C.

For Tucor Industries, Defendant: James R. Wyrsch, Esq., Charles M. Rogers, Esq., HOBBS MARAKIAN & LEE, Kansas City, Missouri.

For Tucor Industries, Defendant: Phillip Torres, Esq., GAYLE & TEKER, Agana Guam.

For Tucor Industries, Defendant: Jerrold M. Ladar, Esq., LADAR & LADAR, San Francisco, CA.

Judges: D. Lowell Jensen, United States District Judge.

Opinion by: D. Lowell Jensen

Opinion

[*1175] ORDER

On December 3, 1997, the Court heard argument on defendant Tucor Industries' petition for a writ of error coram nobis and the Luzon defendant's motion to dismiss the indictment. Reginald K. Tom and Roger W. Fones appeared on behalf of the United States; Warren L. Dean, Jr. appeared for Luzon **[**2]** Moving and Storage Corporation, Philippine-American Moving and Storage Corporation, George Schulze, Sr., and George Schulze, Jr.; James R. Wyrsch, Charles M. Rogers, Phillip Torres and Jerrold M. Ladar appeared for Tucor Industries, Inc. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby GRANTS the Luzon defendants' motion to dismiss the indictment and GRANTS Tucor Industries's petition for a writ of error coram nobis.

I. BACKGROUND

A. *Factual Background and Procedural History*

Defendants are corporations and individuals engaged in the business of transporting goods to and from United States military bases in the Philippines. Defendants were indicted on September 9, 1992 for violating *Section 1* of the Sherman Act, *15 U.S.C. § 1*. The indictment charges that defendants [1] conspired "to suppress competition by fixing prices for moving services supplied in connection with the transportation of military shipments of household goods between the Philippines and the United States." Indictment P 2. Defendants contend that because they provided transportation services solely within the Philippines, **[**3]** any price fixing activity was not unlawful pursuant to the Shipping Act of 1984, § 7(a)(4), 46 U.S.C. App. § 1706(a)(4).

1. *The Tucor Defendants*

Tucor Industries, Inc. is a Philippine company that is affiliated with and partly owned by Tucor International, Inc. Defendants Patrick B. Boll and Dale C. Bailey were corporate officers of defendant Tucor Industries. The indictment charged defendants Tucor International, Tucor Industries, Boll and Bailey ("the Tucor defendants") with one count of conspiring to fix prices in violation of the Sherman Act, *15 U.S.C. § 1*.

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[1] The original indictment was brought against Tucor International, Inc.; Tucor Industries, Inc. d/b/a Tucor Moving and Storage; Philippine-American Moving & Storage Corp.; Luzon Moving & Storage Corp.; D.M. Nazareno & Sons, Inc.; Apex Moving & Storage Corp.; Jose C. Singson, Jr.; George Schulze, Sr.; George Schulze, Jr.; Arturo G. Nazareno; Patrick B. Boll; and Dale C. Bailey.

At their arraignment following the return of the indictment, the Tucor **[**4]** defendants entered pleas of not guilty. On November 18, 1992, the Tucor defendants filed various pre-trial motions, including two motions challenging the jurisdiction of the Court. In one of these motions, defendants sought "dismissal of indictment on the grounds of primary jurisdiction, implied immunity, § 6A, and vagueness." In the other, defendants moved "to dismiss the indictment on grounds of jurisdiction and comity." The United States filed memoranda in opposition to these pre-trial motions. The Court conducted a hearing on defendants' motions on December 2, 1992.

While the Tucor defendants' motions to dismiss were under submission, the parties filed a plea agreement with the Court. The Court held a plea hearing on June 16, 1993. [2] **[**5]** **[*1176]** During the hearing, the Court accepted Tucor Industry's guilty plea and imposed a sentence of a $ 121,800 fine and a $ 200 special assessment. Pursuant to the plea agreement, the United States moved to dismiss he charges against defendants Tucor International and Bailey. [3] Judgment was entered against Tucor Industries on June 22, 1993. *See* June 22, 1993 Judgment, as amended on June 25, 1993.

On August 15, 1997, defendant Tucor Industries ("Tucor") filed a petition for a writ of error coram nobis. Tucor argues that the Shipping Act of 1984 exempted it from criminal liability for price fixing and hence the conduct charged in the indictment could not constitute a crime. Tucor seeks to set aside its June 16, 1993 guilty plea.

The government filed its opposition to defendant's petition on September 10, 1997. Defendant filed its reply on September 22, 1997. At an October 8, 1997 hearing on the matter, the Court ordered the United States to provide further briefing regarding the applicability of the Shipping Act immunities to the conduct charged in the indictment. On November 7, 1997, the United States filed a supplemental memorandum in opposition to Tucor's petition to which Tucor filed a reply on November 10, 1997.

2. *The Luzon Defendants*

Defendants Luzon Moving & Storage Corp. ("Luzon"), Philippine-American Moving & Storage Corp. ("PAMSC"), George Schulze, Sr. and George Schulze, Jr. were charged **[**6]** with one count of conspiring to fix prices in violation of the Sherman Act, *15 U.S.C. § 1*. Luzon and PAMSC claim to be corporations organized under Philippine law with their principle and sole place of business in the Philippines. Defendants George Schulze, Sr. and George Schulze, Jr. claim to be Philippine citizens who reside in the Philippines and are officers and sole shareholders of defendants Luzon and PAMSC. These defendants have not appeared before this Court for arraignment.

On August 15, 1997, defendants Luzon, PAMSC, Schulze, Sr., and Schulze, Jr. ("the Luzon defendants"), filed a motion for leave to make a special appearance for the limited purpose of filing a motion to dismiss the indictment. On the same date, defendants also filed their motion to dismiss the indictment. The Luzon defendants contend that the Shipping Act of 1984, § 7(a)(4), 46 U.S.C. App. § 1706(a)(4), immunizes them from liability for antitrust violations and, as a result, the indictment should be dismissed. On September 10, 1997, the government filed its opposition to defendants' motion for leave to make a special appearance. The government did not, however, file an opposition to defendants' motion **[**7]** to dismiss the indictment.

In an order dated October 20, 1997, the Court granted the Luzon defendants motion for leave to make a special appearance to file their motion to dismiss the indictment. Pursuant to the Court's order at the October 8, 1997 hearing, the United States filed a memorandum on November 7, 1997 in opposition to defendants' motion to dismiss the indictment. The Luzon defendants filed a reply on November 19, 1997. The matter has now been fully briefed and is properly before the Court. [4]

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[2] At the hearing, defendants were represented by Phillip Torres and Jerrold Ladar, both of whom remain as current counsel for Tucor Industries in this matter.

[3] Defendant Boll died on April 16, 1993 and thus was not part of the plea agreement.

[4] Following the December 3, 1997 hearing on the Luzon defendants' motion and Tucor's petition, the Court received a number of submissions from the parties. *See* Government's Letter Briefs, received December 18, 1997 and January 23, 1998; Defendants' Letter Briefs, received December 23, 1997 and February 9, 1998 (responding to government's Letter Briefs).

B. *Legal Standards*

1. *Dismissal of Indictment*

HN1[] Under *Federal Rule of Criminal Procedure 12(b)*, "any defense, objection or request which is **[**8]** capable of determination without the trial of the general issue may be raised before trial by a motion." *Fed. R. Crim. P. 12(b)*. In considering a pretrial motion to dismiss an indictment, the court "must presume the truth of the allegations in the charging instrument." *United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996)*. The court should not consider evidence that does not appear on the face of the indictment. *Id; see also* *United States v. Chant, 1997 U.S. Dist. LEXIS 4714, 1997 WL 231105*, *4 (N.D.Cal. 1997). To grant a motion **[*1177]** to dismiss based on evidence outside the indictment would be tantamount to granting summary judgment for a criminal defendant. *See* *Jensen, 93 F.3d at 669*. Unlike in civil cases, there is no such summary judgment procedure in a criminal case. *Id.*

2. *Writ of Error Coram Nobis*

HN2[] The writ of error coram nobis affords a remedy to attack a conviction when the defendant has served his sentence and is no longer in custody. *Telink, Inc. v. United States, 24 F.3d 42, 45 (9th Cir. 1994)*; *United States v. Walgren, 885 F.2d 1417, 1420 (9th Cir. 1989)*. Specifically, the "writ provides a remedy for those suffering from the 'lingering collateral consequences of an unconstitutional **[**9]** or unlawful conviction based on errors of fact' and 'egregious legal errors.'" *Walgren, 885 F.2d at 1420* (quoting *Yasui v. United States, 772 F.2d 1496, 1498, 1499* & n.2 (9th Cir. 1985)).

The writ fills a very precise gap in federal criminal procedure. **HN3**[] A convicted defendant in federal custody may petition to have a sentence of conviction vacated, set aside or corrected under the federal habeas corpus statute, *28 U.S.C. § 2255*. *United States v. Hayman, 342 U.S. 205, 207, 96 L. Ed. 232, 72 S. Ct. 263 (1952)*. If, however, the sentence has been served, there is no statutory basis to remedy the "lingering collateral consequences" of the unlawful conviction. *Yasui, 772 F.2d at 1498*. Recognizing this gap, the Supreme Court has held that the common law petition for writ of error coram nobis is available in such situations, even though the procedure authorizing the issuance of the writ was abolished in civil cases by *Federal Rule of Civil Procedure 60(b)*. *United States v. Morgan, 346 U.S. 502, 505 n.4, 98 L. Ed. 248, 74 S. Ct. 247 (1954)*. District courts are therefore authorized to issue the writ in federal criminal matters pursuant to the All Writs Act, *28 U.S.C. § 1651(a)*, **[**10]** *id. at 506*, *Walgren, 885 F.2d at 1420*, but may not entertain a petition for the writ with respect to challenges to state convictions, *Sinclair v. Louisiana, 679 F.2d 513, 513-15 (5th Cir. 1982)*; *see also* *Madigan v. Wells, 224 F.2d 577, 578 n.2 (9th Cir. 1955)* (writ of error coram nobis can only issue to aid jurisdiction of court in which conviction was had), *cert. denied*, *351 U.S. 911, 100 L. Ed. 1446, 76 S. Ct. 700 (1956)*. [5]

HN5[] To qualify for coram nobis relief, four requirements must be satisfied: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient **[**11]** to satisfy the case and controversy requirement of Article III; and (4) the error is of the most fundamental character. *Estate of McKinney v. United States, 71 F.3d 779, 781-782 (9th Cir. 1995)* (citation omitted).

HN6[] Coram nobis relief is not limited to individuals. A corporation, not in custody and thus without access to § 22554 relief, can use the writ to attack an unconstitutional conviction. *United States v. Mett, 65 F.3d 1531 (9th Cir. 1995)*; *see also* *United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740, 744 (3d Cir. 1979)* ("courts regularly have allowed corporations to petition for coram nobis").

II. ARGUMENTS

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[5] **HN4**[] A request for a writ of error coram nobis should be filed as a motion in the criminal case, rather than as a separate case. It "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding." *United States v. Morgan, 346 U.S. at 505 n.4*.

Tucor has petitioned for a writ of error coram nobis to set aside its guilty plea. The Luzon defendants argue that the indictment against them should be dismissed. Both motions are founded upon defendants' contention that the conduct alleged in the indictment was immunized by the Shipping Act of 1984.

A. *Shipping Act of 1984*

The parties dispute the scope of an exemption from antitrust liability found in ***HN7***[] Section 7(a)(4) of the Shipping Act of 1984, 46 U.S.C. App. § 1706(a)(4). Specifically, that section provides:

> The antitrust **[**12]** laws do not apply to . . . any agreement or activity concerning the foreign inland segment of through transportation **[*1178]** that is part of transportation provided in a United States import or export trade.

46 U.S.C. App. § 1706(a)(4). According to the government, this section grants immunity only to ocean common carriers. Defendants, on the other hand, contend that the language, structure and purpose of the Shipping Act do not support the government's narrow construction of this exception.

1. *Statutory Interpretation*

HN8[] When interpreting a statute, this Court must look first to the plain meaning of the statute's language. *United States v. Neal, 976 F.2d 601, 602 (9th Cir. 1992)*. If the plain language appears to settle the question, the Court looks to legislative history only to determine whether there is clearly expressed legislative intent that is contrary to the plain language. *Id.* Only in rare or exceptional circumstances will the plain language not control if the statute is unambiguous. *United States v. LeCoe, 936 F.2d 398, 402 (9th Cir. 1991)*. If the plain language does not settle the question, then the Court looks to other sources, such as the legislative history, **[**13]** to decipher the meaning of the ambiguous language. In a criminal case, ambiguous language must be interpreted in defendant's favor under the rule of lenity. *See* *Bifulco v. United States, 447 U.S. 381, 387, 65 L. Ed. 2d 205, 100 S. Ct. 2247 (1980)*; *United States v. Carpenter, 933 F.2d 748, 751 (9th Cir. 1991)*; *United States v. Plaza Health Laboratories, Inc., 3 F.3d 643, 649 (2d Cir. 1993)*.

a. *Plain Meaning of the Statute*

As noted above, Section 7(a)(4) of the Shipping Act of 1984 provides that "the antitrust laws do not apply to . . . any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." 46 U.S.C. App. § 1706(a)(4). On its face, this immunity does not appear to be limited to agreements by or among ocean carriers as suggested by the government. Instead, it appears that the immunity would apply to an agreement between companies providing foreign inland moving services so long as the services were part of "through transportation."

The government correctly points out that ***HN9***[] the plain meaning to be discerned is not the plain meaning of an isolated provision, **[**14]** but instead the plain meaning of the whole statute. Gov't Supp. Mem. at 6:4-14 (citing *Beecham v. United States, 511 U.S. 368, 372, 128 L. Ed. 2d 383, 114 S. Ct. 1669 (1994)*; *John Hancock Mut. Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94, 126 L. Ed. 2d 524, 114 S. Ct. 517 (1993))*. According to the government, looking at the Section 7 immunities in light of Section 4 of the Act makes clear that defendants' interpretation of Section 7 is inconsistent with the plain meaning of the statute.

Entitled "Agreements Within Scope of Act," ***HN10***[] Section 4 states that the Act applies to certain agreements "by or among ocean common carriers," and "among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers." *See* 46 U.S.C. App. § 1702(a) (ocean common carriers), § 1702(b) (marine terminal operators). No other agreements are mentioned in that section. According to the government, agreements among foreign motor carriers do not fall within Section 4 and are therefore outside the scope of the Act.

Defendants contend that the government is, in effect, reading the word "only" into Section 4. Section 4(a) states that "this chapter **[**15]** applies to agreements by or among ocean common carriers . . . ." It does not state that this chapter "only" applies to those agreements. Rather than limit the Section 7 exemptions, defendants argue, Section

4 merely defines the types of agreements for which a filing must be made under Section 5 [6] and for which immunity under Section 7(a)(1) and 7(a)(2) will apply.

i. *Section 7(a) Exemptions*

HN11[] Section 7 of the Act provides six exemptions from antitrust liability:

> The antitrust laws do not apply to--
>
> **[*1179]** (1) any agreement that has been filed under section 1704 of this title and is effective under section 1704(d) or section 1705 of this title, or is exempt under section 1715 of this title from any requirement of this **[**16]** chapter;
> (2) any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 1715 of this title from any filing requirement of this chapter;
>
> (3) any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States, unless that agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States;***HN12***[]
> (4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade;
> (5) any agreement or activity to provide or furnish wharfage, dock, warehouse, or other terminal facilities outside the United States; or
>
> (6) subject to section 1719(e)(2) of this title, any agreement, modification, or cancellation approved by the Commission before the effective date of this chapter under section 814 of this title, or permitted **[**17]** under section 813a of this title, and any properly published tariff, rate, fare, or charge, classification, rule or regulation explanatory thereof implementing that agreement, modification or cancellation.

46 U.S.C. App. § 1706. The government takes the position that each of these exemptions only reaches agreements of or between ocean common carriers. If any one of these provisions grants immunity to an agreement not involving an ocean common carrier, then the government's argument -- that Section 4 limits the scope of the Act to agreements with ocean common carriers -- must fail.

The government's position is that exemptions (1) and (2) apply to agreements filed under the Act, while (3) through (5) apply to ocean common carrier agreements that are described in Section 4, but exempted from filing under Section 5(a). ***HN13***[] Section 5(a) exempts from the filing requirements

> agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States.

46 U.S.C. App. § 1704(a). In essence, the government argues that exemptions (3) through (5) are **[**18]** gap-fillers that provide immunity for certain unfiled ocean common carrier agreements, but do not extend immunity to non-ocean common carrier agreements.

Under the government's theory, exemptions (3) and (4) provide immunity for agreements related to transportation to be performed within or between foreign countries, since such agreements need not be filed under the Act. *See* 46 U.S.C. App. § 1704(a). The government explains that exemptions (3) and (4) are not redundant, although they do overlap. According to the government, exemption (3) provides immunity only for an agreement of an ocean common carrier relating to transportation within or between foreign countries where the agreement does not have a direct, substantial, and reasonably foreseeable effect on United States commerce. Exemption (4), on the other hand, supplements exemption (3) by immunizing agreements of ocean carriers relating to the foreign inland

[6] Section 5(a), 46 U.S.C. App. 1704(a), requires the filing of a conference agreement with the FMC. Section 5(b), 46 U.S.C. App. 1704(b), sets forth the requisite contents of any filed conference agreement, and section 6, 46 U.S.C. App. § 1705, governs the disposition of filed agreements.

segment of "through transportation," which by its nature has an effect on United States commerce. Thus, the government argues that exemption (4) has independent significance even if both (3) and (4) are limited to the agreements of ocean common carriers.

Defendants identify **[**19]** several problems with the government's interpretation of these exemptions. First, defendants argue that Section 7(a)(3) can only be interpreted as applying to persons *other than* "ocean common carriers" in light of the Ninth Circuit's opinion in *Transpacific Westbound Rate Agreement v. Federal Maritime Commission, 951 F.2d 950 (9th Cir. 1991)*. In *Transpacific*, the Ninth Circuit upheld the FMC's determination that ***HN14***[] ocean carriers who operated between foreign ports did not fall within the **[*1180]** Act's definition of "ocean common carrier" and could not benefit from Section 7(a)(1) immunity by filing their foreign-to-foreign agreements with the FMC. *Id. at 953*. The Court approved the FMC's finding that a carrier is an "ocean common carrier" within the meaning of the Act, "only to the extent that it holds itself out to provide transportation between the United States and a foreign [country] . . . ." *Id.* Defendants point out that exemption (3) by its terms does not involve ocean transportation between the United States and a foreign country. Instead, the provision exempts agreements concerning services between foreign countries. Such agreements, under *Transpacific*, do not **[**20]** appear to be agreements involving "ocean common carriers."

Second, defendants contend that the government's "gap filling" theory misinterprets the "gap" created by Section 5(a) of the Act. Section 5(a) exempts from FMC filing "agreements related to transportation to be performed within or between foreign countries . . . ." 46 U.S.C. App. § 1704(a). It is the government's position that the activities described in exemptions (3) and (4), when performed by ocean common carriers, would not be filed under Section 5(a) or immunized under Section 7(a)(1) or 7(a)(2). Exemptions (3) and (4) would provide immunity to these agreements not otherwise covered.

The government's argument ignores the fundamental distinction between "transportation to be performed within or between foreign countries" and "the inland segment of through transportation." Exemption (3) deals with the former and could arguably fill a gap created by Section 5(a). Exemption (4), on the other hand, deals with through transportation, a term of art under the Act, and Section 5(a) in no way exempts ocean carriers from filing agreements relating to the foreign inland segment of through transportation.

ii. *Section 7(b)*

[21]** Section 7(b) states the types of agreements to which the Act does not extend antitrust immunity. Defendants look to Section 7(b)(1) for support of their position that the Section 7(a)(4) exemption is not limited to ocean common carriers. ***HN15***[] Section 7(b)(1) provides:

> This chapter does not extend antitrust immunity to any agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water not subject to this chapter with respect to transportation within the United States.

46 U.S.C. App. § 1706(b)(1). Defendants contend that if Section 7(a)'s antitrust immunities apply only to agreements of ocean common carriers, as the government contends, then Section 7(b)(1)'s preservation of antitrust liability for agreements among motor carriers would be superfluous.

In response to this argument, the government asserts that defendants ignore the fact that 7(b)(1) speaks of agreements *with and among* motor carriers. According to the government, 7(b)(1) reflects a legislative compromise designed to allow ocean carriers to agree on overall through rates, but not to enter into agreements with domestic inland carriers. Yet the government fails to explain **[**22]** why 7(b)(1) refers to agreements "among" motor carriers. If only agreements "with" ocean common carriers were entitled to immunity under the act, there would be no need to reserve liability for agreements "among" domestic carriers. The presence of such a provision strongly supports defendants' position that the immunity under the Act reaches beyond agreements of ocean common carriers.

iii. *Conclusion: Plain Meaning*

This Court concludes that the Section 7(a)(4) immunity means what it says, and is not limited by Section 4. The government's attempt to limit the scope of the immunity by reading "only" into Section 4 of the Act is unconvincing for several reasons. First, the interpretation of Section 7(a)(3) offered by the government is undermined by the Ninth Circuit's decision in *Transpacific*. Second, the government's interpretation of Section 7(a)(4) fails to recognize the ocean common carrier's obligation to file agreements relating to the foreign inland segment of through transportation. Third, the language of Section 7(b)(1) suggests that Congress understood the grant of immunity to extend to agreements among motor carriers unless explicitly withdrawn as in that section. **[**23]** Thus, the Court concludes that the plain meaning **[*1181]** of the statute does not support limiting the scope of the Section 7(a)(4) immunity to agreements of ocean common carriers.

b. *Legislative History*

Since the plain language appears to settle the question, the Court looks to legislative history only to determine whether there is clearly expressed legislative intent that is contrary to the plain language. *United States v. Neal, 976 F.2d 601, 602 (9th Cir. 1992)*. Only in rare or exceptional circumstances will the plain language not control if the statute is unambiguous. *United States v. LeCoe, 936 F.2d 398, 402 (9th Cir. 1991)*. The Court will now review the legislative history in order to determine whether the interpretation urged by the government is compelled by clearly expressed legislative intent.

The government points to legislative history that could arguably support its position that Section 4 was intended to limit the scope of the Section 7 immunities. In the 97th Congress, the Senate Judiciary Committee amended Section 4 of H.R. 4374, the proposed "Shipping Act of 1982". The committee changed the title of the section from "Authorized Activities" to "Agreements Within **[**24]** Scope of the Act." A similar change was made in the introductory sentence of Section 4(a) which was amended to state that "This act applies to agreements among ocean carriers . . . ." H.R. Rep. No. 97-611, Pt. 2 at 3 (1982). The Committee explained that

> through these changes, the Committee makes clear that this section is not intended to define what conduct is or is not authorized under the Act, but rather to indicate the scope of the Act for purposes of defining the breadth of the antitrust exemption set forth in Section 7 of the bill.

H.R. Rep. No. 97-611, Pt. 2 at 31 (1982). In the following Congress when the Shipping Act was passed, the House Merchant Marine and Fisheries Committee said of Section 4 that "This section states the coverage of the bill. It lists the type of agreements to which the bill applies. When read in connection with sections 4 and 7, the effect is to remove the listed agreements from the reach of the antitrust laws as defined in the bill." H.R. Rep. No. 98-53, Pt. 1 at 29 (1983).

Defendants contend that the above quoted references to "Section 7" are really only references to the first exemption found in Section 7. Defendants point out that **[**25]** at when the Judiciary Committee amended Section 4 as described above, the Committee also made significant changes to Section 7 of the Act. In explaining the changes to the Section 7(a)(1) exemption, the Committee stated that the 7(a)(1) provision "defines the scope of the full antitrust immunity conferred by the bill." H.R. Rep. No. 97-611, pt. 2 at 32-33 (1982). Under these circumstances, defendants argue that the description of Section 4 as indicating "the scope of the act for purposes of defining the breadth of the antitrust exemption" can only be read as a reference to Section 7(a)(1).

For affirmative support of their position that Section 7(a)(4) is not limited to agreements with or among ocean common carriers, defendants point to the influence of the Council of European and Japanese National Shipowners Association (CENSA) on the development of an earlier version of the legislation. CENSA proposed an amendment to the 1981 Senate bill, S. 1593, that would have added the following category to the list of agreements granted antitrust immunity:

> any agreement that concerns or involves joint or through intermodal transportation, or other transportation and related services **[**26]** between or within any foreign country or place . . . .

In commenting on the antitrust immunities of the bill, CENSA's representative testified as follows:

> The word "solely" in Section 8(a)(3) could be construed, for example, as excluding from the intended ***antitrust law*** exemption arrangements by conferences or ocean carriers for inland *foreign* motor, rail or air transportation in connection with intermodal routes and services. Also to be kept in mind is the fact that other countries take strong issue with the application of the antitrust laws as well as the Shipping Act to transportation

> arrangements and activities performed within their jurisdictions. Our suggested amendment to Section 8(a) would implement the policy objective of harmonizing U.S. practices with those of its trading partners and would reduce jurisdictional friction and confrontations.
>
> **[*1182]** Surely, applications of the antitrust laws to consolidating and forwarding arrangements and services in other countries as envisaged in the present wording of Section 8(a)(5) would wrongfully invade the jurisdictions of trading partner sovereigns.

Def. Exh. 24, *1981 Shipping Act: Hearing Before Subcommittee* **[**27]** *or Merchant Marine of the Senate Committee on Commerce, Science and Transportation*, 97th Cong. 208 (1981) (statement of Dr. Henry De La Trobe, Vice Chairman, CENSA).

Although the Senate Report on S. 1593 did not refer to the CENSA testimony, the reported bill did contain changes which appear to have addressed CENSA's concern. As introduced, the bill would have provided antitrust immunity to

> . . .
> (3) any agreement or activity that relates solely to transportation services between foreign countries;
> (4) any agreement or activity that relates to shippers' councils operating exclusively outside the United States;" and
> (5) any agreement or activity to provide or furnish warfage, dock, warehouse, or other terminal facilities exclusively outside the United States.

S. 1593, 97th Cong., 1st Sess., §§ 8(a) at 15 (1991). The reported bill, on the other hand, contained the following exemptions: "any agreement or activity that relates solely to ocean or through transportation services within or between foreign countries whether or not via the United States" and "any agreement or activity concerning the inland portion of any intermodal movement occurring outside the **[**28]** United States, through part of transportation in a United States import or export trade." S. 1593, 97th Cong., 2d Sess., § 8(a)(4) and (a)(5) at 56 (1982). To the extent that CESNA's input had an effect on a precursor provision to Section 7(a)(4), this tends to support defendants' position that the immunity was designed to cover agreements among foreign motor carriers.

The strongest support for defendants' position is found in the Report accompanying the final version of S. 1593. First, the Report states that the exemption section "extends a 'blanket' antitrust immunity to agreements of ocean common carriers, to agreements of marine terminal operators, to shippers' councils, to loyalty contracts, and to other activities regulated under the provisions of the bill." S. Rep. No. 97-414, 97th Cong., at 34 (1982). Then, after describing in detail the activities regulated under the bill that would receive antitrust immunity, the Report shifts to activities that, at least implicitly, were not regulated by the bill but would nonetheless receive immunity from antitrust prosecution:

> In addition, transportation service within or between foreign countries, terminal services in foreign **[**29]** countries, as well as the activities of foreign shippers' councils are exempted from the antitrust laws. This is done in furtherance of the policy objective of the bill to harmonize U.S. shipping regulation more closely with that of our trading partners.

Id. This language appears to recognize immunities outside the scope of conduct otherwise regulated by the filing requirements of the Act. Moreover, defendants point out that the exclusion from antitrust liability of agreements among domestic inland carriers first appeared in the reported version of S. 1593. Defendants argue that the recognition in the Senate Report of immunity for non-ocean carrier agreements coupled with the explicit denial in S. 1593 of immunity for domestic motor carrier agreements together compel the conclusion that agreements of foreign inland carriers were intended to be immunized by the proposed Act.

The legislative history appears to favor defendant's position, although it does not conclusively resolve the issue at hand. Most notably, there is no discussion in the 98th Congress of the scope of the foreign inland segment immunity. Accordingly, the Court is left to draw inferences from earlier legislative **[**30]** history on previous unenacted versions of the bill. Certainly these inferences, even if on balance they favored the government's position, which they do not, would be insufficient to overcome the plain meaning of the Act.

c. *Conclusion: Scope of Section 7(a)(4)*

Section 7(a)(4) is not limited to agreements involving ocean common carriers. To hold otherwise would be to adopt a statutory interpretation that renders other provisions of **[*1183]** the Act meaningless. Most notably, Section 7(b)(1) which preserves antitrust liability for agreements among domestic motor carriers would have been entirely unnecessary if the Act's scope was limited to ocean carriers by Section 4. Furthermore, although the legislative history does not conclusively resolve the issue, it does tend to support the defendants' view that, in an effort to harmonize United States' practices with those of our trading partners, the Act provided immunities beyond those provided for under the regulatory filing scheme set up by the statute. The legislative history certainly does not provide a basis for reaching a result contrary to the plain meaning of the Act.

For the foregoing reasons, the Court holds that ***HN16***[] Section 7(a)(4) is **[**31]** not limited to agreements involving ocean common carriers. The statutory immunity is available for agreements among non-ocean common carriers so long as those agreements concern "the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." 46 U.S.C. App. § 1706(a)(4).

B. *The Luzon Defendants' Motion to Dismiss*

The Luzon defendants seek dismissal of the indictment on the basis that the conduct charged in the indictment falls within Section 7(a)(4), and therefore cannot constitute a violation of ***antitrust law***. The government counters that, even if Section 7(a)(4) applies to non-ocean carriers, it is not clear from the face of the indictment that the conduct alleged would fall within that exemption. As noted above, the Court may not consider evidence outside the face of the indictment in resolving defendants' motion. *See* United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996).

1. *Conduct Described in the Indictment*

Defendants contend that the conduct alleged in the indictment relates exclusively to the "foreign inland segment of through transportation," and, as such, falls squarely within **[**32]** the Section 7(a)(4) exemption from United States antitrust laws. The indictment alleges that

> each corporate defendant engaged in the business of providing moving services in connection with the transportation of military shipments of household goods between the Philippines and the United States.

Indictment at 5:7-11. It further alleges that

> the defendants and others entered into and engaged in a combination and conspiracy to suppress competition by fixing prices for moving services supplied in connection with the transportation of military shipments of household good between the Philippines and the United States.

Id. at 2:9-14. The indictment explains how transportation services were provided and alleges that the activities described in the indictment had a substantial effect on United States trade and commerce. *Id.* at 6:12 - 8:18. In explaining the jurisdictional nexus of the alleged offenses, the indictment describes the activities of "agents" as follows:

> For outbound shipments to the United States, the agents accepted bookings on behalf of the U.S. freight forwarders they represented from U.S. military installations in the Philippines, **[**33]** packed the shipments, and transported the shipments by motor van to a port in the Philippines for transfer to an overseas carrier. For inbound shipments, the agents picked up the shipments at the port, transported the shipments by motor van to the final destination, and unloaded and unpacked the shipments.

Id. at 6:19 - 7:2. Thus, it appears from the face of the indictment that the conduct alleged -- providing moving services between Philippine ports and military bases in the Philippines -- occurred exclusively within the Philippines.

The government contends that the transportation described in the indictment is not necessarily "through transportation" within the meaning of the Act. ***HN17***[] The Act defines "through transportation" as

> continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or point.

[*1184] 46 U.S.C. App. § 1702(26). The Act defines "through rate" as "the single amount charged by a common carrier in connection with through transportation." 46 U.S.C. App. § **[**34]** 1702(25).

The government relies primarily on the language of Paragraph 2 of the indictment for its position that the indictment on its face is not limited to agreements concerning the foreign inland segment of through transportation.

Paragraph 2 charges that

> the defendants and others entered into and engaged in a combination and conspiracy to suppress competition by fixing prices for moving services supplied in connection with the transportation of military shipments of household goods between the Philippines and the United States.

According to the government, this broad language could encompass agreements unrelated to through transportation.

Specifically, the government identifies two types of movements that would not constitute "continuous transportation" as required in the definition of "through transportation." First, the government presents the hypothetical situation in which United States freight forwarders arrange for the inland transportation in the United States and the Philippines, but the Department of Defense arranges separately and in its own name for the ocean segment of the transportation. Gov't Opp. at 17-18. According to the government, the indictment **[**35]** could be construed to include such an arrangement, and this arrangement could not be characterized as "through transportation."

The arrangement described in the indictment itself undermines the government's argument. According to indictment, the "Department of Defense contracts with U.S. freight forwarders for the transportation of military shipments of household goods between the Philippines and the United States." Indictment at P13. The indictment repeatedly alleges that the moving services provided by defendants were part of a "continuous and uninterrupted flow of United States foreign commerce." Indictment at PP15, 16, 17, 18, 19. Furthermore, the indictment defines "military shipments of household goods" as "any shipment of furniture, personal effects or unaccompanied baggage owned by U.S. Department of Defense military or civilian employees and their families *that is transported between the Philippines and the United States under a Government Bill of Lading*." Indictment at P7 (emphasis added). This reference to the International Through Government Bill of Lading (ITGBL) program establishes that the hypothetical arrangement in which the Department of Defense separately contracted **[**36]** for ocean carriage could not be encompassed by the indictment. *See* Def. Exh. 1, Decl. of Francis Galuzzo of DOD's Military Traffic Management Command (program is shipment to/from overseas under single Bill of Lading, and freight forwarders submit single bid which includes foreign inland carriers' rate). The repeated references to continuous and uninterrupted transportation as well as the obvious references to the ITGBL program compel the conclusion that the indictment alleges conduct that is part of "through transportation."

Second, the government argues that if the U.S. freight forwarder dealt with defendants as shippers rather than as connecting carriers, the transportation would not constitute "through transportation." The government relies on the definition provided in 46 U.S.C. App. § 1702(17) for the proposition that the freight forwarders may have dealt with defendants as shippers. ***HN18***[] Section 1702(17) provides that "non-vessel-operating common carrier" means "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper *in its relationship with an ocean common carrier*." 46 U.S.C. App. § 1702(7) (emphasis added). This **[**37]** provision does not support the government's position. While a non-vessel-operating common carrier (NVOCC) may be a shipper in relation to the actual ocean common carrier, the freight forwarder remains a common carrier in its relationship to the Department of Defense. *See* 46 U.S.C. App. § 1702(6) (defining common carrier). There is simply no basis for reading into Section 1702(17) an assertion that the connecting carrier chain is broken simply because the freight forwarder is not the actual ocean carrier.

[*1185] 2. *Conclusion: Dismissal of Indictment*

The Court has concluded that Section 7(a)(4) exempts agreements among foreign motor carriers relating to the foreign inland segment of through transportation. The present indictment on its face alleges conduct occurring entirely within the Philippines and in relation to through transportation of military household goods under a single Bill of Lading. Because the indictment alleges conduct for which defendants are immune from criminal liability, the Court must grant defendants' motion to dismiss. [7]

[38]** Even if the Court were unable to conclude whether Section 7(a)(4) exempted the type of agreements at issue in this case, the Court would still be required to grant defendants' motion. ***HN19***[] "In criminal prosecutions the rule of lenity requires that ambiguities in the statute be resolved in the defendant's favor." *United States v. Plaza Health Laboratories, Inc., 3 F.3d 643, 649 (2d Cir. 1993)*. "Where a criminal law is ambiguous," courts "are wary of imposing criminal liability for conduct that the law does not clearly prohibit." *United States v. Foster, 133 F.3d 704, 708 (9th Cir. 1998)* (citing *Bifulco v. United States, 447 U.S. 381, 387, 65 L. Ed. 2d 205, 100 S. Ct. 2247 (1980)*. The fact that the ambiguity is contained in a statutory exemption, rather than the statutory definition of the criminal conduct, does not preclude application of this rule. *See* *United States v. Sheek, 990 F.2d 150 (4th Cir. 1993)* (applying rule of lenity in interpretation of the term "parent" in a statutory exemption to Federal Kidnapping Act). Thus, even if the Court had found that the Shipping Act exemption was ambiguous, the Court would resolve the ambiguity in defendants' favor and grant defendants' **[**39]** motion to dismiss the indictment.

C. *Tucor's Petition for Writ of Error Coram Nobis*

Tucor seeks a writ of error coram nobis to set aside its June 16, 1993 guilty plea. ***HN20***[] A corporation that has been sentenced only to a fine can employ a writ of error coram nobis to attack an unconstitutional conviction. *United States v. Mett, 65 F.3d 1531, 1534 (9th Cir. 1995)*. Although no longer operating as a corporation, Tucor remains a corporate entity with standing to pursue a writ of error coram nobis because it has not undergone corporate dissolution. *See* *Telink, Inc. v. United States, 24 F.3d 42, 44-45 (9th Cir. 1994)*. The government does not dispute that Tucor has standing to bring this petition.

Tucor attacks its conviction on several bases. First, Tucor argues that the indictment was defective because, in light of the Shipping Act exemption, the indictment failed to state an offense. Second, Tucor argues that its due process rights were violated by the government's failure to disclose the Shipping Act exemption to Tucor or to the Court. Third, Tucor argues that the government violated its *Fifth Amendment* rights by selectively prosecuting Tucor, but dismissing charges against **[**40]** Greek companies that had, according to Tucor, engaged in nearly identical conduct.

1. *Sufficiency of the Indictment*

Tucor argues that the indictment was deficient because it failed to raise the Shipping Act exemption and because the conduct alleged in the indictment does not amount to a crime.

a. *Omission of Exemption*

The indictment contained no reference to the Shipping Act exemption which Tucor claims immunizes it from Sherman Act liability. "***HN21***[] While an indictment must ordinarily charge every essential element of an offense, it need not negate every applicable statutory exception." *Echavarria-Olarte v. Reno, 35 F.3d 395, 399 (9th Cir. 1994)*, *cert. denied*, *514 U.S. 1090, 131 L. Ed. 2d 736, 115 S. Ct. 1812 (1995)*; *see also* *United States v. Green, 962 F.2d 938, 941 (9th Cir. 1992)* (government need not allege exception in the indictment); *United States v. Hester, 719 F.2d 1041, 1042 (9th Cir. 1983)* (government not required to allege defendant's non-Indian status in indictment under the Federal Enclaves **[*1186]** Act); *McKelvey, et al v. United States, 260 U.S. 353, 357, 67 L. Ed. 301, 43 S. Ct. 132 (1922)* ("By repeated decisions it has come to be a settled rule in **[**41]** this jurisdiction that an indictment . . . founded on a general provision defining the elements of an offense . . . need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is

[7] Because the Court grants defendants' motion to dismiss the indictment on the basis that the indictment alleges conduct that falls within the relevant Shipping Act exemption, it is not necessary to reach defendants' alternative argument that bilateral treaties between the United States and the Philippines also require dismissal of the indictment.

incumbent on one who relies on such an exception to set it up and establish it."). Therefore, the Court concludes that the Tucor indictment did not fail to state an offense simply because it did not raise and negate a potentially relevant statutory exemption to antitrust liability. [8]

[42]** b. *Failure to State an Offense*

The Court has already concluded that the conduct alleged in the indictment does not amount to a crime. Nonetheless, the government argues that Tucor's guilty plea precludes Tucor from raising this attack on its conviction.

HN22[] A defendant may attack a guilty plea by asserting jurisdictional claims that "the applicable statute is unconstitutional or that the indictment fails to state an offense." *United States v. Caperell, 938 F.2d 975, 977 (9th Cir. 1991)* (quoting *United States v. Montilla, 870 F.2d 549, 552 (9th Cir. 1989)*. In *Caperell*, the Ninth Circuit stated that:

> Although a guilty plea generally waives all claims of constitutional violation occurring before the plea, "jurisdictional" claims are an exception to this rule. In *Montilla*, we stated that, although the dividing line between constitutional claims waived by a plea of guilty and those that survive the plea is not always clear, "claims that 'the applicable statute is unconstitutional or that the indictment fails to state an offense' are jurisdictional claims not waived by the guilty plea."

Caperell, 938 F.2d at 977 (citations omitted). "[A] plea of guilty **[**43]** to a charge does not waive a claim that -- judged on its face -- the charge is one which the state may not constitutionally prosecute." *United States v. Broce, 488 U.S. 563, 575-76, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989)*. If the unconstitutionality is evident from the indictment and the record at the time of the guilty plea, then defendant may be entitled to attack the plea. *See* *United States v. Broce, 488 U.S. 563, 575, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989)*.

United States v. Caperell, 938 F.2d 975 (9th Cir. 1991), forecloses the argument that Tucor has waived its right to assert the insufficiency of the indictment. In *Caperell*, defendant pleaded guilty to engaging in a criminal enterprise relating to the manufacture, sale and possession of methamphetamine. *Id. at 976*. On appeal, defendant argued that the indictment failed to state an offense because methamphetamine was unlawfully included on the schedules of controlled substances. *Id. at 977*. The government argued that defendant had waived this defense by pleading guilty. The Ninth Circuit rejected the government's argument. The court emphasized that defendant's claim was "jurisdictional," and therefore **[**44]** reviewable, because it was capable of resolution by examining the indictment and the relevant statute. *Id. at 977-78*.

In the instant case, as in *Caperell*, defendant's attack on the sufficiency of the indictment can be resolved by reference to the indictment and relevant statutes. ***HN23***[] By pleading guilty, Tucor waived its right to contest the facts to which it admitted. *See* *United States v. Mathews, 833 F.2d 161 (9th Cir. 1987)*. However, Tucor did not waive its **[*1187]** right to assert that the conduct alleged in the indictment, accepted as true, does not constitute a crime. Since Tucor's claim can be resolved by reference to the face of the indictment and the applicable statute, Tucor can attack its conviction despite its guilty plea.

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[8] *United States v. King, 587 F.2d 956 (9th Cir. 1978)*, relied on by Tucor, does not compel a different conclusion. In *King*, a doctor was charged as a co-defendant in a conspiracy to possess cocaine with the intent to distribute. The indictment identified the doctor as a physician but did not allege that he distributed cocaine without a legitimate medical purpose. *Id. at 963*. The court held that the indictment failed to state an element of the offense and was therefore deficient. *Id.* The *King* decision was premised on the Ninth Circuit's earlier conclusion in *United States v. Black, 512 F.2d 864 (9th Cir. 1975)*, that the lack of authorization to dispense a controlled substance was an element of the crime charged. *King, 587 F.2d at 963*. In contrast, there is no support for the view that the inapplicability of the subject Shipping Act exemption is an element of the charges against Tucor that must appear in the indictment. Accordingly, the Court rejects Tucor's argument that *King* requires that the indictment raise and negate the relevant Shipping Act exemption.

As discussed above, the Shipping Act exemption noted by Tucor removes Tucor's conduct from application of the antitrust laws of the United States. Thus, Tucor pleaded guilty to an indictment that did not allege criminal conduct. Had the Court been aware of this exemption at the time of Tucor's change of plea hearing, the Court would certainly not have accepted a guilty plea. Having now become aware of this exemption, the Court must allow Tucor to attack **[**45]** its conviction. Because Tucor is not in custody, it properly petitions for a writ of error coram nobis as the vehicle for obtaining relief. For the foregoing reasons, the Court will grant Tucor's petition.

2. *Failure to Disclose*

Tucor sets forth compelling evidence that counsel for the government knew of the statutory exemption when it entered into the plea agreement with Tucor. According to Tucor, at the time of the indictment in the instant case, the government was investigating similar conduct by companies involved in the transportation of military household goods from bases in Greece. On February 9, 1993, the attorney for Interdean, one of the Greek moving companies under suspicion, met with counsel for the government, including Reginald Tom, concerning the Grand Jury proceedings in that matter. Defendant's Exh. 1, Decl. of Warren L. Dean, Jr. at P 2. At this meeting, Interdean's attorney, Warren Dean, alerted counsel for the government that Interdean considered itself immune from antitrust liability by virtue of Section 7 of the Shipping Act of 1994. *Id.* at P 3. The government attorneys at the meeting allegedly asked Dean to provide a written analysis of the applicability **[**46]** of the Shipping Act's antitrust immunity provisions. *Id.* at P 5. Dean provided this written analysis to Tom, counsel for the government, on February 17, 1993. Thus, counsel for the government was aware of the Shipping Act exemptions in February, 1993, approximately four months before Tucor entered into the subject plea agreement. Nonetheless, counsel for the government did not disclose to the defendant or the Court that there was a potentially relevant exemption from antitrust liability in the Shipping Act of 1984.

Tucor argues that by this omission, the government violated its *Brady* obligations and violated its duty of candor to the Court. In *Brady v. State of Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, the Supreme Court held that "***HN24***[] suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." This obligation by its own terms reaches "evidence." The focus of the obligation is on providing defendants access to exculpatory evidence to which they otherwise would not have access. *See generally United* **[**47]** *States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)*. This logic does not apply to published legal authority, particularly where defendant is represented by counsel who undoubtedly had access to the materials in question. Accordingly, the Court finds that Tucor's *Brady* claim is without merit.

Tucor also contends that the government breached its duty of candor to the Court by not raising the exemption issue during the June 16, 1993 plea hearing. As pointed out by Tucor, ***HN25***[] attorneys have a "continuing duty to inform the court of any development which may conceivably affect the outcome of the litigation." *Tiberton Bd. of License Commissioners v. Pastore, 469 U.S. 238, 240, 83 L. Ed. 2d 618, 105 S. Ct. 685 (1985)* (quoting *Fusari v. Steinberg, 419 U.S. 379, 391, 42 L. Ed. 2d 521, 95 S. Ct. 533 (1975)* (Burger, C.J., concurring)). Furthermore, an United States Attorney has an even greater obligation than a private litigant to see that justice is done. *See Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935)*.

The government denies that it had concluded prior to entering into the plea agreement that Section 7(a)(4) immunized Tucor's conduct. **[**48]** *See* Opp. at 12:24-26; *See also* Decl. of Reginald K. Tom (Department at no time concluded exemption applied to defendant). **[*1188]** The government's supplemental briefing contains a defensible, although, in the Court's opinion, incorrect, interpretation of the scope of the Shipping Act immunities. Under these circumstances, the Court finds that the government has rebutted Tucor's contention that the government considered Tucor's conduct immunized when it entered into the plea agreement.

The fact that the government had not concluded at the time of Tucor's plea that Section 7(a)(4) immunized Tucor from prosecution does not mean that the government fulfilled its duty of candor to the Court. Rather than bring to the attention of the Court a statutory provision that, on its face, appeared to immunize Tucor from prosecution, the government, by its silence in the plea proceedings, prevented this issue from being resolved prior to the Court's acceptance of the plea and imposition of sanctions. Even if the government's interpretation of the statute were correct, the government's failure to bring this potentially applicable immunity to the attention of the Court is hard to understand, particularly **[**49]** in light of the Court's conclusion in this case that the conduct at issue does not violate federal law, and, in the Court's view, represents a far too restrictive view of prosecutorial obligations.

3. *Selective Prosecution*

As a final basis for setting aside its guilty plea, Tucor argues that the government selectively prosecuted the defendants in this case. Tucor notes that the government decided not to prosecute the Greek defendants after learning of the statutory exemption, but continued to prosecute the Philippine defendants. According to Tucor, its nationality was the only possible basis for the government's decision, since there was "no factual distinction" between the acts of the Greek companies and those of Tucor and its co-defendants. Def. Pet. at 21.

Tucor cannot maintain ***HN26***[] a selective prosecution claim because any such claim was foreclosed once Tucor plead guilty. *See* *United States v. Aguilar, 883 F.2d 662, 705 n. 44 (9th Cir. 1989)* (defense of selective prosecution is deemed waived if not raised prior to trial); *United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974)*. Tucor argues that the selective prosecution claim did not ripen until after defendant had **[**50]** entered its plea. Specifically, Tucor learned of the decision not to prosecute the Greek defendants on December 1, 1993, over five months after judgment was entered pursuant to the plea agreement. While these facts may suggest that there was no "waiver" of the selective prosecution in a technical sense, Tucor's guilty plea still forecloses independent inquiry into its selective prosecution claim. *See* *Broce, 488 U.S. at 573* (conscious waiver not necessary with respect to each potential defense relinquished by a guilty plea); *Cf.* *Tollett v. Henderson, 411 U.S. 258, 266, 36 L. Ed. 2d 235, 93 S. Ct. 1602 (1973)* (guilty plea foreclosed defendant's challenge to selection of Grand Jury even though technically no "waiver" because defendant had not known of discriminatory jury selection until after plea).

Even if Tucor's selective prosecution claim could survive its guilty plea, Tucor's evidence would be insufficient to support such a claim. To establish a claim of selective prosecution, the defendant must show that the prosecution "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States, 470 U.S. 598, 608, 84 L. Ed. 2d 547, 105* ***[**51]*** *S. Ct. 1524 (1985)*. A defendant must show not only that similarly situated defendants were not prosecuted, but also that the prosecution was deliberately based on classifications protected under the *Equal Protection Clause*. *Id. at 608-10*. Other than conclusorily asserting that the government based its prosecutorial decision on nationality, Tucor has failed to make a showing that the government's decision to prosecute Philippine, but not Greek, moving companies was impermissible. Any number of factors could have been involved in the government's decision not to prosecute the Greek companies that were under investigation.

4. *Conclusion: Coram Nobis Relief*

Tucor has set forth a number of arguments in support of its petition for a writ of error coram nobis. The Court will grant Tucor's petition because the conduct alleged in the indictment to which Tucor pleaded guilty does not amount to a criminal offense.

[*1189] III. CONCLUSION

For the foregoing reasons, the Court hereby:

(1) GRANTS defendant Tucor's petition for a writ of error coram nobis;

(2) VACATES the Judgment entered on June 22, 1993, and amended on June 25, 1993; and

(3) GRANTS the Luzon defendants' motion to dismiss **[**52]** the indictment.

IT IS SO ORDERED.

Dated: June 15, 1998.

D. Lowell Jensen

United States District Judge

Western Parcel Express v. UPS of Am.

United States District Court for the Northern District of California

June 15, 1998, Decided ; June 15, 1998, Filed; June 18, 1998, Entered in Civil Docket

C-96-1526-CAL

Reporter

65 F. Supp. 2d 1052 *; 1998 U.S. Dist. LEXIS 8924 **; 1999-2 Trade Cas. (CCH) P72,622

WESTERN PARCEL EXPRESS, Plaintiff, v. UNITED PARCEL SERVICE OF AMERICA, INC., et al., Defendants.

Disposition: **[**1]** Defendant's motion for summary judgment on plaintiff's Section Two claims granted. Summary judgment granted to defendant on plaintiff's Section One claims. Judgment entered in favor of defendants and against plaintiff.

Core Terms

relevant market, regional, delivery, pricing, customers, carriers, shipping, market power, antitrust, market share, contracts, barrier, predatory, competitors, summary judgment, argues, monopoly, density, deregulation, genuine issue, small package, options, Parcel, intrastate, genuine issue of material fact, monopoly power, packages, predator, anti trust law, trucking

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[ ] **Entitlement as Matter of Law, Appropriateness**

Summary judgment can be granted only if there is no genuine issue of material fact. When the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue of material fact for trial. Defendant bears the initial burden of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN2[] **Regulated Practices, Private Actions**

In opposing a motion for summary judgment in an antitrust case, the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts. The burden shifts to plaintiff to go beyond the pleadings and present specific facts showing that, despite defendants' contentions, there is a genuine issue of fact which requires a trial. The evidence presented must be viewed in a light most favorable to plaintiff to determine whether genuine issues of material fact exist. If the pleadings, affidavits and other material present no genuine issues of material fact, defendant is entitled to judgment.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Evidence > Admissibility > Circumstantial & Direct Evidence

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Evidence > Types of Evidence > Circumstantial Evidence

HN3[] **Anticompetitive & Predatory Practices, Predatory Pricing**

A monopoly claim, the Sherman Act, *15 U.S.C.S. § 2*, based on predatory pricing requires the plaintiff to show that the defendant possesses, or is likely to possess, monopoly power in a relevant market. Monopoly power may be shown by direct evidence of defendant's restriction of services or charging of supra-competitive prices. In absence of direct evidence of market power, plaintiff may use circumstantial evidence to show that defendant possesses monopoly power or is likely to possess it. Showing monopoly power by circumstantial evidence requires plaintiff to define the relevant market, show that defendant controls a dominant share of that market, and show that there are significant barriers to the entry of new competitors or to the expansion of existing competitors.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Sherman Act, Claims**

To establish a claim for attempted monopoly, *15 U.S.C.S. § 2*, a plaintiff must show four basic elements: 1) specific intent to control prices or destroy competition; 2) predatory or anti-competitive conduct directed at accomplishing that purpose; 3) a dangerous probability of achieving monopoly power; and 4) causal antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN5[] **Monopolies & Monopolization, Attempts to Monopolize**

It is not possible to analyze the alleged monopoly impact of conduct under the Sherman Act, *15 U.S.C.S. § 2* without first defining the relevant market which such conduct is allegedly monopolizing. A relevant market is generally defined as a pool of services that are reasonably interchangeable and are therefore economic substitutes for one another. Without the definition of an appropriate relevant market, it is not possible to determine the impact of a defendant's conduct upon the competition in the market. A plaintiff has the burden of proving the scope of the relevant market, which typically is defined by the relevant product market and the relevant geographical market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN6[] **Monopolies & Monopolization, Actual Monopolization**

The determination of whether a service is reasonably interchangeable requires consideration of the cross-elasticity of demand.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN7[] **Entitlement as Matter of Law, Genuine Disputes**

On summary judgment, a court is not to weigh the credibility of the evidence presented, but rather decide whether the evidence presents a genuine issue of fact. But assertions in expert declarations do not automatically create genuine issues of fact. When expert opinions are not supported by sufficient facts, or when the indisputable record contradicts or otherwise renders the opinions unreasonable, they cannot be relied upon. Expert opinion evidence has little probative value in comparison with the economic factors that may dictate a particular conclusion. Expert declarations may be useful as a guide in interpreting market facts, but they are not a substitute for competent economic evidence.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN8[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The showing of a defendant's significant market share is essential to proving a predatory pricing claim, because it relates to the power to charge supra-competitive prices in the market. And a showing of market share is one of the requirements for a circumstantial showing of market power. Market share data must reflect the actual circumstances in a relevant market and must not be extrapolated from separate or parallel markets.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN9[] **Estoppel, Collateral Estoppel**

Facts established by stipulations or concessions arguendo, rather than by judicial resolution, are not fully litigated and do not have collateral estoppel effect.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN10[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A plaintiff in a predatory pricing claim must show that new rivals are barred from entering the market. A barrier to entry is an obstacle that is capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting. The Ninth Circuit has recognized five types of entry barriers: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) considerations imposing higher capital costs on new entrants; and (5) in some situations, economies of scale.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN11[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The mere fact that entry would require a large absolute expenditure of funds does not constitute a barrier to entry in the sense of being a predatory practice; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN12[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A showing that there are barriers to the expansion of existing competitors in a predatory pricing claim is relevant to prove market power.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN13[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Predatory pricing is generally thought to occur in two stages. First, the alleged predator prices its goods or services below its marginal cost for those goods or services. It hopes that, in the long run, such a price war will drive competitors from the market and thereby increase both its market share and market power. In the short term, the alleged predator, and any competitor that matches its predatory prices, suffers losses. However, because consumers get the benefit of the lower prices, there is no actionable harm to competition and no actionable antitrust violation in that first step.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN14[] **Actual Monopolization, Anticompetitive & Predatory Practices**

In stage two of predatory pricing, the alleged predator seeks to recoup the losses that it suffered during stage one by charging supra-competitive prices, i.e. prices above competitive levels. At the time the predator implements stage two, it must possess enough market power so that by restricting its own output, it can restrict the supply to the market. Supply restrictions artificially increase demand and thus allows the predator to maintain its supra-competitive prices. However, without market power, the predator's recoupment will be thwarted by competitors who will offer their services at prices below the predator's supra-competitive prices. And unless the predator is capable of recoupment, predatory pricing does not hurt consumers.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN15[] **Sherman Act, Claims**

The failure to show antitrust injury, even with proof of an illegal restraint, is fatal to a claim under the Sherman Act, *15 U.S.C.S. 1*.

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Judges: CHARLES A. LEGGE, UNITED STATES DISTRICT JUDGE.

Opinion by: CHARLES A. LEGGE

Opinion

[*1053] *OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT*

Defendants have moved for summary judgment. The motion was opposed, briefed, argued and submitted for decision. The court has reviewed the moving and opposing papers, the records submitted by both sides in connection with the motion, the record of the case, the applicable legal authorities and the arguments of counsel.

I.

Since this is a motion for summary judgment, this court is governed by the standards of *Rule 56 of the Federal **[**2]** Rules of Civil Procedure*. That is, ***HN1***[] summary judgment can be granted only if there is no genuine issue of material fact. When the record as a whole could not lead a rational trier of fact to find for the non-moving party, here the plaintiff, there is no genuine issue of material fact for trial. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*; *In re Super Premium Ice Cream Distribution Antitrust Litigation, 691 F. Supp. 1262, 1265 (N.D.Cal. 1988)*, *aff'd sub nom. Haagen-Dazs Co., Inc. v. Double Rainbow Gourmet Ice Creams, Inc., 895 F.2d 1417 (9th Cir. 1990)*.

Defendant bears the initial burden of "informing the district court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)*.

"***HN2***[] In opposing a motion for summary judgment in an antitrust case, the non-moving party 'must do more than simply show that there **[**3]** is some metaphysical doubt as to the material facts.'" *Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 853 (9th Cir. 1995)*, *quoting* *Matsushita, 475 U.S. 574 at 586, 106 S. Ct. 1348 at 1356, 89 L. Ed. 2d 538*. The burden shifts to plaintiff to go beyond the pleadings and present *specific facts* showing that, despite defendants' contentions, there is a genuine issue of fact which requires a trial. *Sicor, 51 F.3d at 853*, *citing* *Celotex, 477 U.S. at 324, 106 S. Ct. at 2553*. The evidence presented must be viewed in a light most **[*1054]** favorable to plaintiff to determine whether genuine issues of material fact exist. *See Thurman Industries, Inc. v. Pay ' N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989)*. If the pleadings, affidavits and other material present no genuine issues of material fact, defendant is entitled to judgment. *Sicor, 51 F.3d at 853*.

The same summary judgment standards apply in an antitrust case such as this. The facts stated in this opinion and order are found to be facts by a measure of no genuine issue of material fact.

II.

Plaintiff Western Parcel Express ("WPX") alleges that since 1994 the United Parcel Service defendants (collectively "UPS") have violated the federal antitrust **[**4]** laws and California state law in competing with WPX in the regional, business-to-business, small package delivery market in the western United States. As a result of motions to dismiss (Order of December 3, 1996), certain of WPX's claims were dismissed, leaving three federal antitrust claims.

WPX's federal claims accuse UPS of violating both Sections One and Two of the Sherman Act. *15 U.S.C. §§ 1* and *2*. WPX makes two claims under Section Two, alleging that UPS monopolized and attempted to monopolize, by predatory pricing of its delivery services, the intrastate small package delivery market in which WPX operates. WPX's Section One claim alleges that UPS used exclusive-dealing contracts to offer below-cost prices, and thereby illegally restrained competition in WPX's market area.

In May 1997, the parties stipulated to and the court ordered a bifurcation of the discovery. The subject of the first discovery was what the parties termed the "Market Power Issues." The Market Power Issues were defined as (1) the definition of the relevant market, (2) the division of market shares in the relevant market, and (3) the existence of any barriers to entry or expansion in the relevant market.

[5]** After the discovery on the Market Power Issues was completed, UPS filed this motion for summary judgment. UPS argues that because WPX does not and cannot define a relevant market, and cannot show that UPS possesses sufficient market power to recoup an investment in below-cost pricing, UPS is entitled to summary judgment on both of WPX's Section two claims. UPS similarly argues that because WPX cannot show that it experienced any causal anti-trust injury, or that UPS's contracts are exclusive dealing, UPS is also entitled to summary judgment on WPX's Section One claim.

After WPX filed its opposition and UPS replied, the court heard oral argument. At the hearing WPX requested leave to file a supplemental brief to supply the court with additional legal authority and additional evidence in support of its opposition. After the parties filed their supplemental briefing, the court took the motion under submission.

III.

Because of the nature of these anti-trust claims, some discussion is necessary of the industry in which these parties and others operate. The following facts are either admitted or are demonstrated with no genuine issue.

The package delivery industry is a multi-billion **[**6]** dollar, international industry. In the United States more than 70% of all deliveries are accomplished by ground transportation, primarily through intra- and inter-state trucking. So called "small" parcels are packages of limited dimensions weighing up to 150 pounds. And so called "regional" or "intrastate" shipping describes deliveries going to destinations within 450-500 miles of their origin. Regional services are typically provided to customers with large and consistent volumes of shipping through contractual arrangements ("contract carrier service"). The same services are provided to the smaller customers with intermittent shipping **[*1055]** needs through standard terms ("common carrier service").

Prior to nationwide deregulation of intrastate trucking in 1995, the regional markets were dominated by small regional carriers, with some competition from regional less-then-truckload carriers ("LTLs"). For a variety of reasons, the larger national carriers did not compete with the regional carriers. Local delivery carriers were also ineffective competition to the regional carriers due to their limited local service areas. National LTLs did not effectively compete in the regional markets for **[**7]** a variety of reasons.

The Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), implemented in January 1995, marked the culmination of nearly two decades of Congressional effort to deregulate competition in the trucking industry. *See* 49 U.S.C. § 41713(b)(4). The most important impact of the FAAAA on the intrastate trucking business was to eliminate extensive and costly federal regulatory requirements, which previously served as a barrier to new entries into the market. Those regulations controlled pricing and limited the routes of carriers. Congress envisioned that without such regulations, market forces would dictate pricing and routing in the most efficient manner and would open the intrastate trucking markets to more competition.

At the same time, technological innovations in Logistical Information Services ("LIS") allow customers to become more precise in scheduling their shipping needs. Customers desire "just in time" delivery service in order to reduce their inventory costs. As a result of deregulation and LIS, carriers have diversified their shipping services. Numerous "deferred" services, such as second-day and third-day delivery options, were added to **[**8]** the basic services previously provided. These additional services have resulted in a continuum of shipping options available to customers. The options also make it economically beneficial for some customers to use only one carrier to handle all of their shipping needs, regional and otherwise ("single sourcing").

The result has been a substantial increase in competition for regional small package delivery business. Both large and small carriers have restructured their operations to reach customers they were previously unable to serve. Customers, having shipping options and LIS systems, can now compare carrier options and prices to meet their needs. The competition for their business is intense and customer "churning," *i.e*. repeated carrier switching by the customers, is common. But so is single sourcing. WPX and UPS compete for the regional small package shipping business of customers in the western United States.

Plaintiff WPX specializes in the regional ground-based delivery of small packages. From a small beginning in 1978, it has grown significantly and now has 700 employees, serves 15,000 customers, and earns $ 100 million in revenues annually. In 1996, WPX handled more than **[**9]** six million packages. Part of WPX's growth came from its acquisition of other regional, local, and LTL carriers. It now provides intrastate shipping services in ten western and mountain states.

Prior to 1994, governmental regulation of the intrastate trucking industry by the State of California provided WPX with some protection against new entrants into the California market, which was a significant portion of WPX's market. However, in 1994 California deregulated pricing, routing, and service offerings in the small-package carrier industry in California. *See In the Matter of United Parcel Service, Inc.*, No. 92-02-026, *1996 Cal. PUC LEXIS 1221*, at *3 n.1 (Dec. 20, 1996). UPS was one, but only one, of the national shippers to enter the California market after California deregulation went into effect.

Since deregulation in California in 1994, WPX's profit margins have decreased. The implementation of the FAAAA in 1995 also negatively impacted WPX's profit **[*1056]** margins. Nonetheless, WPX reported its pre-tax profit margins as almost 20% for the years 1994 through 1996. WPX blames the decrease in its profit margins almost exclusively upon UPS's entry into the intrastate market. However, **[**10]** while WPX's profit margins may have shrunk, WPX's revenues have grown from $ 29.4 million in 1994 to $ 47 million in 1997.

Defendant UPS provides local, regional, national, and international shipping services. UPS's 1996 financial statements indicate that it handled over 12 million packages for 1.4 million customers, generating an after-tax profit of approximately $ 1.1 billion dollars. It employs over 330,000 employees at approximately 1,500 operating facilities. The statements suggest that over 90% of UPS's revenue is from ground based deliveries for both residential and business customers.

In 1994, UPS began to compete with WPX and other regional carriers. At first that competition was limited to California. But once the FAAAA was implemented in 1995, UPS entered the regional shipping markets in most of the other western states. UPS documents show that by 1996 UPS was promoting itself as a single sourcing option for customers, and was offering volume discounts as incentives for customers to use UPS for the majority of their shipping needs. By 1997, more than 20 of WPX's past customers had switched to UPS, some on the basis of the single sourcing option available from UPS.

WPX **[**11]** and UPS are not the only carriers providing shipping services in the western United States. There are many national, regional, and local carriers providing a variety of services. The large national carriers include RPS, Federal Express ("Fedex"), and the United States Postal Service ("USPS").

RPS focuses on business-to-business small package delivery. Its 1996 annual revenue exceeded $ 1.3 billion. Through September 1997, RPS's revenue year-to-date was $ 1.1 billion, up 19% from the same period in 1996. Until 1995, RPS provided only long-haul business-to-business services. However with deregulation of the industry in 1995, RPS entered the regional market. RPS provides regional service throughout large portions of five western states.

Fedex competes for time-sensitive delivery of packages throughout the nation. It offers a variety of delivery options for business-to-business delivery of small packages. In 1995, shipping industry analysts viewed Fedex's expansion into the ground delivery business as part of an industry trend to compete with regional carriers like WPX. Fedex's 1996 Annual Report highlighted its commitment to serve the ground-based time-sensitive regional delivery market. **[**12]** In October 1997, Fedex announced it intended to acquire the corporate parent of RPS and Viking Freight.

USPS competes in the delivery of smaller packages, up to 70 pounds, offering its services throughout the nation. In 1997 USPS announced a major initiative to update its tracking technology, with specific mention of improving its overnight and deferred services. WPX's expert notes that USPS's successful response to the 1997 Teamster/UPS strike established USPS as an acceptable alternative for business-to-business package delivery.

Of the regional carriers operating in the west, WPX is the largest. However, there are several others. They include California Overnight and Golden State Overnight. In 1995 WPX merged with Air Data Express, a regional carrier serving the Pacific Northwest. In 1996, WPX acquired two more regional carriers in Oregon and Texas.

National and regional LTL carriers are also active in the west. LTL carriers sell excess space on trucks already scheduled for long-haul or multistate shipping routes. Industry analysts note that the shift to options like just-in-time delivery have made LTLs available regional alternatives for some customers.

[*1057] Local carriers also **[**13]** provide delivery of small packages and some LTL services, within limited geographic areas. Most are small, privately held companies, more like local couriers than large shipping companies. There are at least seventy such companies operating in California. While these carriers provide basic delivery options for customers with local needs, some provide alternative regional delivery services.

A final option are the private delivery fleets operated by customers themselves. Many companies choose to have their own fleets to accomplish their distribution needs. Although there is little industry analysis of the impact of these private fleets on the intrastate trucking market, private fleets are another option for customers.

The record demonstrates that the market for the regional delivery of small packages is competitive. Customers have a wide continuum of choices of services and carriers. The deregulation legislation is apparently having its over-all intended effect. The question in this case is whether defendant UPS has nevertheless acquired and exercised monopoly power in a relevant sector of the market, and has engaged in predatory pricing.

IV.

WPX alleges that since May 1994 UPS has **[**14]** used monopoly power to predatorially price its regional shipping services to eliminate WPX as a competitor in the regional market in the western United States. WPX contends that UPS dominates the regional market and that WPX is UPS's only significant competition.

HN3[] A Section Two monopoly claim based on predatory pricing requires the plaintiff to show that the defendant possesses, or is likely to possess, monopoly power in a relevant market. *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*. Monopoly power may be shown by direct evidence of defendant's restriction of services or charging of supra-competitive prices. *See* *Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997)*, *citing* *Rebel Oil, 51 F.3d at 1434*. In absence of direct evidence of market power, plaintiff may use circumstantial evidence to show that defendant possesses monopoly power or is likely to possess it. *Forsyth. 114 F.3d at 1475*. Showing monopoly power by circumstantial evidence requires plaintiff to define the relevant market, show that defendant controls a dominant share of that market, and show that there are significant barriers to the entry of new competitors **[**15]** or to the expansion of existing competitors. *I.d*. at 1476.

WPX also claims that UPS's predatory pricing violates the "attempt to monopolize" language of Section Two. WPX alleges the same facts as in its monopoly claim, with the one difference that UPS intends to, but has not yet, monopolized the relevant market. ***HN4***[] To establish a Section Two claim for attempted monopoly WPX must show four basic elements: 1) specific intent to control prices or destroy competition; 2) predatory or anti-competitive conduct directed at accomplishing that purpose; 3) a dangerous probability of achieving monopoly power; and 4) causal antitrust injury. *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)*. Because the discovery leading to this motion was limited to the Market Power Issues stated above, only consideration of the last two elements is possible upon the evidence presented.

To show that UPS has a "dangerous probability of achieving monopoly power" in the relevant market, WPX must provide evidence that UPS's pricing will likely help it achieve a dominant share of the relevant market such that UPS can later recoup the losses it sustains by below-cost pricing.

Therefore, the same **[**16]** Market Power Issues are important to an analysis of both the monopoly and attempted monopoly claims.

[*1058] V.

Central to plaintiff's claims of monopoly and attempted monopoly is the necessity to define a relevant ***HN5***[] market. It is not possible to analyze the alleged monopoly impact of UPS's conduct without first defining the relevant market which such conduct is allegedly monopolizing. *See* *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455-56, 113 S. Ct. 884, 890, 122 L. Ed. 2d 247 (1993)*; *Thurman*, 875 F.2d at 1373 ("defining the relevant market is indispensable to" Section Two monopolization claims).

A relevant market is generally defined as a pool of services that are reasonably interchangeable and are therefore economic substitutes for one another. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1489 (9th Cir. 1991)*. Without the definition of an appropriate relevant market, it is not possible to determine the impact of a defendant's conduct upon the competition in the market. *Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890, 122 L. Ed. 2d 247 (1993)*; *Rebel Oil Company, Inc. v. Atlantic Richfield Company, 51 F.3d at 1434*. Plaintiff **[**17]** has the burden of proving the scope of the relevant market, which typically is defined by the relevant product market and the relevant geographical market. *See, e.g., United States v. Grinnell, 384 U.S. 563, 575-76, 86 S. Ct. 1698, 1706, 16 L. Ed. 2d 778 (1966)*; *Morgan, 924 F.2d at 1489-90*.

"Defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business," while "a geographic market is 'an area of effective competition' where buyers can turn for alternate sources of supply." *Morgan, 924 F.2d at 1489-90*. In practice, economists provide the court with expert testimony to explain the relevant market and to measure the impact of the allegedly illegal conduct. *See, e.g., U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 599 (1st Cir. 1993)*.

WPX argues that the definition of the relevant market is an issue for the jury, and thus it is not appropriate for the court to rule on the relevant market in this motion. *See Image Tech. Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997)*("Ultimately **[**18]** what constitutes a relevant market is a factual determination for the jury"). However, as with any issue of fact, if no genuine issue exists, or if plaintiff has failed to carry its burden of going forward with the evidence, summary judgment is appropriate. *See Morgan, 924 F.2d at 1489-90*; *In re Super Premium Ice Cream, 691 F. Supp. at 1268*. It is therefore proper for this court to examine the record and the law, to decide if there are genuine fact issues concerning the relevant market.

In its complaint, WPX defined the relevant market as "the time sensitive transportation by ground based delivery from one place of business to another place of business of small packages or parcels, generally weighing between one pound and one hundred and fifty pounds, in intrastate and interstate commerce within the Western United States." WPX then further described the relevant market by delineating the product and geographic components. The relevant product market was defined as the time sensitive delivery of small parcels over variable distances, but most commonly consisting of delivery within 150 miles in two days. The relevant geographic market was described as California, Arizona, Nevada, **[**19]** Oregon, Washington, Idaho, Montana, Utah, and Alaska.

UPS argues that this definition is so broad that the shipping services of all carriers must be considered in order to analyze that market and the impact of UPS's conduct in that market. UPS has provided factual evidence and the opinion of an expert with significant experience in antitrust and economic issues in the package delivery industry. The conclusion from that record is that after deregulation and LIS, customers view the shipping market as a continuum of all shipping services, **[*1059]** which are interchangeable depending upon need and price. The services need not be identical to be considered reasonably interchangeable. ***HN6***[] The determination of whether a service is reasonably interchangeable requires consideration of the cross-elasticity of demand. *United States v. E.I. du Pont de Nemours and Co., 351 U.S. 377, 394, 76 S. Ct. 994, 1007, 100 L. Ed. 1264 (1956)*. If customers respond to a small price change in a service by changing to another provider, there is a high cross-elasticity of demand between the services. In such a case, the services are reasonably interchangeable and therefore compete in the same market. UPS argues that based on the record **[**20]** it could not attain market power because so many alternatives exist for customers that any attempt to charge high prices would open the door for competitors.

WPX then proposed a different relevant market. Its amended definition was the market for regional time-definite, ground-based delivery of small parcels in California, Arizona, Nevada, and in portions of Utah. WPX argues that in this narrower market, WPX and UPS are the only carriers competing for regional contract carrier services, and that since UPS has underbid and thereby obtained some of WPX's customers in this market, UPS now possesses an illegal monopoly. WPX provides certain evidence in support of its arguments. And WPX includes numerical calculations intended to show that UPS is predatorially pricing its regional small parcel delivery service in the market as WPX defines it. WPX did not, however, answer the thrust of UPS's arguments or evidence.

UPS in reply again submitted a report from its expert, in which the expert stressed several weakness in WPX's theories, highlighted evidence that WPX excluded or failed to answer, and explained that even if WPX's new market definition were correct, WPX could still not show that **[**21]** UPS possessed market power.

In WPX's supplemental brief, it again changed its definition of the relevant market. It has narrowed the definition to include only the overnight, ground-based regional small package delivery service to wholesale distributors who need to ship products within approximately 500 miles of their strategically located warehouses. UPS replies that even this narrower definition does not represent the realities of a market, could not be a relevant market for antitrust purposes, and does not rebut the evidence UPS previously presented. UPS again argues that because WPX has not responded to the evidence UPS presented concerning the relevant market, summary judgment is appropriate.

WPX's efforts to redefine and narrow its alleged relevant market may be procedurally improper. *See* *International Telephone & Telegraph Corp. v. General Telephone & Elec. Corp., 518 F.2d 913, 934 (9th Cir. 1975)*(plaintiff's failure, in its pleadings, to include certain products in its definition of the relevant product market was binding); *Continental Trend Resources, Inc. v. OXY USA Inc., 44 F.3d 1465, 1481 n.19 (10th Cir. 1995)*(preventing plaintiff who pleaded broad, multi-state **[**22]** relevant market from revising the definition during the course of the litigation to narrow it). But even if some narrower definition were legally appropriate, it is not supported by the record here. The parties have developed the record through lengthy discovery on the issue. And the record does not support, factually or legally, plaintiff's claimed market.

WPX attempts to narrow the defined market in order to identify a small market in which UPS might have monopoly power. WPX's attempt to define the market on the basis of price or product variances is contrary to case law holding that "such distinctions are economically meaningless where the differences are actually part of a *spectrum* of price and [product options]." *In re Super Premium Ice Cream, 691 F. Supp. at 1268* (emphasis in original). *See also* *Brown Shoe Co. v. United States, 370 U.S. 294, 326, 82 S. Ct. 1502, 1524-25, 8 L. Ed. 2d 510 (1962)*. (explaining that pricing in a wide market does not provide a **[*1060]** rational way to subdivide a market into antitrust relevant markets). And the record here shows both a spectrum of consumer choices, and active competition for those choices. Both UPS's and WPX's expert reports **[**23]** describe the shipping options available to consumers in the so-called regional shipping market. UPS's expert explained, and WPX's experts confirmed, that deregulation and advanced LIS technology have significantly increased the diversity of this spectrum.

WPX attempts to establish its relevant market position by the reports of two experts. However, neither has a background in antitrust economics, both disclaimed expertise in ***antitrust law*** in their depositions, and neither has offered an opinion on the definition of relevant markets in antitrust litigation. And neither has responded to UPS's evidence or expert's report.

HN7[] On summary judgment, this court is not to weigh the credibility of the evidence presented, but rather decide whether the evidence presents a genuine issue of fact. But assertions in expert declarations do not automatically create genuine issues of fact. *Rebel Oil, 51 F.3d at 1440*. When expert opinions are not supported by sufficient facts, or when the indisputable record contradicts or otherwise renders the opinions unreasonable, they cannot be relied upon. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578, 2598, 125 **[**24]** L. Ed. 2d 168*. "Expert opinion evidence … has little probative value in comparison with the economic factors" that may dictate a particular conclusion. *Matsushita, 475 U.S. at 594 n.19, 106 S. Ct. at 1360 n.19*. Expert declarations may be useful as a guide in interpreting market facts, but they are not a substitute for competent economic evidence. *Brooke Group, 509 U.S. at 242, 113 S. Ct. at 2598*. The opinion of WPX's experts do not create genuine fact issues about the definition of the relevant market.

Plaintiff's citation to *Forsyth v. Humana, 114 F.3d 1467*, is pertinent to the definition of a relevant product market in a Section Two case. But plaintiff cannot use that authority to define a relevant market as narrow as it contends. Plaintiff argues from *Forsyth* that price differentials alone may serve to create different relevant markets. To the extent that *Forsyth* so indicates, it was where the demand for one product showed no relationship to the price for the other. But plaintiff's evidence here does not establish such a factual predicate. As stated, the customers in this industry view shipping services as a continuum of shipping options and prices. While **[**25]** *Forsyth* is properly cited for the proposition that direct evidence of market power can defeat the need to provide circumstantial evidence of market power, the evidence here does not support the argument which plaintiff makes about pricing in this industry.

By a standard of no genuine issue of material fact, this court therefore determines that plaintiffs' attempted definition of a relevant market, even in its most narrow form, is not acceptable either legally or factually. At the very least, plaintiff has failed to meet its burden of going forward with the evidence on this issue under the standards of *Celotex* and *Matsushita*.

VI.

The lack of a defined relevant market might eliminate the necessity for this court to examine any further questions about UPS's alleged market power. However, it is apparent from the record that under any definition of a relevant market, UPS does not have the necessary market power for purposes of the anti-trust laws. Since the parties have conducted extensive discovery on this issue and have discussed it in their briefs, some consideration by the court is therefore appropriate.

HN8[] The showing of a defendant's significant market share is essential **[**26]** to proving a predatory pricing claim, because it relates to the power to charge supra-competitive prices in the market. And a showing of market share is one of the requirements **[*1061]** for a circumstantial showing of market power. *Rebel Oil, 51 F.3d at 1434*. Market share data must reflect the actual circumstances in a relevant market and must not be extrapolated from separate or parallel markets. *See, e.g., Morgan, 924 F.2d at 1491*; *Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 749 (3rd Cir. 1996)*; *Bell v. Dow Chem. Co., 847 F.2d 1179, 1184 (5th Cir. 1988)*.

UPS argues that even if WPX's definition of a relevant market were proper, WPX has not presented adequate evidence of UPS's market.

WPX argues that UPS possesses an 83% share of the relevant market. However, the 83% number was taken from a 1994 UPS business plan for its West Los Angeles District, and it represents UPS's market share of *all* ground shipping, not just time-sensitive, and only in West Los Angeles. WPX cannot extrapolate this number to represent UPS's market share of the entire claimed relevant market. *See, Morgan, 924 F.2d at 1491*. WPX's expert reports and WPX's other evidence do not provide **[**27]** a reasonable estimate of UPS's market share of any market, be it the relevant market defined in the complaint or the narrower market WPX now proposes.

WPX argues that the market share figure presented by UPS's expert, 20-25%, is imprecise and based on faulty assumptions. It is indeed imprecise. However, the argument is insufficient for two reasons.

First, UPS's expert disclaimed that his market share estimation was precise. He stated that the statistics needed to prepare an accurate market share estimate are simply not in existence. He explained that the reason no such statistics exist is because neither industry analysts nor shipping companies collect data on a market defined by overnight, ground-based business-to-business delivery of small parcels. He also explained that he had to base his estimate on market statistics that do not separate business from residential delivery.

Second, and more important, UPS does not have the burden of proving its market share. Rather, UPS's burden is to make a *prima facie* showing that WPX does not present sufficient evidence to show that UPS has a significant market share in a relevant market. UPS did that by showing that because WPX's market **[**28]** definition was erroneous WPX could never show UPS's market share. WPX's burden was then to show sufficient evidence of UPS's market share in a relevant market to create a genuine issue. It has not done so.

WPX argues that it need not provide market share data because UPS conceded market power in another antitrust case involving regional shipping. *See General Parcel Service, Inc. v. United Parcel Service of America, Inc.*, Civ. Action No. 1:95-CV-0320-RCF, Slip Op. at 5 (N.D. Ga. Aug. 30, 1996). However, the court in the *GPS* case noted that UPS's concession was not binding outside the consideration of that motion. UPS made the concession of market power in order to expedite the resolution of that predatory pricing case, because GPS could not show that UPS's prices were predatory regardless of the market power issues. ***HN9***[] Facts established by stipulations or concessions *arguendo*, rather than by judicial resolution, are not fully litigated and do not have collateral estoppel effect. *See* *Sekaquaptewa v. MacDonald, 575 F.2d 239, 247 (9th Cir. 1978)*.

Given the lack of an adequately defined relevant market, WPX does not present adequate evidence of UPS's market share. Even assuming **[**29]** that WPX's redefinition of the relevant market is accurate, it does not offer adequate evidence on the market share issue. The court therefore concludes that WPX has failed to provide sufficient evidence to create a genuine issue of fact concerning UPS's market share in a relevant market.

VII.

Another step in the analysis of the market power issue is to examine whether **[*1062]** there are barriers to the entry of new competitors, or barriers to the expansion of existing competitors, in the market.

HN10[] A plaintiff in a predatory pricing claim "must show that new rivals are barred from entering the market . . . ." *Rebel Oil, 51 F.3d at 1439*. A barrier to entry is an obstacle that is "capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting." Areeda & Turner, ***Antitrust Law***, P 727d. The Ninth Circuit has recognized five types of entry barriers: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) considerations imposing higher capital costs on new entrants; and (5) in some situations, economies of scale. *Rebel Oil, 51 F.3d at 1439*. **[**30]**

WPX argues that large capital costs associated with entrance into the regional shipping market is a significant barrier to entry. It further argues that the need for a regional carrier to maintain high delivery density is also a barrier to entry. Delivery density refers to the ability of a carrier to make multiple deliveries to each individual location served, thereby maximizing the revenue per stop. WPX argues that delivery density is essential to the success of any regional carrier. UPS counters that simply because setup and maintenance costs are high does not mean that entrance of new competitors is precluded. Further, UPS attacks the delivery density argument as being illogical; that is, if delivery density were a pre-requisite to entry, then no new regional carrier could ever successfully start operations.

WPX highlights its capital costs during its recent expansion, noting that it had to borrow to finance the expansion of its business by the acquisition of other regional carriers. Borrowing money to *expand* a market is not really relevant as a barrier to entry. But even if this evidence were relevant, "***HN11***[] the mere fact that entry [would require] a large absolute expenditure **[**31]** of funds does not constitute a 'barrier to entry;' a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm." *Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1428 (9th Cir. 1993)* *quoting* 2 Areeda & Turner, ***Antitrust Law*** P 409e at 303. WPX's argument is also answered by the fact that WPX was successful in obtaining the money and in expanding.

WPX's argument about delivery density is also unsupported by the record. First, if delivery density were a significant barrier, neither WPX nor RPS could have attained the success they have. Both started small and expanded with or without delivery density. Additionally, if the court were to assume that WPX's narrow market definition is a true relevant market, UPS's entrance into the market in California in 1994 also answers WPX's density argument. The delivery density argument is really an explanation of price/volume discounting, and is not an explanation of a barrier to entry. It merely explains that delivery density lowers costs, and that lower costs obviously help a carrier maintain profitability. WPX's ability to develop delivery density is perhaps partially **[**32]** responsible for the profit margins WPX enjoyed prior to deregulation. However, no evidence presented by WPX explains how delivery density is a barrier to entry. And WPX offers no evidence to contradict UPS's evidence that delivery density, while perhaps forcing a new entrant to focus on a smaller piece of the market before expanding into the whole market, is not a barrier to entry.

Therefore, the court must conclude that WPX has not presented sufficient evidence to create a genuine fact issue on the existence of barriers to entry.

HN12[] A showing that there are barriers to the expansion of existing competitors is also relevant to prove market power. *Rebel Oil, 51 F.3d at 1439*. WPX does not discuss this issue in its opposition to UPS's motion. Moreover, in both 1995 and 1996, WPX successfully expanded by acquiring at least two regional carriers in the geographic **[*1063]** market it defined in its complaint. But more important in a summary judgment motion, WPX does not contest UPS's evidence or legal authority on the issue. WPX has thus failed to carry its burden to show that their are genuine issues of fact concerning barriers to expansion.

Finally, as discussed above in section III, numerous **[**33]** competitors to both WPX and UPS have in fact entered and are serving the market. This record shows that there are not material barriers to entry and expansion, and that the market is competitive.

VIII.

Plaintiff's allegations of predatory pricing by UPS are also interwoven with the issues of monopoly, attempted monopoly, and whether there has been an anti-trust injury.

HN13[] Predatory pricing is generally thought to occur in two stages. *Rebel Oil, 51 F.3d at 1433*. First, the alleged predator prices its goods or services below its marginal cost for those goods or services. *Id*. It hopes that, in the long run, such a price war will drive competitors from the market and thereby increase both its market share and market power. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117-18, 107 S. Ct. 484, 493, 93 L. Ed. 2d 427 (1986)*. In the short term, the alleged predator, and any competitor that matches its predatory prices, suffers losses. However, because consumers get the benefit of the lower prices, there is no actionable harm to competition and no actionable antitrust violation in that first step. *Brooke Group, 509 U.S. at 224*, *quoting* *Brown Shoe v. United States,* ***[**34]*** *370 U.S. at 320* ("it is axiomatic that the antitrust laws protect competition not competitors").

HN14[] In stage two, the alleged predator seeks to recoup the losses that it suffered during stage one by charging supra-competitive prices, *i.e*. prices above competitive levels. *Rebel Oil, 51 F.3d at 1434*. At the time the predator implements stage two, it must possess enough market power so that by restricting its own output, it can restrict the supply to the market. Supply restrictions artificially increase demand and thus allows the predator to maintain its supra-competitive prices. *See* Areeda & Turner, ***Antitrust Law*** P501, at 322. However, without market power, the predator's recoupment will be thwarted by competitors who will offer their services at prices below the predator's supra-competitive prices. And unless the predator is capable of recoupment, predatory pricing does not hurt consumers. *Brooke Group, 509 U.S. at 224-25*.

WPX has not presented adequate evidence about UPS's pricing under that analysis. This prevents WPX from establishing causal antitrust injury, the type of injury the antitrust laws were designed to prevent. Predatory pricing is only harmful when the **[**35]** predator succeeds in recouping the losses it suffered by its earlier below-cost pricing. Even if the allegations of below-cost pricing were true, WPX provides no market evidence that suggests UPS is likely to gain such monopoly pricing power.

WPX relies on *Marsann Co. v. Brammall, Inc., 788 F.2d 611 (9th Cir. 1986)*, for the proposition that where proof of harm to competition is apparent, failed or impossible market analysis should not cause a case to be dismissed. In *Marsann* the district court granted summary judgment on the ground that the plaintiff could not show with precision that predatory prices were charged. *Id. at 613*. The Ninth Circuit reversed, suggesting that absolute precision was not required in calculating the predatory price figures. *Id. at 615*. *Marsann* was fact-specific and is not helpful to plaintiff here because of the absence of evidence on the market and on the other market power issues. No trier of fact could assess the impact of anti-competitive pricing on a relevant market when that relevant market is undefined. And even if the relevant market were defined, without specific evidence indicating market shares **[*1064]** or entry or expansion barriers, **[**36]** no analysis of causal antitrust injury is appropriate.

Plaintiff must show not just an injury to itself as UPS's competitor. Rather, its burden is to show an injury to competition. There is no genuine issue of fact that competition has in fact increased, offering the benefits of the competition to customers. There is therefore no evidence showing a present or likely causal anti-trust injury.

IX.

The court therefore concludes that plaintiff has not demonstrated a genuine issue of material fact on its causes of action based on monopoly or attempted monopoly. It has not carried its burden of showing a genuine issue on the relevant market. Nor has it presented sufficient evidence to show a genuine issue on defendant's market power in that relevant market. And it is has not shown anti-trust injury. Defendant's motion for summary judgment on plaintiff's Section Two claims must therefore be granted.

X.

WPX's remaining claim alleges that UPS's shipping contracts ("CCAs"), are contracts that unreasonably restrain trade in violation of Section One of the Sherman Act, by requiring shippers to use UPS exclusively for their regional shipping needs. Specifically, WPX contends that these contracts **[**37]** contain terms that prevent customers from using other carriers. WPX also alleges that other contract terms prevent the customers from easily terminating the contracts, and require the customers to use UPS exclusively in order to secure promised discounts. Finally, WPX claims that UPS's use of these "exclusive dealing" contracts injures competition and causes WPX to suffer economic injury of the type the antitrust laws were designed to prevent.

UPS does not dispute the existence of CCAs with many of WPX's former customers. However, it disputes that the contracts are exclusive. The contracts (1) are terminable at will by either party on between 7 to 30 days notice; (2) do not require the customers to use UPS exclusively; and (3) do not base any discount to the customers upon the exclusive use of UPS.

To establish a claim under Section One, WPX must show that the CCAs unreasonably restrained trade under a rule of reason analysis. *See* *Bhan, 929 F.2d 1404, 1410 (9th Cir. 1987)* (citing *T.W. Elec. Serv. v. Pacific Elec. Contrs. Ass'n., 809 F.2d 626, 632-33 (9th Cir.1987))*; *McDaniel v. Appraisal Inst., 117 F.3d 421, 422-23 (9th Cir. 1997)*, *cert. denied*, *140 L. Ed. 2d 470,* ***[**38]*** *118 S. Ct. 1305 (1998)*. To apply a rule of reason analysis the court must look for the actual effects of the CCAs on competition in the market. In order for the CCAs to be illegal restraints, WPX must show that the probable effect of the CCAs is to foreclose competition in a substantial portion of the market. *Cf.* *Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997)*. In addition, WPX must show that it suffered "antitrust injury" - i.e. an injury resulting from the anti-competitive effects of UPS's contracts. *Rebel Oil, 51 F.3d at 1443-44*.

The foreclosure effect of the CCAs is related to the issue of market share. *See* *Omega, 127 F.3d at 1162-63*. But as discussed above WPX has not shown a relevant market and has not delineated UPS's market share of any market.

Further, WPX has not provided adequate evidence that the CCAs are in fact exclusive. All of the contracts in evidence have termination clauses that allow either party to terminate for any reason as long as 7, 10, or 30 days notice, (depending on the specific contract) is given. Nearly all of the contracts have relatively short durations, ranging from 30 days to 3 years. (Only one contract, that **[**39]** with American Greetings, falls outside this range of duration. However, the American Greetings' CCA was entered into in 1993, prior to deregulation and UPS's entrance into the regional contract carrier market in the **[*1065]** west). Most important, none of the contracts contain terms requiring a customer to give all of its shipping business to UPS. The contracts often require the customer to maintain certain levels of volume in order to receive agreed pricing discounts. And some of the contracts state that the customer will make UPS the preferred carrier for the customer's regional shipping needs. But that is not a *requirement* that the customer can use only UPS.

The duration and termination terms of the CCAs do not support WPX's contentions that they are exclusive dealing contracts in violation of Section One. *Cf.* *Omega, 127 F.3d at 1163-64*. A competitor could obtain one of UPS's customers by offering better prices or services and having the customer provide UPS with the contractually stated notice. The termination provisions diminish the competitive advantage that such contracts create. *Id. at 1164*.

WPX's evidence on the exclusivity of the contracts is only the testimony of James **[**40]** Gordon, Traffic Manager at Henry Schein. Prior to 1995, when Schein entered into a CCA with UPS, it used WPX for its regional shipping needs. Mr. Gordon stated in his deposition that he never thought that UPS's CCA with Schein was exclusive. He always believed that he could terminate the contract at any time for any reason. Mr. Gordon never believed that all of Schein's business would have to go through UPS, and he indicated that Schein's commitment to ship 53,000 packages a week through UPS did not amount to that company's total weekly shipping volume.

Even if WPX could show exclusivity, the fact that other shippers have recently entered the market also indicates that competition exists and that the market is not foreclosed.

Even if the CCAs could be cast as unreasonable restraints, WPX cannot show that it has suffered antitrust ***HN15***[] injury. The failure to show antitrust injury, even with proof of an illegal restraint, is fatal to a Section One claim. *See McDaniel, 117 F.3d 421 at 423*. Despite WPX's arguments, it has not been effectively eliminated from the market. Rather, it experienced a 60% increase in sales, generating over $ 100 million in revenues last year, the third year of UPS's **[**41]** alleged anti-competitive actions. WPX's claimed reduction of its higher profit margins does not equate to antitrust injury. *See id*. ("It is not enough for [the plaintiff] to show that a competitor, himself, was injured").

Plaintiff has not produced sufficient evidence to show that the contracts are exclusive dealing contracts, has not shown that the alleged restraints on the customers are unreasonable, and has not shown anti-trust injury. Plaintiff's evidence is insufficient to create a genuine issue of material fact on these issues. Summary judgment must therefore be granted to defendant on plaintiff's Section One claims.

Dated: June *15*, 1998.

CHARLES A. LEGGE

UNITED STATES DISTRICT JUDGE

JUDGMENT

For the reasons set forth in this court's order of August 13, 1996, this court's order of December 3, 1996, and the Opinion and Order signed and filed this date, judgment is hereby entered in favor of defendants and against plaintiff.

Dated: June *15*, 1998.

CHARLES A. LEGGE

UNITED STATES DISTRICT JUDGE

Hickory Specialties, Inc. v. Forest Flavors Int'l, Inc.

United States District Court for the Middle District of Tennessee, Northeastern Division

June 18, 1998, Entered on the Docket

No. 2:97-0008

Reporter
12 F. Supp. 2d 760 *; 1998 U.S. Dist. LEXIS 9926 **; 48 U.S.P.Q.2D (BNA) 1493

HICKORY SPECIALTIES, INC. v. FOREST FLAVORS INT'L, INC. and SAMUEL D. CRACE.

Disposition: **[**1]** Defendant's motion for summary judgment on Count V GRANTED, and the defendants' motion for summary judgment on the three remaining counts DENIED.

Core Terms

patent, trade secret, liquid, smoke, divulged, trade secret protection, refinements, disclosure, manufacturing, preemption, summary judgment, damages, secret, judicial estoppel, material fact, defendants', misappropriation, non-disclosure, slip opinion, loyalty, summary judgment motion, unfair competition, confidential, non-compete, injunction, technology, courts, permanent injunction, employees, settlement agreement

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate only when there is no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. In responding to a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some specific facts showing that there is a genuine issue for trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Summary Judgment, Evidentiary Considerations**

A dispute about a material fact is "genuine" within the meaning of *Fed. R. Civ. P. 56* only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The mere existence of a scintilla of evidence in support of the nonmoving party's position will be insufficient. The court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Unfair Business Practices > General Overview

HN3[] **False Designation of Origin, Elements of False Designation of Origin**

Under Tennessee law the tort of unfair competition is composed of three elements, focusing on the action of "passing off" a product. A plaintiff must prove that: (1) the defendant engaged in conduct which "passed off" its organization or services as that of the plaintiff; (2) in engaging in such conduct, the defendant acted with an intent to deceive the public as to the source of services offered or authority of its organization; and (3) the public was actually confused or deceived as to the source of the services offered or authority of its organization.

Torts > Business Torts > Unfair Business Practices > General Overview

HN4[] **Business Torts, Unfair Business Practices**

The term "passing off" is synonymous with "palming off." Both refer to false representation tending to induce buyers to believe that the defendant's product is that of the plaintiff.

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Patent Law > Claims & Specifications > General Overview

HN5[] **Exclusive Rights, Manufacture, Sale & Use**

An application for a patent requires disclosure in exchange for the exclusive right to use the patented invention for a given term.

Patent Law > ... > Specifications > Definiteness > General Overview

HN6[] **Specifications, Definiteness**

See *35 U.S.C.S. § 112*.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Federal Versus State Law > Patent Law

HN7[] **Intellectual Property, Misuse of Rights**

In the Sixth Circuit, if a trade secret is patented there is no further right to secrecy. The patent is a legal disclosure with the right to a limited, temporary monopoly granted as the reward for disclosure.

Trade Secrets Law > Federal Versus State Law > Federal Preemption

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Generally Known

Trade Secrets Law > Federal Versus State Law > Patent Law

HN8[] **Federal Versus State Law, Federal Preemption**

The subject matter of a trade secret must be secret. Matters of public knowledge or general knowledge in the industry or ideas which are well known or easily ascertainable, cannot be trade secrets.

Trade Secrets Law > Federal Versus State Law > Federal Preemption

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Civil Actions > Questions of Fact

Trade Secrets Law > Federal Versus State Law > General Overview

Trade Secrets Law > Federal Versus State Law > Patent Law

Trade Secrets Law > Misappropriation Actions > General Overview

HN9[] **Federal Versus State Law, Federal Preemption**

Post-patent refinements qualify for trade secret protection as an exception to the general patent preemption rule.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN10[] **Estoppel, Judicial Estoppel**

Judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN11[] **Estoppel, Judicial Estoppel**

The Sixth Circuit has identified three burdens which a party must meet to show that its opponent should be judicially estopped: (1) that the opponent took a contrary position; (2) that the contrary position was under oath in a prior proceeding; and (3) that the prior position was accepted by the court.

Counsel: For HICKORY SPECIALTIES, INC., plaintiff: Jay Scott Bowen, Timothy L. Warnock, Sarah W. Anderson, Bowen, Riley, Warnock & Jacobson, PLC, Nashville, TN.

For FOREST FLAVORS INTERNATIONAL, INC., SAMUEL D. CRACE, defendants: Benjamin Cleveland Fordham, Craig Vernon Gabbert, Jr., David Alexander Fardon, Joseph Allen Kelly, Harwell, Howard, Hyne, Gabbert & Manner, Nashville, TN.

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For HICKORY SPECIALTIES, INC., counter-defendant: Jay Scott Bowen, Timothy L. Warnock, Bowen, Riley, Warnock & Jacobson, PLC, Nashville, TN.

Judges: Thomas A. Wiseman, Jr., Senior United States District Judge.

Opinion by: Thomas A. Wiseman, Jr.

Opinion

[*761] MEMORANDUM

The Court previously dismissed the plaintiff's non-compete claims, finding as a matter of law that any non-compete obligations expired in 1992. See Mem. Op., Aug. 20, 1997 (Doc. 37, at 5-7, **[**2]** 7 n.2, 11-12). The defendants now move for summary judgment on the four remaining claims: (1) Count II, Violation of Non-Disclosure Agreements; (2) Count III, Breach of Fiduciary Duty of Loyalty; (3) Count IV, Usurpation and Disclosure of Trade Secrets; and (4) Count V, Unfair Competition. The Court GRANTS the defendants' motion for summary judgment on Count V. The Court DENIES the defendants' motion for summary judgment on the three remaining counts, finding that a question of material fact exists as to whether an exception to the general rule of patent preemption should apply.

I. Relevant Background

As explained in this Court's memorandum opinion dated August 20, 1997, (Doc. 37), Hickory Specialties, Inc. ["HSI"] produces liquid smoke, a by-product of the controlled **[*762]** burning of wood that is used to flavor meat. HSI was founded in the early 1970's by the Crace brothers, R. Joseph and Don, each of whom owned fifty percent of the company stock. In 1982, Don Crace sold his stock in HSI to his brother, R. Joseph, for $ 4.2 million.

Defendant Sam Crace is Don Crace's son. He grew up working at HSI, and possessed enough knowledge of the liquid smoke process that HSI required him to **[**3]** sign both a ten year non-compete covenant and an agreement to never compete with HSI. Sam Crace quit working at HSI in 1989, and in 1994 he formed Forest Flavors, Inc. ["FFI"], a competing liquid-smoke business, and one of the defendants in this action.

On August 1, 1978, HSI and then-co-plaintiff Griffin Laboratories, Inc., brought suit in the Chancery Court for Cumberland County, Tennessee, for injunctive relief and damages alleging misappropriation and infringement of trade secrets against B & L Laboratories and former employee Charles Ledford. See Defs.' Notice of Filing (Doc. 19, ex. J, at 1-2). The Chancellor dismissed the case, but on July 6, 1979 the Tennessee Court of Appeals reversed, finding that HSI and Griffin's liquid smoke process was a trade secret. *Hickory Specialties, Inc. v. B & L Lab., Inc., 592 S.W.2d 583, 587 (Tenn. Ct. App. 1979)*. The Court of Appeals ordered the chancellor to issue an injunction "enjoining the defendants . . . from divulging or using any trade secrets of plaintiffs relating to the manufacture or manufacturing process, distribution or sale of liquid smoke . . ." *Id. at 588*.

On November 1, 1979 and before the chancellor had responded **[**4]** to the mandate above, HSI applied for a temporary restraining order. See HSI's Mem. in Supp. of App. for TRO, Nov. 1, 1979 (Doc. 60, ex. 2, at 4). Due to a procedural shuffle, HSI filed its petition for a TRO in the Tennessee Supreme Court. [1] **[**5]** HSI's petition for a TRO asserted that Mr. Ledford's sale, production, manufacture, advertising, and distribution of liquid smoke was imminent. Id. HSI may have asserted also that Mr. Ledford disclosed HSI's trade secrets. See Aff. of R. Joseph Crace, filed in Supp. of 1979 TRO (Doc. 60, ex. 3). [2] The Tennessee Supreme Court granted the 1979 TRO for fear that HSI might suffer irreparable harm if the Court refused to grant it. See Hickory Specialties, Inc. v. B & L Labs., Inc., No. 4228, slip op. (Tenn. Nov. 8, 1979) (Doc. 28, ex. 2). The TRO enjoined Mr. Ledford and B & L from divulging or using any trade secrets of HSI. Id.

[6]** On February 11, 1980, the chancellor responded to the mandate from the Tennessee Court of Appeals, and issued a permanent injunction against Ledford and B&L. Hickory Specialties, Inc. v. B&L Labs., Inc., No. 4228, slip op. (Ch. Cumberland County Feb. 11, 1980) (doc. 28, ex. 4). Among other instructions, the injunction "permanently enjoined [the defendants] from divulging or using any trade secrets of [the plaintiffs]." Id.

On some date between February 11 and April 3, 1980 [3], HSI asked the Chancery **[*763]** Court for Cumberland County to hold Mr. Ledford and B & L in contempt of the permanent injunction. See HSI's Pet. for Civ. Contempt (__, 1980) (Doc. 60, ex. 6). In that petition, HSI alleged that Mr. Ledford and B & L had violated the injunction entered by

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[1] According to HSI, the chancery court and the court of appeals lacked jurisdiction when HSI sought permission to appeal the court of appeals' decision. Because the court of appeals had not issued an enforceable order yet, HSI's only option was to seek relief in the Tennessee Supreme Court.

[2] In its present pleadings, HSI claims that it never asserted in 1979 that Mr. Ledford had disclosed HSI trade secrets. HSI's 1998 Mem. in Resp. to Defs'. M. for Sum. J. (doc. 63, at 3). However, according to defendants FFI and Sam Crace, R. Joseph Crace's 1979 affidavit indicates that HSI *did* assert in 1979 that Mr. Ledford had disclosed HSI trade secrets. In the seventh paragraph of his affidavit, R. Joseph Crace states that if Baltimore Spice representatives came to B&L Laboratories to "observe the manufacturing process and to offer technical assistance," the trade secrets of HSI would be revealed and their value would be "diminished beyond calculation." Id. at P 7. What HSI fails to point out, but what FFI catches, is that R. Joseph Crace stated in the third paragraph of that same affidavit that Baltimore Spice representatives *did* recently visit the B&L Laboratories to offer technical assistance. Id. at P 3. Reading paragraphs seven and three together, one could conclude that HSI's trade secrets were rendered valueless when the Baltimore Spice representatives came to offer technical assistance at B&L Labs, contrary to the assertion of HSI in its pleadings before this Court.

[3] HSI's petition for contempt is undated, except to show that the year was 1980. We know, however, that HSI must have filed its petition prior to April 3, 1980 since that is the day the chancellor issued his order on that matter.

the Tennessee Court of Appeals by using HSI's trade secrets. See id. at PP 7-8. Specifically, HSI alleged that Ledford and B&L were using HSI's trade secrets to make liquid smoke and then selling that liquid smoke at a lower price than HSI so that customers were refusing to purchase HSI's liquid smoke. See id. at P 10. Although the crux of HSI's petition focused on the illegal use of its trade secrets, **[**7]** HSI also asserted generally that Ledford was in the process of divulging its trade secrets: "It is imperative that an immediate hearing be held, as to the amount of damages Plaintiffs are entitled, as each day that Plaintiffs' trade secrets are divulged and used dilutes their value." Id. at P 17.

The chancellor held Mr. Ledford and B & L in contempt of the permanent injunction. Hickory Specialties, Inc. v. B & L Labs., Inc., No. 4228, slip op. at 1-2 (Ch. Cumberland County, Apr. 3, 1980) (Doc. 60, ex. 7). The chancellor focused primarily on the defendants' illegal use of the trade secret, and ordered them to cease manufacturing liquid smoke and to destroy any equipment similar to HSI's that the defendants used to make liquid smoke. Nowhere in his order did the chancellor make **[**8]** specific findings that the defendants divulged HSI's trade secrets. Nevertheless, the chancellor ordered the clerk and master, "to assess the amount of damages to which Plaintiffs are entitled for the divulging by the Defendants of their trade secrets." Id. at 1-2.

Pursuant to the chancellor's direction, the clerk and master determined the fair market value of HSI's and then-co-plaintiff Griffith's trade secrets to be $ 2,751,000. Hickory Specialties, Inc. v. B & L Labs., Inc., No. 4228, slip op. (Clerk and Master, Cumberland County Sept. 5, 1980) (doc. 60, ex. 8). However, he found that HSI and Griffith showed no damages "in the nature of lost profit or loss of business," and awarded zero damages. Id.

HSI objected to the clerk and master's report, and urged the chancellor to award it $ 2,751,000 in damages. See HSI's Obj. to Master's Rep., Sept. 9, 1980 (Doc. 28, ex. 9). HSI stated that, "plaintiffs submit that the correct measure of damages in this cause for wrongful divulging by the Defendants of Plaintiffs' trade secrets is the fair market value of those trade secrets . . . ." Id. at 2.

Before the chancellor ruled on the objections to the clerk and master's **[**9]** report, HSI and Ledford entered into settlement agreements. Ledford admitted that he had divulged trade secrets of HSI to B&L, Jay Olson, and Glen Fisher -- who were apparently employees at B&L. See Settlement Agreement of Sept. 29, 1981 (doc. 60, ex. 9). But, as FFI points out, Ledford's settlement agreement admitted that he had disclosed the secrets to other unnamed people besides Olson, Fisher, and B&L. He stated:

> Ledford has knowingly used and divulged, among other things, the following information that he now recognizes to constitute the trade secrets of [HSI] and that he recognizes to be confidential and proprietary to it, to, among others, B&L . . ., Jay Olson and Glen Fisher.

Id. (emphasis added). Also in that agreement, Ledford promised to never divulge HSI's trade secrets to anyone again. Id.

Eventually, the chancellor reviewed the parties' objections to the clerk and master's report and found that the plaintiffs should have been awarded damages in the amount of the fair market value of their trade secrets. See Hickory Specialties, Inc. v. B&L Labs., Inc., No. 4228, slip. op at 1-2 (Ch. Cumberland County June 6, 1983) (doc. 28, ex. 11). **[**10]** The chancellor wrote that, "The Master was directed 'to assess the measure of damages to which the plaintiffs (plaintiff now) are entitled for divulging by the defendants of their trade secrets.['] What the master was to determine differs from what he did determine." Id. at 1.

On November 3, 1981, the United States Patent Office granted Mr. Ledford a patent for liquid smoke. (Doc. 28, ex. 13.) He filed his application for a patent on May 8, 1980, and assigned the patent to The Baltimore **[*764]** Spice Company. Id. HSI thereafter purchased the patent from Baltimore Spice. See Aff. of R. Joseph Crace (doc. 26, P 2).

In 1986, R. Joseph Crace retired from HSI. Id. at P 1. Until then, he served as either the president and CEO or the chairman of the board since HSI's founding. Id.

On January 29, 1997, HSI filed a complaint in this Court naming Sam Crace and FFI as defendants. (Doc. 1.) The complaint listed six separate counts: (1) breach of a covenant not to compete; (2) breach of a non-disclosure agreement; (3) breach of fiduciary duty; (4) trade secret violations; (5) unfair competition; and (6) misrepresentation and promissory fraud. The defendants answered and counterclaimed **[**11]** on February 24, 1997, alleging that HSI had violated *15 U.S.C. §§ 1-2*, and asserting damages under *15 U.S.C. § 15*. (Doc. 5.) The plaintiff answered the counterclaim on March 17, 1997, at which point HSI demanded a jury. (Doc. 11.)

On August 20, 1997, this Court granted in part the defendants' motion for summary judgment, dismissing the first and sixth claims (both regarding non-compete agreements), and finding as a matter of law that any non-compete obligations expired in 1992. See Mem. Op., Aug. 20, 1997, at 5-7, 7 n.2, 11-12. The defendants had argued that summary judgment was appropriate on the trade secret claims based on two theories. First, the defendants argued that the plaintiffs waived or lost their trade secret on liquid smoke because the records to the B & L case were not sealed. The Court denied the motion on that theory, finding that questions of material fact existed as to whether the records were easily ascertainable. Second, the defendants argued that the fact the plaintiff's liquid smoke is patented (the "Ledford" patent) preempts it from protection as a trade secret. The Court found that misappropriation of trade secrets is governed by state law, and that **[**12]** a question of material fact existed as to whether the Ledford patent is a product or a process patent.

The defendants now move for summary judgment on grounds of judicial estoppel and, again, patent preemption -- this time citing new authority.

II. Law and Analysis

A. Summary Judgment

HN1[] Summary judgment is appropriate only when there is no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476-80 (6th Cir. 1989)*. The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex, 477 U.S. at 323*. In responding to a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." Id.

The Supreme Court concluded in *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*, that ***HN2***[] a dispute about a material fact is "genuine" within the meaning of *Rule 56 of the Federal Rules of Civil Procedure* **[**13]** only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id. at 248*. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." *Id. at 252*. Of course, the Court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. *Id. at 255*.

B. All Four Remaining Claims are Properly Classified as One Trade Secret Claim

According to the defendants, HSI's complaint shows that HSI's "allegations that defendants have stolen Hickory's trade secrets are at the very heart of each of Hickory's remaining claims." See Defs.' Reply Mem. (Doc. 66, at 9). The plaintiffs disagree. See Pl.'s Resp. Mem. (Doc. 63, at 12). HSI's four remaining counts are predicated on finding parts of HSI's liquid smoke are viable trade secrets. Therefore, unless HSI can prove that parts of its liquid smoke qualify for trade secret protection, the four remaining counts will fail.

[*765] 1. Count II (violation of non-disclosure agreement)

In its complaint, HSI stated that:

> Defendant Sam Crace has breached the Non-Disclosure Agreements into which **[**14]** he entered by disclosing Hickory Specialties' confidential information to Defendant Forest Flavors and otherwise.
>
> These breaches and threatened breaches have harmed and threaten further and irreparable harm to Hickory Specialties. These defendants have stated that they may use the same processes and techniques which Hickory Specialties employs, as well as other information belonging to Hickory Specialties which they have contractually agreed not to do.

> The use and disclosure of Hickory Specialties' confidential information and know-how, in violation of the several contractual agreements that he [defendant] would not do so, will result in damages to Plaintiff.

See Compl. (Doc. 1, at PP 24-26) (emphasis added). The language of Count II shows HSI must succeed on its argument that its information is a protectable trade secret in order to succeed in arguing that the defendants violated its non-disclosure agreements. The heart of paragraphs 24-26 hinge on proving that the defendants divulged the plaintiff's trade secrets. As the defendants assert, without a valid trade secret to disclose, there is no way for the defendants to have violated a non-disclosure **[**15]** agreement. See Defs.' Reply Mem. (Doc. 66, at 9).

2. Count III (breach of fiduciary duty of loyalty)

In its complaint, HSI stated that:

> While he was an employee of [HSI] and its agent, and solely because of that relationship, [HSI] disclosed to [defendant] Sam Crace, and he was given access to, all of its trade secrets, confidential information, confidential manufacturing techniques, processes and formulae. In addition, he learned of the equipment necessary to manufacture liquid smoke and was involved in the refinement and improvement of the equipment and the manufacturing techniques. He learned the identity of customers, suppliers, and all relevant pricing information, as well as the costs of manufacture.
>
> Because Sam Crace gained access to, assisted in the development of, and learned this information during his employment at [HSI] and because of his agency relationship with it, he is imbued with a fiduciary duty of loyalty to [HSI] and is bound not to use or disclose that information or otherwise use it or take advantage of it to the detriment of [HSI]. This information is an asset of [HSI] which it is entitled to protect from wrongful use or disclosure **[**16]** by Sam Crace.
>
> If the information is used or disclosed as the Defendant has threatened, [HSI] is damaged irreparably. It is entitled to injunctive relief.

See Compl. (Doc. 1, at PP 28-30) (emphasis added). Again, the defendants assert that it is impossible to violate a duty of loyalty when one imparts information that has already been disclosed, as established in the Chancellor's 1980 findings. See Defs.' Reply Mem. (Doc. 66, at 9). Additionally, the defendants refer the Court to a Tennessee Court of Appeals decision which found that former employees do not violate any "duty of loyalty" by competing with former employers, absent a non-compete covenant, even when the employees learned allegedly "confidential" information in their prior jobs. See id. (citing *Data Processing Equipment Corp. v. Martin, 1987 Tenn. App. LEXIS 3150*, No. 87-230- *II, 1987 WL 30155*, slip op. at *6 (Tenn. Ct. App. Dec. 30, 1987)). The Court already found that the plaintiff's non-compete covenants were invalid. See Mem. Op., Aug. 20, 1997 (Doc. 37, at 6-7). This authority is persuasive, and lends support to the conclusion that the defendants could not have violated a duty of loyalty if there were no trade **[**17]** secrets to protect. The Court finds that Count III, like Count II, will fail if the plaintiff cannot prove it deserves trade secret protection.

3. Count IV (usurpation and disclosure of trade secrets)

In its complaint, HSI states:

> **[*766]** [HSI] is the owner of several trade secrets. In 1979, the Tennessee Court of Appeals adjudicated many of [HSI's] manufacturing processes, techniques and equipment to be trade secrets. That ruling operates as collateral estoppel upon these Defendants.
> Although stating that he will use new technology to manufacture liquid smoke, . . . Defendants Sam Crace and Forest Flavors, on information and belief, intend to use many of the processes, formulae, manufacturing techniques and equipment which have been found to be trade secrets of [HSI]. Moreover, they surreptitiously ordered equipment and materials in an effort to avoid detection by Plaintiff of their plans, operations and activities to enter the liquid smoke business and use and divulge HSI's trade secrets.

> The Defendants learned of HSI's trade secrets only through Defendant Crace's employment at [HSI] and the wrongful disclosure by Sam Crace to Defendant Forest Flavors. These Defendants **[**18]** are not entitled to use or disclose them.

See Compl. (Doc. 1, at PP 31-33) (emphasis added). As with Counts II and III, Count IV of the plaintiff's complaint is not actionable unless the Court finds that HSI's information qualifies as a trade secret. See *Arco Indus. Corp. v. Chemcast, 633 F.2d 435, 441-43 (6th Cir. 1980)* (reversing the district court's ruling that the defendants misappropriated the plaintiff's trade secret where none of the plaintiff's information could be labeled as a trade secret).

4. Count V (Unfair Competition)

In its complaint, HSI states:

> The Defendants' breaches of their duties of loyalty, breaches of the contractual and common law non-disclosure obligation and the wrongful use of HSI's manufacturing techniques, know-how, knowledge, and equipment, as well as their customer information, pricing information and other confidential information constitutes unfair competition. In addition, the Defendants have surreptitiously ordered material and supplies in an effort to keep their plans to compete unfairly with HSI's secret.

See Compl. (Doc. 1, at PP 35). Although neither party has referred to it, the Sixth Circuit's opinion in **[**19]** *Sovereign Order of Saint John of Jerusalem, Inc. v. Grady, 119 F.3d 1236, 1243 (6th Cir. 1997)*, gives the Court no option but to rule against the plaintiff on Count V. [4] In Grady, the Sixth Circuit explained that ***HN3***[] the tort of unfair competition is composed of three elements under Tennessee law, focusing on the action of "passing off" [5] a product. Id.

> Although Tennessee law regarding unfair competition is not well developed, it appears that there are three elements to this tort. A plaintiff must prove that: (1) the defendant engaged in conduct which "passed off" its organization or services as that of the plaintiff; (2) in engaging in such conduct, the defendant acted with an intent to deceive the public as to the source of services offered or authority of its organization; and (3) the public was actually confused or deceived as to the source of the services offered or authority of its organization.

Id. The plaintiff in the instant case bases its claim for unfair competition on the three grounds listed as Counts II, III, and IV: (1) breach of the duty of loyalty; (2) breach of non-disclosure obligations; (3) and misappropriation/ disclosure of trade secrets. **[**20]** Because the plaintiff has not alleged that the defendants "passed off" the defendants' liquid smoke as that of the plaintiff, the Court GRANTS summary judgment to the defendants on Count V, based on this rationale alone. Id.

Because the Court GRANTS the defendants motion for summary judgment as to **[*767]** the plaintiff's Count V, only three of the plaintiff's claims now remain. In sum, all three **[**21]** of plaintiff's remaining claims depend on a conclusion that HSI's information qualifies as a trade secret.

C. Patent Preemption

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[4] Both the case cited by the plaintiff, *Johns-Manville Corp. v. Guardian Indus. Corp., 586 F. Supp. 1034, 1041 (E.D. Mich. 1983)*, and the case cited by the defendants, *Arco Indus. Corp. v. Chemcast, 633 F.2d 435, 441-43 (6th Cir. 1980)*, rely on Michigan law rather than Tennessee law and are therefore merely persuasive.

[5] ***HN4***[] The term "passing off" is synonymous with "palming off." Both refer to "false representation tending to induce buyers to believe that the defendant's product is that of the plaintiff . . . ." See W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 130, at 1015 (5th ed. 1984).

HN5[] An application for a patent requires disclosure in exchange for the exclusive right to use the patented invention for a given term. See *Scharmer v. Carrollton Mfg. Co., 525 F.2d 95, 99 (6th Cir. 1974)*. An application for a patent must:

> *HN6*[] contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and [must] set forth the best mode contemplated by the inventor of carrying out his inventions.

35 U.S.C.A. § 112 (1984) (emphasis added).

It is generally accepted that once information is patented, it can no longer be a trade secret. "Whether secrecy is lost through seepage in conduct of business, sale or exposition of a product embodying the secret, disclosure of the idea through a trade or technical publication, or by way of patent . . . the principle remains: a secret on the wing cannot be recalled." 1 Roger **[**22]** M. Milgrim, Milgrim on Trade Secrets § 1.03, at 1-98 (1997). "In general, both a patent and a trade secret in the same subject matter cannot coexist. . . . When an inventor decides that [information] is patentable, disclosure of that [information] in a patent immediately voids any trade secrets in it." Robert C. Scheinfeld & Gary M. Butter, Using Trade Secret Law to Protect Computer Software, 17 Rutgers Computer & Tech L.J. 381, 399 (1991). "Patent and trade secret protection are typically mutually exclusive." Id. at 408. "A manufacturer who has developed a process which is potentially a trade secret must . . . choose whether he will protect his process through trade secrecy or through patent law." George J. Alexander, Commercial Torts § 3.1, at 90 (2d ed. 1988). "Information that may have been subject to trade secret protection prior to the patent grant is actually deemed disclosed to the extent that it is described in the patent." *Id., at 100*.

HN7[] The rule in the Sixth Circuit is that, "if a trade secret is patented there is no further right to secrecy. The patent is a legal disclosure with the right to a limited, temporary monopoly granted as the reward for **[**23]** disclosure." *Scharmer, 525 F.2d at 99* (finding that "when the patent was granted, the plaintiff's property right in the trade secret ceased prospectively. Thus, he had no right of action for misuse of a trade secret subsequent to that date."). In establishing this rule for our circuit, the Sixth Circuit looked to other circuits rather than to law from a specific state. Nevertheless, caselaw from Tennessee courts implies the same result. [6]

[24]** In *Hickory Specialties, Inc. v. B & L Lab., Inc., 592 S.W.2d 583, 587 (Tenn. Ct. App. 1979)*, the Court of Appeals held that, *HN8*[] "the subject matter of a trade secret must be secret. Matters of public knowledge or general knowledge in the industry or ideas which are well known or easily ascertainable, cannot be trade secrets." Id., cited in *Heyer-Jordan & Assocs. v. Jordan, 801 S.W.2d 814, 821 (Tenn. Ct. App. 1990)*. Since the B & L Court was not faced with the question before this Court, it does not state explicitly that patent protection preempts trade secret protection. However, patented information fits the definition from B & L of what constitutes a non-trade secret: by their essence patents describe information which is both a "matter[] of public knowledge" and "easily ascertainable." **[*768]** E.g., id.; see e.g., *35 U.S.C.A. § 112* (requiring patent applicants to fully describe the information so that members of the public can create the same process or product).

When Mr. Ledford patented HSI's liquid smoke process in 1981, he divulged the trade secrets that HSI possessed regarding liquid smoke at that point in time. See Depo. of R. J. Crace (Doc. 18, ex. A, at **[**25]** 87-90). HSI now

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[6] In the Court's August, 1997 Memorandum Opinion, (doc. 37), the Court denied the defendants' motion for summary judgment. The defendants based their motion in part on the theory of patent preemption. At that point, the Court found that a question of material fact existed as to whether HSI's patent was a product patent or a process patent. As authority on that point, the Court cited *Arco Indus. Corp. v. Chemcast Corp., 633 F.2d 435, 443 (6th Cir. 1980)*. Arco was an appeal from a federal district court sitting in Michigan, applying Michigan law. Upon further examination, the Court finds that Arco is not controlling in the instant case on the issue of patent preemption. No other Sixth Circuit case analyzes this issue (process versus product patent) and, more importantly, nor does any Tennessee court. Additionally, neither party in the instant suit has raised the issue of the product/process patent difference.

owns the "Ledford patent." See id. at 88-90. In a deposition taken on March 26, 1997, R. Joseph Crace testified for HSI as a Rule 30(b)(6) designee. He stated:

Q: And he [Ledford] basically patented the Hickory process.

A: Right.

Q: And these parameters you're talking about, the temperatures, the sawdust, the process without forced air, he tried -- he [Ledford] actually did put all those in the patent, didn't he?

A: Yes.

. . .

Q: You would agree with me that [the Ledford] patent itself talks about -- which [HSI], you said owns now, that patent talks about, basically the [HSI] process.

A: Yes.

Id. at 88-90. Later in the same deposition, R. Joseph Crace identified a document from HSI's files, dated July 6, 1987. See Doc. 18, ex. A, att. 6. The defendants' attorney asked R. JOSEPH Crace about the document:

Q: [The July 6, 1987 document] says that the product and the process that's described in the Ledford patent are virtually identical to those used by [HSI]. You would agree that says that.

A: Yes.

Q: You would agree with that statement.

A: Yes.

Q: And then it goes on and lists 12 areas of particulars.

A: Yes.

[26]** *Id. at 100-01*. These admissions by HSI's Rule 30(b)(6) witness indicate that HSI disclosed the trade secrets surrounding its liquid smoke when it patented its liquid smoke. The Court finds that under the general rule of patent preemption, HSI would be preempted from arguing now that its process is still a valuable secret. However, as discussed below, this Court believes that an exception to the general rule exists when a party subsequently refines its patented information/technology. Because a question of material fact exists as to whether HSI's trade secrets are refinements -- or mere clarifications -- of the patent, the Court must DENY summary judgment on the three remaining counts.

HSI argues that the Court should apply an exception to the general patent preemption rule. HSI argued in its pleadings and at the hearing on the instant motion that the facts of this case are similar to those of *Johns-Manville Corp. v. Guardian Indus. Corp. 586 F. Supp. 1034 (E.D. Mich 1983)*, in that the information in the patent is merely the "tip of the iceberg," and that the trade secrets lurk underneath that tip. In Johns-Manville, the plaintiff brought suit against the defendant **[**27]** corporation and defendant former employees for patent infringement, misappropriation of trade secrets, and violation of employment fiduciary duty. As discussed below, the Johns-Manville Court held that the plaintiff could own a patent on certain information, and simultaneously receive trade secret protection for refinements made to that same information. HSI cites Johns-Manville as authority for the proposition that a party can obtain patent protection and trade secret protection simultaneously. Impliedly, HSI asserts that Johns-Manville gives this Court permission to find that the refinements to HSI's liquid smoke deserve trade secret protection even though HSI's liquid smoke is already patented.

In Johns-Manville, the District Court in Michigan found that the defendants both infringed the patent and misappropriated trade secrets. *Id. at 1042, 1076*. Although the Johns-Manville Court published the conclusion of its opinion, it placed much of its analysis under seal. See *Id. at 1048* (removing pages 28-35 of its opinion discussing the development of the plaintiff's trade secrets); 1072 (removing pages 114-127 of the opinion discussing the propriety of enjoining **[**28]** the defendants from misappropriating the trade secrets). **[*769]** The plaintiff in Johns-Manville asserted that the defendants misappropriated nine alleged trade secrets. *Id. at 1069*. The court found that four items were protected as trade secrets, while five items were not. *Id. at 1076*. [7]

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[7] In concluding that the defendants infringed the plaintiff's patent, the Johns-Manville Court noted the infringement of two specific parts of the technology: the *Heated Spinner Ambient, and the Air Ring. 586 F. Supp. 1034 at 1067-69*. (As to the heated spinner

[29]** Nowhere in the published parts of the Johns-Manville opinion does the court discuss how it came to the conclusion that information can be protected simultaneously as a patent and as a trade secret. Nowhere does it discuss whether a patent precludes trade secret protection when a patent, by its nature, discloses the secret. Nowhere does it discuss HSI's theory that improvements to patents can receive trade mark protection, although it does acknowledge that disclosure of the secret renders information unprotectable as a trade secret. *Id. at 1071-73*.

As to the issue of disclosure/non-disclosure, the Johns-Manville Court raised only the following points. First, the court addressed the plaintiff's maintenance of tight security around the plant where the plaintiff developed the technology, and plaintiff's policies regarding secrecy. *Id. at 1071-72*. Next, the court addressed the publication of a book by employees of the defendant (who used to be employees of the plaintiff) which contained only general descriptions of the technology. *Id. at 1072*. Finally, the court addressed the rule in Michigan that information must not be readily ascertainable to the general public **[**30]** without hardship or difficulty, *Id. at 1073*, similar to the rule in Tennessee. For authority on that rule, the court cited *Hayes-Albion Corp. v. Kuberski, 108 Mich. App. 642, 311 N.W.2d 122 (Mich. Ct. App. 1981)*. Kuberski is completely irrelevant to the instant case since the plaintiffs in that case chose to not patent their technology. *Hayes-Albion Corp. v. Kuberski, 421 Mich. 170, 364 N.W.2d 609, 612 (Mich. 1984)* (affirming in part and reversing in part). In that regard, the Kuberski court could not have been confronted with the issue of patent preemption. Also, in discussing Kuberski, the Johns-Manville court never mentioned the concept of patent preemption. *586 F. Supp. at 1073*. Finally, the Johns-Manville court focused its attention on the difference between product and process patents, id., which appears to be a debate that varies from state to state. As discussed above, although Michigan law differentiates between product and process patents, this Court has been unable to find any case in Tennessee that addresses the issue.

This Court finds that it cannot rely on Johns-Manville to preclude it from finding patent preemption, even though **[**31]** the Johns-Manville Court apparently reached the opposite result. Unfortunately, the Johns-Manville opinion neither discusses any of that court's thinking on this issue, nor does it cite any authority for its conclusion, at least in the published parts of its opinion.

Nevertheless, it is possible that the Sixth Circuit has contemplated the possibility of an exception to the general rule of patent preemption where a party refines information or technology which the party has previously patented. In dicta, the Sixth Circuit stated that, "Certainly it is possible that a new combination of known steps or processes can be entitled to trade secret protection." *Arco Indus. Corp. v. Chemcast Corp., 633 F.2d 435, 442 (6th Cir. 1980)* (reversing a finding of trade secret misappropriation and patent infringement on grounds separate from the refinement exception). This Court holds that ***HN9***[] post-patent refinements qualify for trade secret protection as an exception to the **[*770]** general patent preemption rule. In the instant case, a question of material fact exists as to whether this refinement exception should, or should not, apply.

Evidence in the record indicates that HSI's patent on liquid **[**32]** smoke reveals material which would preclude HSI from receiving trade secret protection, due to the general patent preemption rule. As discussed above, R. Joseph Crace acknowledged in a deposition that the product and process that are described in the Ledford patent are virtually identical to those used by HSI. See Depo. of R. Joseph Crace (Doc. 18, ex. A, at 87-90, 100-01). This evidence implies that presently HSI merely may be clarifying information found in the patent and labeling it a trade secret. Unlike post-patent refinements, clarification of a patent would not be new information subject to trade secret protection. Since applications for patents must set forth the "full, clear, concise, and exact terms as to enable any person skilled in the art . . to make and use the same, and must set forth the best mode contemplated by the

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ambient, the court found that while a certain element of the spinner was an improvement to the patent, the defendants "ignored the file wrapper history, and read J-M's claims too narrowly." *Id. at 1067*. Neither party in the instant case has raised the issue of file wrapper estoppel.)

The Johns-Manville Court then addressed the trade secret issues, and noted the nine trade secrets that the plaintiff claimed the defendants misappropriated. *Id. at 1069*. The Court sealed part of its discussion on this issue, see *id. at 1073* (sealing pages 114-27 of the opinion), and then concluded that the defendants had misappropriated the Air Ring (along with three other trade secrets), while also concluding that the defendants had not misappropriated the Heated Spinner Ambient. *Id. at 1076*. Therefore, it is unclear how the Johns-Manville Court reached this conclusion.

inventor of carrying out his inventions," *35 U.S.C.A. § 112 (1984)*, clarifications would set forth only what was already required to be disclosed when the patent was sought. While HSI may argue that the Ledford patent is invalid for failing to fully disclose information necessary for others to make the same liquid smoke as HSI, this argument has no **[**33]** bearing on the fact that mere clarification of the patent's contents would be preempted. See *Scharmer v. Carrollton Mfg. Co., 525 F.2d 95, 99 (6th Cir. 1974)* ("The fact that the patent was subsequently declared invalid negates only the inventor's right to a limited monopoly and not the public disclosure which attends issuance of the patent.").

The record also contains evidence to the contrary, indicating that HSI may have made refinements to its patent. For instance, on June 16, 1986 Sam Crace sent a letter to Joe Crace identifying several pieces of information and technology that HSI may have been interested in patenting. (Doc. 60, ex. 17.) Since the Ledford patent was issued in 1981, this letter from 1986 indicates that HSI identified steps which may be post-patent refinements to its liquid smoke. E.g., *Arco, 633 F.2d at 442*. It is unclear whether these steps are mere clarifications of the patent that should have been disclosed at the time the patent was sought, or whether these steps are refinements that HSI made subsequent to issuance of the patent.

Because a genuine issue of material fact exists as to whether HSI's information qualifies for trade secret protection through **[**34]** the patent preemption refinement exception, the Court cannot grant summary judgment on the plaintiff's three remaining claims.

D. Submission of Evidence After the Close of Discovery

HSI seeks to introduce a late-filed list of 36 newly identified trade secrets through its expert witness, Byron D. Taylor, (doc. 61), when it originally submitted a list of only 31 trade secrets in its response to interrogatories in February, 1997. (Doc. 18, ex. F, no. 1). HSI filed Byron Taylor's affidavit three days after the close of discovery. [8] HSI attempts to introduce this post-discovery filing by classifying it as a supplementation pursuant to Local Rule 9(a)(3) and *Rule 26(e) of the Federal Rules of Civil Procedure*.

The defendants direct **[**35]** the Court to two highly persuasive decisions from neighboring courts. First, according to *Haun v. Humana, Inc., 651 F. Supp. 120, 122 (W.D. Ky 1986)*, "Matters inconsistent with admissions conclusively established under Rule 36 cannot be considered by the Court in ruling upon Defendant's Motion for Summary Judgment." According to Haun, the Court should not allow HSI to file a post-discovery affidavit that is inconsistent with HSI's 14 month old interrogatory answer. Second, *Minnkota Power Co-Op., Inc. v. Manitowoc Co., Inc., 669 F.2d 525, 528-29 (8th Cir. 1982)*, explains how it is proper for a court to exclude a party's expert testimony where the party possessed information to answer the expert interrogatory long before discovery closed, and yet failed to do so. Based on these principles, the Court finds that the **[*771]** plaintiff is estopped from introducing contradictory post-discovery proof in the form of Byron Taylor's April 13, 1998 affidavit.

E. Judicial Estoppel

HN10[] Judicial estoppel forbids a party from taking a position "inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." *Griffith v. Wal-Mart Stores, Inc., 135 F.3d* ***[**36]*** *376, 380 (6th Cir. 1998)* (quotations and citations omitted); see also *Warda v. C.I.R., 15 F.3d 533, 538-39* (6th Cir.), cert. denied, *513 U.S. 808, 115 S. Ct. 55, 130 L. Ed. 2d 14 (1994)* (taxpayer who inherited land as a result of state court decree adopting her position that will was invalid may not avoid paying tax by claiming in later case that she was not entitled to inherit land). The purpose of judicial estoppel is to "preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." Id.

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[8] Discovery closed on April 10, 1998 (per the Court's Order of January 6, 1998), except that, at HSI's request, the defendants agreed to extend the date for any expert deposition and agreed to a future supplemental deposition of Sam Crace. See Mar. 27, 1998 Agreed Order (doc. 59).

> Ambitious or greedy litigants who have discovered the financial rewards of successful litigation may not be satisfied with a single victory. Instead, they may try to maximize their financial and nonfinancial successes by litigating a case as many times as possible, sometimes flagrantly reversing earlier positions. . . . . The doctrine [of judicial estoppel] empowers courts to preserve the sanctity of litigants' oaths, to avoid inconsistent judgments, to constrain litigants' manipulations of the judicial process, and to conserve judicial resources by throwing **[**37]** out inconsistent claims.

Ashley S. Deeks, Comment, Raising the Cost of Lying: Rethinking Erie for Judicial Estoppel, *64 U. Chi. L. Rev. 873, 873, 885 (1997)* (urging federal courts sitting in diversity to apply the most aggressive version of judicial estoppel available to it between federal and state law, and noting that the Sixth Circuit applies its own version of judicial estoppel). Further, "when a litigant asserts a position in federal court that is inconsistent with one she took in state court, she puts at risk the integrity of both the federal and the state courts." Id. at 888.

The doctrine of judicial estoppel raises questions of whether it is best classified as substantive or procedural and, hence, whether a federal court sitting in diversity should apply state or federal law. See id. at 884. Without addressing the nature of the doctrine -- whether it is a substantive or a procedural doctrine -- the Sixth Circuit has determined that the doctrine raises primarily federal interests, and that federal law should therefore control. See *Edwards v. Aetna Life Ins., Co., 690 F.2d 595, 598 n.4 (6th Cir. 1982)* (noting that "federal courts must be free to develop **[**38]** principles that most adequately serve their institutional interests").

HN11[] The Sixth Circuit has identified three burdens which a party must meet to show that its opponent should be judicially estopped: (1) that the opponent took a contrary position; (2) that the contrary position was under oath in a prior proceeding; and (3) that the prior position was accepted by the court. See *Griffith, 135 F.3d at 380*.

In the instant case, the third requirement of Griffith is not met. First, and most importantly, the chancellor issued a permanent injunction at the direction of the Tennessee Court of Appeals which permanently enjoined Mr. Ledford and B & L from divulging or using any trade secrets of HSI. Hickory Specialties, Inc. v. B & L Labs., Inc., No. 4228, slip op. (Ch. Cumberland County Feb. 11, 1980) (doc. 28, ex. 4). Presumably, that injunction is still in force. When the chancellor later held Mr. Ledford and B & L in contempt of the permanent injunction, Hickory Specialties, Inc. v. B & L Labs., Inc., No. 4228, slip op. at 1-2 (Ch. Cumberland County Apr. 3, 1980) (doc. 28, ex. 6) (focusing primarily on the illegal use of HSI's trade secrets), he demonstrated that the injunction **[**39]** was still in force. When the chancellor ordered Mr. Ledford and B & L to pay HSI over two million dollars in damages, he did not find that HSI's trade secrets were rendered valueless. Hickory Specialties, Inc. v. B & L Labs., Inc., No. 4228, slip op. at 1-2 (Ch. Cumberland County June 6, 1983) (doc. 28, ex. 11). Finally, Mr. Ledford promised in a settlement agreement with HSI that he never would divulge HSI's trade **[*772]** secrets to anyone again. See Settlement Agreement of Sept. 29, 1981 (doc. 60, ex. 9).

Even if HSI asserted (1) that Mr. Ledford and B & L divulged HSI's trade secrets, (2) that HSI's trade secrets were rendered valueless, and (3) that judgment for the full value of the trade secrets was rendered, and even if that position is contrary to the position taken in the instant litigation -- that HSI's liquid smoke is still a secret and has value -- the instant defendants have failed to show that any previous court accepted the position that HSI's trade secrets were divulged to the point that HSI's liquid smoke no longer contained any trade secrets. Because a permanent injunction remains in effect, the defendants cannot overcome the third requirement of Griffith. Therefore, **[**40]** the Court refuses to grant summary judgment on the grounds of judicial estoppel.

III. Conclusion

For the foregoing reasons, the Court DENIES the defendants' motion for summary judgment.

An appropriate order will enter.

Thomas A. Wiseman, Jr.

Senior United States District Judge

ORDER

For the reasons stated in the accompanying memorandum, the Court GRANTS the defendants' motion for summary judgment on Count V, and DENIES the defendants' motion for summary judgment on the three remaining counts, finding that a question of material fact exists as to whether an exception to the general rule of patent preemption should apply.

It is so ORDERED.

Thomas A. Wiseman, Jr.

Senior United States District Judge

Kottle v. Northwest Kidney Ctrs.

United States Court of Appeals for the Ninth Circuit

May 6, 1998, Argued, Submitted, Seattle, Washington ; June 18, 1998, Filed

No. 96-36258

Reporter

146 F.3d 1056 *; 1998 U.S. App. LEXIS 12892 **; 1998-1 Trade Cas. (CCH) P72,185; 98 Cal. Daily Op. Service 4672; 98 Daily Journal DAR 6626

SHELDON P. KOTTLE, Plaintiff-Appellant, v. NORTHWEST KIDNEY CENTERS, Defendant-Appellee.

Subsequent History: Certiorari Denied February 22, 1999, Reported at: *1999 U.S. LEXIS 1061*.

Prior History: [1]** Appeal from the United States District Court for the Western District of Washington. D.C. No. CV 96-0472 CRD. Carolyn R. Dimmick, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

sham exception, baseless, misrepresentations, entities, lobbying, kidney, anticompetitive, dialysis, sham, allegations, antitrust, advocacy, lawsuit, branch of government, petitioning, administrative agency, proceedings

LexisNexis® Headnotes

Healthcare Law > ... > Facility Planning > Certificates of Need > General Overview

HN1[] **Facility Planning, Certificates of Need**

The Health Planning and Resource Development Act authorizes the Department of Health to administer a Certificate of Need (CON) program to allocate health care resources. *Wash. Rev. Code § 70.38.105(1)*. Under the CON program, the establishment of a new health care facility is subject to approval by the Department. *Wash. Rev. Code § 70.38.105(4)(a)*.

Healthcare Law > ... > Facility Planning > Certificates of Need > General Overview

HN2[] **Facility Planning, Certificates of Need**

After receiving a Certificate of Need application, the Department of Health may conduct a public hearing. *Wash. Rev. Code § 70.38.115(9)*. At the hearing, any person may appear and be represented by counsel and may present oral and written argument and evidence. An "affected" person may also appear and conduct reasonable questioning of persons who make relevant factual allegations. Wash. Admin. Code § 246-310-180(5). Any health care facility that provides services similar to those sought to be provided by the applicant is considered an "affected person." Wash. Admin. Code § 246-310-010(2)(b). Following the hearing, the department must issue written findings. Wash. Admin. Code § 246-310-490(1).

Administrative Law > Agency Adjudication > Review of Initial Decisions

Healthcare Law > ... > Facility Planning > Certificates of Need > General Overview

HN3[] Agency Adjudication, Review of Initial Decisions

An applicant who has been denied a Certificate of Need has the right to appeal the Department's of Health's decision to an adjudicative proceeding governed by the Washington Administrative Procedure Act. *Wash. Rev. Code § 70.38.115(10)*, Wash. Admin. Code § 246-310-610.

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

HN4[] Transportation, Railroads

U.S. Const. amend. I guarantees the right to petition the government for a redress of grievances. *U.S. Const. amend. I*, cl. 6. For the Petition Clause to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

HN5[] Freedom of Speech, Political Speech

The right to petition extends to all departments of the government, and therefore, the same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

HN6[] Noerr-Pennington Doctrine, Right to Petition Immunity

The Noerr-Pennington doctrine a direct application of the Petition Clause.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

Governments > State & Territorial Governments > General Overview

HN7[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

HN8[] Exemptions & Immunities, Noerr-Pennington Doctrine

Since the Petition Clause mentions only the right to petition the government for a redress of grievances, *U.S. Const. amend. I*, cl. 6, the Noerr-Pennington doctrine does not protect lobbying efforts directed at private organizations.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN9[] Exemptions & Immunities, Noerr-Pennington Doctrine

The "sham" exception to Noerr encompasses situations in which persons use the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon. A "sham" situation involves a defendant whose activities are not genuinely aimed a procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN10[] Noerr-Pennington Doctrine, Sham Exception

The scope of the sham exception depends on the type of governmental entity involved. When the branch of government involved is a court of law, there are three circumstances in which an antitrust defendant's activities might fall into the sham exception. First, if the alleged anticompetitive behavior consists of bringing a single sham lawsuit, antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with plaintiff's business relationships. Second, if the alleged anticompetitive behavior is the filing of a series of lawsuits, the question is whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. Finally, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Appeals > Standards of Review > General Overview

HN11[] **Motions to Dismiss, Failure to State Claim**

In reviewing a dismissal for failure to state a claim, the appellate court considers whether the plaintiff could prove any set of facts that would entitle him to relief.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN12[] **Pleadings, Heightened Pleading Requirements**

When a plaintiff seeks damages for conduct which is prima facie protected by *U.S. Const. amend. I*, the danger that the mere pendency of the action will chill the exercise of *first amendment* rights requires more specific allegations than would otherwise be required. In such cases, the court employs a heightened pleading standard, and that standard.

Counsel: Mark G. Olson, Everett, Washington, for the plaintiff-appellant.

Douglas C. Ross, Davis Wright Tremaine, LLP, Seattle, Washington, for the defendant-appellee.

Judges: Before: David R. Thompson and A. Wallace Tashima, Circuit Judges, and Tom Stagg, District Judge. [*] Opinion by Judge Tashima.

Opinion by: A. WALLACE TASHIMA

Opinion

[*1058] OPINION

TASHIMA, Circuit Judge:

In this case we apply the *Noerr-Pennington* doctrine in the context of an administrative proceeding. Specifically, we must determine whether the scope of the "sham" exception is different in an administrative proceeding than in litigation.

I. Background [1]

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[*] The Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

[1] Because this is an appeal from a dismissal for failure to state a claim, we take Kottle's factual allegations as true. *Federation of African American Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996)*.

[2]** In 1979, the State of Washington enacted the Health Planning and Resource Development Act (the "Act"). RCW 70.38. The Act declares that it is the "public policy of this state" to engage in health planning and encourage both consumers and providers throughout the state to be involved so as to control "excessive increases in costs." RCW 70.38.015(1). **HN1**[] The Act authorizes the Department of Health (the "Department") to administer a Certificate of Need ("CON") program to allocate health care resources. RCW 70.38.105(1). Under the CON program, the establishment of a new health care facility is subject to approval by the Department. RCW 70.38.105(4)(a). A kidney dialysis treatment center is such a health care facility subject to approval. WAC 246-310-010(18).

HN2[] After receiving a CON application, the Department may conduct a public hearing. RCW 70.38.115(9). At the hearing, any person may appear and be represented by counsel and may present oral and written argument and evidence. An "affected" person may also appear and "conduct reasonable questioning of persons who make relevant factual allegations." WAC 246-310-180(5). Any health care facility that provides services similar to those sought **[**3]** to be provided by the applicant is considered an "affected person." WAC 246-310-010(2)(b). Following the hearing, the Department must issue written findings. WAC 246-310-490(1). **HN3**[] An applicant who has been denied a CON has the right to appeal the Department's decision to an adjudicative proceeding governed by the Washington Administrative Procedure Act ("APA"). RCW 70.38.115(10); WAC 246-310-610.

Plaintiff-appellant Sheldon P. Kottle is a physician specializing in nephrology and transplant medicine. Kottle is the sole officer and shareholder of King County Kidney Center ("KCKC"). In 1991, Kottle filed CON applications with the Department seeking approval to build two kidney dialysis centers under the name KCKC. At that time, defendant Northwest Kidney Centers ("NWK") was the only provider of kidney dialysis services in King County. Perceiving Kottle to be a threat to its monopoly, NWK began a hostile campaign to prevent Kottle from establishing KCKC within NWK's market. NWK undermined Kottle's business negotiations and aggressively opposed Kottle's CON applications using methods and means which were improper and unlawful. NWK made false statements of fact and misrepresentations about **[**4]** Kottle and KCKC and encouraged others to do so. NWK's false statements and misrepresentations included the need for kidney dialysis services in King County. Influenced by NWK's statements, the Department rejected Kottle's CON applications on March 30, 1992. [2] At all times, NWK acted with the intent of eliminating competition and preserving its monopoly in the kidney dialysis market in King County. In 1995, NWK filed its own CON application for a similar dialysis facility at the same location. Contrary to its own statements opposing Kottle's CON application in 1992, the data presented by NWK in 1995 show that it knew of the need for kidney dialysis services in King County over the past 15 years.

In this action, Kottle alleged that NWK has unreasonably restrained trade and attempted to monopolize the market for kidney dialysis services in violation of §§ 1 and 2 of the Sherman Act, **[**5]** 15 U.S.C. §§ 1, 2. The complaint also alleged supplemental state law claims for violation of Washington's ***antitrust law***, RCW 19.86.030 et seq. The district court dismissed the action for failure to state **[*1059]** a claim upon which relief can be granted. It held that NWK's activities were protected by the *Noerr-Pennington* doctrine. Kottle appeals, and we affirm.

II. The Noerr-Pennington Doctrine

HN4[] The First Amendment to the United States Constitution guarantees the right "to petition the Government for a redress of grievances." U.S. Const. amend. I, cl. 6. The Supreme Court has long recognized that for the Petition Clause to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way. In Eastern RR Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961), the Court rejected antitrust liability stemming from an aggressive lobbying campaign by railroads to persuade states to adopt legislation that would severely limit competition from truckers. The Court explained that "in a **[**6]** representative democracy such as this . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." Id. at 137. The Court then concluded that the

[2] The record does not indicate whether Kottle exercised his right to appeal the Department's decision to an adjudicatory hearing.

Sherman Act did not apply to the railroads' advocacy of legislative action, notwithstanding their anticompetitive intent. *Id. at 138*.

The Court subsequently expanded the holding of *Noerr* to include activities aimed at the executive and judicial branches of government. *United Mine Workers v. Pennington, 381 U.S. 657, 669-70, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* (executive); *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)* (judicial). The Court explained that "***HN5***[] the right to petition extends to all departments of the Government," and therefore, "the same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." *California Motor Transp.,* 404 U.S. at 612-13.

This circuit has clarified that ***HN6***[] the *Noerr-Pennington* doctrine is not merely **[**7]** a narrow interpretation of the Sherman Act in order to avoid a statutory clash with *First Amendment* "values." Rather, the doctrine is a direct application of the Petition Clause, and we have used it to set aside antitrust actions premised on state law, as well as those based on federal law. *E.g., Amarel v. Connell, 102 F.3d 1494, 1524 (9th Cir. 1996)*. Thus, ***HN7***[] the *Noerr-Pennington* doctrine sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government. [3]

[8]** Given the sweep of the *Noerr-Pennington* doctrine, we have no difficulty in joining our sister circuits to conclude that a lobbying effort designed to influence a state administrative agency's decision to issue a CON is within the ambit of the doctrine. *See Tarabishi v. McAlester Regional Hosp., 951 F.2d 1558, 1570 n.17 (10th Cir. 1991)*; *St. Joseph's Hosp. v. Hospital Corp. of America, 795 F.2d 948, 955 (11th Cir. 1986)*. Indeed, in *Boulware v. State of Nev. Dep't of Human Resources, 960 F.2d 793 (9th Cir. 1992)*, we applied the *Noerr-Pennington* doctrine in the context of a state lawsuit that invoked a CON program in an attempt to quash competition. *See also Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 577-78 (6th Cir. 1986)* (same). The only difference between *Boulware* and this case is that the advocacy **[*1060]** here occurred before an administrative agency rather than a court. But since *Noerr-Pennington* protects advocacy before all branches of government, *California Motor Transp., 404 U.S. at 510*, this is a distinction without a difference. [4] Accordingly, NWK's activities in this case implicate the *Noerr-Pennington* doctrine.

[9]** *III. The Sham Exception*

The more difficult question is whether NWK's activities fall within the "sham" exception to the *Noerr-Pennington* doctrine. In *Noerr,* the Court acknowledged that "there may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere with the business relationships of a competitor, and the application of the Sherman Act would be justified." *365 U.S. at 144*. In *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*, the Court explained:

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[3] Of course, ***HN8***[] since the Petition Clause mentions only the right "to petition the *Government* for a redress of grievances," *U.S. Const. amend. I*, cl. 6 (emphasis added), the *Noerr-Pennington* doctrine does not protect lobbying efforts directed at private organizations. *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-500, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*. Kottle reads into *Allied Tube* a distinction between "political" and "economic" lobbying activity, from which he argues that the *Noerr-Pennington* doctrine does not apply in this case because NWK's activities were designed only to promote NWK's own economic gain. Such a distinction would render the doctrine a nullity since it is doubtful that an antitrust defendant exists that was not motivated by economic gain. We read *Allied Tube* more narrowly, as merely recognizing the public/private distinction recognized in the Petition Clause itself.

[4] The present case is also analogous to *Assigned Container Ship Claims, Inc. v. American President Lines, Ltd., 784 F.2d 1420 (9th Cir. 1986)*, in which we extended *Noerr-Pennington* immunity to petitions before the Federal Maritime Administration concerning the need for additional American flag ocean carrier service. *Id. at 1422*.

> HN9[] The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are not genuinely aimed a procuring favorable government action at all, not one who genuinely **[**10]** seeks to achieve his governmental result, but does so through improper means.

Id. at 380 (citations and quotation marks omitted).

Although the *Noerr-Pennington* doctrine applies to activities directed at any branch of government, HN10[] the scope of the sham exception depends on the type of governmental entity involved. *See California Motor Transp., 404 U.S. at 513* ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."); *Boone v. Redevelopment Agency, 841 F.2d 886, 896 (9th Cir. 1988)*. When the branch of government involved is a court of law, this circuit recognizes three circumstances in which an antitrust defendant's activities might fall into the sham exception. First, if the alleged anticompetitive behavior consists of bringing a single sham lawsuit (or a small number of such suits), the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*; *Amarel, **[**11]** 102 F.3d at 1518-19*; *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 810-11 (9th Cir. 1994)*.

Second, if the alleged anticompetitive behavior is the filing of a series of lawsuits, "the question is not whether any one of them has merit - some may turn out to, just as a matter of chance - but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *31 F.3d at 811* (citing *California Motor Transp., 404 U.S. 508 at 512)*; *Oregon Natural Resources Council v. Mohla, 944 F.2d 531, 534 (9th Cir. 1991)*.

Finally, in the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if "a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Liberty Lake Inv., Inc. v. Magnuson, 12 F.3d 155, 158 (9th Cir. 1993)*; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1260 (9th Cir. 1980)*.

[*1061] It is obvious that these three ways in which litigation might be **[**12]** a sham do not necessarily extend beyond the litigation context. For instance, if the alleged anticompetitive behavior consisted of lobbying a state legislature (as in *Noerr*), rather than filing a suit in state court, it would seem quite pointless to ask whether the lobbying effort was "objectively baseless." To decide objective baselessness, we would need objective standards, of which there are few, if any, in the political realm of legislation, against which to measure the defendant's conduct.

Similarly, the second and third variants of the litigation sham exception do not make sense in the legislative realm. Subjecting a defendant to antitrust liability because it pursued a pattern of baseless legal claims does not generate the same collateral consequences as subjecting the same defendant to antitrust liability because it engaged in numerous unsuccessful attempts to lobby a state legislature - the latter would eviscerate the Petition Clause. And the sham exception for intentional fraud on a court cannot lightly be taken to apply in a legislative context because, as the Supreme Court has observed, the political arena has a higher tolerance for outright lies than the judicial **[**13]** arena does. *California Motor Transp., 404 U.S. at 512-13*.

Thus, the scope of the sham exception to the *Noerr-Pennington* doctrine depends on the branch of government involved. If it is the legislature, the sham exception is extraordinarily narrow. But if it is the judicial branch, this circuit recognizes three categories of anticompetitive behavior that can amount to a sham and, therefore, outside the protection of the *Noerr-Pennington* doctrine.

The present case, however, involves neither a court nor a legislature. Here we deal with asserted anticompetitive behavior directed at an administrative agency, and the question we must decide is what the scope of the sham exception is when the executive branch of the government is involved. Complicating our inquiry is the fact that the executive branch is radically diverse. At the federal level, it encompasses everything from formal hearings before independent administrative agencies, which are bound, both procedurally and substantively, by statutes and regulations, to the unapologetically political decisions of trade negotiators and other Presidential advisers. At the state level, executive officials can likewise be elected or **[**14]** appointed, and they also have greatly varying levels of discretion and independence.

It seems clear that for some kinds of executive entities, the sham exception to the *Noerr-Pennington* doctrine should be the same as it is for judicial bodies, [5] but for others such a sham exception would be far too broad. In recognition of the vastly different types of executive entities that exist, this circuit has generally shaped the sham exception according to our estimation of whether the executive entity in question more resembled a judicial body, or more resembled a political entity. In *Amarel,* for example, we analyzed the putatively sham litigation under the "objectively baseless" inquiry established by *Professional Real Estate*. 102 F.3d at 1519-20. We then lumped the petitioning of State Department officials and Korean government officials alongside the lobbying efforts directed at members of Congress, and brusquely held these petitioning efforts shielded by *Noerr-Pennington*. *Id. at 1520*. Similarly, in *Boone,* we noted that the administrative agency in question made decisions virtually unguided by enforceable standards and that these decisions could be appealed only **[**15]** to a legislative body. *841 F.2d at 896*. We concluded that the agency was essentially a political body, and we refused to apply the broader sham exception that exists for judicial entities. *Id.* Our holding in *Boone* followed from a prior holding in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of* ***[*1062]*** *Culinary Workers, 542 F.2d 1076 (9th Cir. 1976)*, that rejected the judicial sham exception for proceedings before the San Francisco Board of Permit Appeals, after concluding that the Board was essentially a political body. *Id. at 1079*.

[16]** By contrast, we have applied the judicial sham exception to proceedings before the Federal Maritime Administration, *Assigned Container, 784 F.2d 1420 at 1423*, and the Interstate Commerce Commission, *Clipper Exxpress, 690 F.2d 1240 at 1262*. We have suggested that the sham exception is narrower in communications with the police than it is in the legislative realm. *Forro Precision, Inc. v. IBM, 673 F.2d 1045, 1060 (9th Cir. 1982)*. We have also discussed the sham exception as it applies to activities directed at a state attorney general, *Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964)*, and public airport officials, *In re Airport Car Rental Antitrust Litig., 693 F.2d 84, 86 (9th Cir. 1982)*, without clearly resolving the scope of the sham exception in those cases.

If the exact scope of the sham exception to the *Noerr-Pennington* doctrine has not always been clear in the administrative context, our cases at least stand for the general proposition that "the scope of immunity depends on the degree of political discretion exercised by the government agency." *Forro Precision, 673 F.2d at 1060 n.10*. *See also Boone, 841 F.2d at 896* ("If the agency and the council **[**17]** were acting as adjudicative bodies, the range of lobbying activities immunized by *Noerr-Pennington* would be much narrower.") Recent cases by the Supreme Court and this circuit (*e.g., Professional Real Estate, Amarel, USS-POSCO,* and *Liberty Lake*) have clarified the scope of the sham exception in judicial proceedings, but they do not alter this court's previous understanding that for purposes of the sham exception, executive entities are treated like judicial entities only to the extent that their actions are guided by enforceable standards subject to review. Only when administrative officials must follow rules is it meaningful to ask whether a petition before an agency was "objectively baseless," or whether there has been a pattern of petitioning without regard to the "merit" of the petitions. Similarly, our concern about intentional misrepresentation to government officials is much greater outside of the political realm.

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[5] The Supreme Court suggested as much in *California Motor Transp.* when it lumped together courts and certain administrative agencies, and referred to them collectively as "adjudicatory tribunals" for purposes of the sham exception. *404 U.S. at 512*. As should be clear from our opinion, this circuit does not read *California Motor Transp.* to say that *all* administrative entities are equivalent to judicial ones for purposes of *Noerr-Pennington*. Rather, *California Motor Transp.* suggests that an administrative sgency should be treated like a judicial one only if the former is, in fact, acting in an "adjudicatory" capacity.

IV. Kottle's Case

With this framework in mind, we now apply the sham exception to Kottle's case. The anticompetitive behavior that Kottle alleges consists of NWK's lobbying the Department against issuing a CON for KCKC's kidney dialysis center. Allegedly, **[**18]** NWK made numerous intentional misrepresentations to the Department and it engaged in improper and unlawful lobbying efforts.

If we thought that the Department was an essentially political entity, like the San Francisco Board of Permit Appeals, *see* *Franchise Realty, 542 F.2d at 1079*, Kottle's suit would have absolutely no merit at all. Misrepresentations are a fact of life in politics, *California Motor Transp., 404 U.S. at 512*, and lobbying is the sine qua non of democracy. *Id. at 510-11*.

We conclude, however, that the Department exercises a sufficiently circumscribed form of administrative authority that it is appropriate to apply the same sham exception here that we do in the litigation context. Heeding our own observation that executive entities come in many shapes and sizes, we will not list any single factor, or combination of factors, as decisive in determining whether the Department operates in a sufficiently non-political way to warrant application of the judicial sham exception. Rather, we look to the totality of the circumstances.

The CON determination by the Department bears many indicia of a true adjudicatory proceeding. The Department conducts public hearings, **[**19]** accepts written and oral arguments, permits representation by counsel, and allows affected persons to question witnesses. The Department must issue written findings after its hearing. Its decision is appealable, and that appeal is governed by APA procedures and statutory standards. In all, we believe that this combination of facts makes the application of the judicial sham exception appropriate in this case.

Thus, Kottle can get around the *Noerr-Pennington* doctrine only if his allegations **[*1063]** show one of three things: (1) NWK's advocacy before the Department was objectively baseless and merely an attempt to stifle competition; (2) NWK engaged in a pattern of petitions before the Department without regard to the merit of the petitions; or (3) NWK's misrepresentations before the Department deprived the entire CON proceeding of its legitimacy. We can easily dispense with the second of these grounds because Kottle's complaint alleges interference with only two CON applications. *See* *Amarel, 102 F.3d at 1519* (holding that a handful of legal proceedings does not amount to a "pattern" of baseless claims).

We can also dispense with the first of these grounds. NWK's advocacy before the **[**20]** Department was not objectively baseless because NWK prevailed. In the litigation context, the Supreme Court has reminded us that a winning lawsuit is, by definition, not objectively baseless. *Professional Real Estate, 508 U.S. at 61 n.5*. Because we view the CON hearing as analogous to litigation, we must conclude that a victory before the Department necessarily indicates that NWK's position was not objectively baseless. *See* *Franchise Realty, 542 F.2d at 1079* ("We find it particularly hard to accept the characterization as 'baseless' or 'frivolous' of opposition which is entirely successful in obtaining the governmental action sought, as apparently was the case here.") We note that Kottle did have the right to appeal the Department's decision, and had he obtained a reversal of the Department's denial of the CON, then NWK's initial victory before the Department would not necessarily indicate that NWK's position was not objectively baseless. *Hydranautics v. Filmtec Corp., 70 F.3d 533, 538 (9th Cir. 1995)*. A winning lawsuit that is overturned on appeal, after all, is not a winning lawsuit, and the same logic applies to an administrative ruling. As far as the record discloses, **[**21]** however, Kottle did not appeal the Department's ruling. Therefore, the success of NWK's opposition to Kottle's CON applications conclusively demonstrates that the opposition was not objectively baseless.

This leaves Kottle with only the third of the sham exception possibilities. Notwithstanding *Noerr-Pennington,* Kottle can overcome a 12(b)(6) motion if his allegations demonstrate that NWK so misrepresented the truth to the Department that the entire CON proceeding was deprived of its legitimacy. Kottle's complaint, however, falls far short of adequately alleging this variant of the sham exception. He alleges in very general terms that NWK engaged in a hostile campaign to oppose the CON applications; that it used "means which were improper and/or unlawful"; that it conspired with other unnamed entities to oppose Kottle's CON applications; that it made misrepresentations about Kottle and the need for a kidney dialysis center, and encouraged others to do so; and that these statements influenced the Department's decision.

From Kottle's complaint, we do not know exactly what representations NWK made, or to whom; with whom NWK conspired; what exactly its "improper and/or unlawful" **[**22]** methods of advocacy were; or what other testimony the Department may have had that could have influenced its decision to deny Kottle's CON application. Normally, we would be willing to give Kottle the benefit of the doubt, because ***HN11***[] in reviewing a dismissal for failure to state a claim, we usually ask ourselves whether the plaintiff could prove *any* set of facts that would entitle him to relief. [6] *Franchise Realty, 542 F.2d at 1082*. This case is different, however, because ***HN12***[] when "a plaintiff seeks damages . . . for conduct which is prima facie protected by the *First Amendment*, the danger that the mere pendency of the action will chill the exercise of *First Amendment* rights requires more specific allegations than would otherwise be required." *Id. at 1083*.

In such cases, we employ a heightened pleading standard, and that standard "would have no force if in order to satisfy **[**23]** it, a party could simply recast disputed issues from the underlying litigation as 'misrepresentations' by the other party." *Mohla, 944 F.2d at 536* (citing *Omni Resource Dev. Corp. v. Conoco, Inc., 739 F.2d 1412, 1414 (9th Cir. 1984))*.

[*1064] We conclude, that Kottle's vague allegations of misrepresentation "are therefore insufficient to overcome *Noerr-Pennington* protection." *Id.* [7]

[24]** *AFFIRMED.*

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[6] It also appears that Kottle has taken his "best shot." The record does not disclose that he requested leave to amend his complaint.

[7] In addition to his challenge to NWK's *Noerr-Pennington* immunity, Kottle contends that the district court erred in not striking an affidavit attached to NWK's reply memorandum in support of its motion to dismiss. The affidavit's sole purpose was to put before the court certain public records of the Department. We agree with the district court that these records were properly the subject of judicial notice; therefore, reliance on them did not convert the motion to dismiss into a summary judgment motion. *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)*.

Evans v. State

Supreme Court of Utah

June 23, 1998, Filed

No. 970146

Reporter
963 P.2d 177 *; 1998 Utah LEXIS 37 **; 346 Utah Adv. Rep. 3; 1998-1 Trade Cas. (CCH) P72,192

Steven L. Evans, Plaintiff and Appellee, v. State of Utah, Defendant and Appellant. Joseph L. Evans, Evans Broadcasting, Inc., and Country Gold Broadcasting Inc., Plaintiffs and Appellees, v. State of Utah, Defendant and Appellant.

Subsequent History: [1]** As Corrected March 15, 1999.

Prior History: Third District, Salt Lake. The Honorable David S. Young.

Disposition: Reversed and remanded for proceedings consistent with this opinion.

Core Terms

reasonable cause, exempt, radio station, Antitrust, district court, advertising, attorney general, probable cause, regulated, anti trust law, public utility, Broadcasting, plaintiffs', station, antitrust violation, narrowly, courts, subject to regulation, investigator, radio, written order, anticompetitive, provisions, initiated, articles, merchant, prices

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Appeals, Standards of Review**

A trial court determination of whether a specific set of facts gives rise to reasonable suspicion is a determination of law and is reviewable nondeferentially for correctness. Nevertheless, because the legal standard for "reasonable suspicion" and "probable cause" is highly fact dependent, courts have afforded a measure of discretion to such determinations. Therefore, courts will review the district court's decision for correctness while affording a measure of discretion to that court in the application of the correctness standard to a given set of facts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

The Utah Antitrust Act authorizes the attorney general to issue civil investigative demands (CID) when the attorney general has reasonable cause to believe that any person may be in possession, custody or control of any information relevant to a civil antitrust investigation. Utah Code Ann. § 76-10-917(1) (1995). If the CID recipient fails to comply with the demand, the attorney general may file a petition for an order compelling compliance with the demand. Utah Code Ann. § 76-10-917(7)(a) (1995). Thereafter, the court must hold a hearing at which the attorney general has the burden of establishing that the demand is proper, that there is reasonable cause to believe that there has been a violation of this act, and that the information sought or document or object demanded is relevant to the violation. Utah Code Ann. § 76-10-917(7)(b)(ii) (1995).

Civil Procedure > Judgments > Entry of Judgments > General Overview

HN3[] Judgments, Entry of Judgments

Regardless of the language used during the hearing, the language in the court's final written order controls, and an appellate court will presume the order is correct unless affirmatively shown otherwise. Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service. Utah Code of Judicial Admin. R4-504(2).

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

HN4[] US Department of Justice Actions, Investigations

Federal ***antitrust law*** authorizes the issuance of civil investigative demands whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation. *15 U.S.C.S. § 1312(a)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] Public Enforcement, State Civil Actions

There is a test to determine whether the attorney general had shown reasonable cause: The decision is relatively uncomplicated, as it does not involve extensive weighing or testing of evidence or any resolution of conflicts on the evidence. The question at hearing is not whether the state's information is true or uncontradicted, but whether, assuming its accuracy, the state has in its possession sufficient information to satisfy a judge that it is reasonable to believe that there has been a violation of the act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] Public Enforcement, State Civil Actions

See Utah Code Ann. § 76-10-915(1)(a) (1995).

Governments > Legislation > Interpretation

HN7[] **Legislation, Interpretation**

When the court interprets statutes, its primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve. The court therefore looks first to the statute's plain language. The court need not look beyond its plain language unless it finds some ambiguity in it. Statutory language is ambiguous if it can reasonably be understood to have more than one meaning. However, if the court finds a provision ambiguous, which causes doubt or uncertainty as to its meaning or application, the court must analyze the act in its entirety and harmonize its provisions in accordance with the legislative intent and purpose.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Public Enforcement, State Civil Actions**

See Utah Code Ann. § 76-10-912 (1995).

Governments > Legislation > Interpretation

HN9[] **Legislation, Interpretation**

Antitrust laws should be construed broadly and exemptions should be construed narrowly so as to give effect to their purposes.

Counsel: George A. Hunt, Salt Lake City, for Steven Evans.

Gayle F. McKeachnie, Clark A. McClellan, Vernal, for Joseph Evans, Evans Broadcasting, and Country Gold Broadcasting.

Jan Graham, Att'y Gen., R. Wayne Klein, Asst. Att'y Gen., Salt Lake City, for the State.

Judges: RUSSON, Justice. Chief Justice Howe, Associate Chief Justice Durham, Justice Stewart, and Justice Zimmerman concur in Justice Russon's opinion.

Opinion by: RUSSON

Opinion

[*178] *RUSSON, Justice*:

INTRODUCTION

The State appeals a district court order granting petitions to quash antitrust civil investigative demands the State issued to Joseph Evans, Steven Evans, Evans Broadcasting, Inc., and Country Gold Broadcasting, Inc. The State sought information relating to possible antitrust violations between radio stations in the Uintah Basin; however, the district court ruled that the State had not met its burden under Utah Code Ann. § 76-10-917(7)(b)(ii) to maintain an investigation and that the radio stations **[**2]** were exempt from investigation under section 76-10-915(1)(a). We reverse and remand.

BACKGROUND

In 1996, a merchant in the Uintah Basin contacted the Antitrust Division of the Utah **[*179]** Attorney General's office ("Division") and complained of possible collusion in the pricing of radio station advertising in the Vernal and Roosevelt radio markets. The merchant had compared advertising rates in the area and informed the Division that the rates charged by the radio stations in Vernal were identical to those in Roosevelt. The merchant also reported that he had been offered a discount on advertising rates if he would advertise on radio stations in both cities.

The Division conducted a preliminary investigation into the merchant's allegations and found that there are only four radio stations in the Uintah Basin--two stations are located in Roosevelt, and two are located in Vernal. The two radio stations in Roosevelt, KNEU and KFIX, are both owned by Evans Broadcasting, Inc., and Country Gold Broadcasting, Inc. Joseph Evans, the owner of these corporations, manages KNEU and KFIX. The radio stations in Vernal, KVEL and KLCY, are owned by Ashley Communications, Inc., which is owned by James Davis. **[**3]** [1] Joseph Evans' son, Steven Evans, is the general manager of KVEL and KLCY. The real estate and buildings where the Vernal radio stations are located are owned by DEE Properties, L.L.C., a limited liability corporation with six members: James Davis, Steven Evans, Joseph Evans, and their wives.

The four radio stations operate under licenses granted by the Federal Communications Commission (FCC) as required by the FCC for lawful operation. The FCC does not actively regulate prices charged by radio stations for advertising.

In December 1996, pursuant to Utah Code Ann. § 76-10-917, the Division issued civil investigative demands (CIDs) to Steven Evans, Joseph Evans, Evans Broadcasting, Inc., and Country Gold Broadcasting, Inc. The CIDs requested testimony and documents related to the advertising prices and collusion among the four radio stations.

Plaintiffs filed separate petitions to quash the CIDs, and the district court consolidated **[**4]** the petitions at a hearing on February 14, 1997. In granting the petitions, the court concluded that (1) the State failed to meet its burden to show that it had "reasonable cause" to believe a violation had occurred under Utah Code Ann. § 76-10-917(7)(b)(ii), and (2) the radio stations were exempt from investigation under Utah Code Ann. § 76-10-915(1)(a) because they are "subject to regulation" by the FCC.

On appeal, the State raises the following two arguments: first, the court incorrectly applied a "probable cause" standard and therefore incorrectly ruled that the State had not met its statutory burden, and second, the court erred in finding that plaintiffs' activities are exempt from the Act.

STANDARD OF REVIEW

We are asked to review whether the district court erred in ruling that the State had not met its statutory burden of showing "reasonable cause" to believe a civil antitrust violation had occurred. This is a question of first impression. However, we believe the standard of review is similar to the standard we apply in the area of criminal law regarding similar questions.

We have stated that ***HN1***[] "'a trial court determination of whether a specific set of facts gives rise to **[**5]** reasonable suspicion is a determination of law and is reviewable nondeferentially for correctness.'" *State v. Hodson, 907 P.2d 1155, 1157 (Utah 1995)* (quoting *State v. Pena, 869 P.2d 932, 939 (Utah 1994))*. Nevertheless, because the legal standard for "reasonable suspicion" and "probable cause" is highly fact dependent, we have afforded a "measure of discretion" to such determinations. *Id.*; *State v. Poole, 871 P.2d 531, 533 (Utah 1994)*. Therefore, we will review the district court's decision for correctness while affording a "measure of discretion" to that court in our application of the correctness standard to a given set of facts. *Id.*

However, the court's ruling that plaintiffs' activities are exempt from the Act is a matter of statutory interpretation, which involves a question of law. We will therefore review that ruling for correctness without deference. *S.H. v. Bistryski, 923 P.2d 1376, 1379 (Utah 1996)*.

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[1] Ashley Communications and James Davis were not plaintiffs in the action below.

[*180] ANALYSIS

I. THE "REASONABLE CAUSE" STANDARD UNDER

UTAH CODE ANN. § 76-10-917

The first issue we must decide is whether the district court correctly determined that the State had not met its burden of showing that it was justified in issuing the CIDs. ***HN2***[] **[**6]** The Utah Antitrust Act authorizes the attorney general to issue CIDs "when the attorney general has *reasonable cause* to believe that any person may be in possession, custody or control of any information relevant to a civil antitrust investigation." Utah Code Ann. § 76-10-917(1) (1995) (emphasis added). If the CID recipient fails to comply with the demand, the attorney general may file a petition for an order compelling compliance with the demand. *Id.* § 76-10-917(7)(a). Thereafter, the court must hold a hearing at which the attorney general has the burden of establishing "that the demand is proper, that there is *reasonable cause to believe that there has been a violation of this act*, and that the information sought or document or object demanded is relevant to the violation." *Id.* § 76-10-917(7)(b)(ii) (emphasis added).

Initially, the State asserts that the court incorrectly relied on a "probable cause" standard rather than on the significantly lower "reasonable cause" standard and therefore erred in ruling that the State had not met its statutory burden. To support its claim, the State relies on the record from the hearing, in which the court made repeated references **[**7]** to probable cause.

For example, during the hearing the judge asked whether it is true that "you have got to show, before you can issue a civil investigative demand, some *probable cause* to believe, that there is a violation, and that *probable cause* rises to the level of, let's say, just short of the evidence that would be required in a preliminary hearing." (Emphasis added.) Thereafter, at counsel's request, the court explained its ruling from the bench, stating, "In relation to the issue of *probable cause*, I don't find adequate information in the affidavit to support the notion that there was an agreement [between plaintiffs]." (Emphasis added.)

Although the court referred to probable cause several times during the hearing, in its written order the district court concluded, "The State failed to meet its burden to show that *reasonable cause* existed to warrant investigation of the activities described in the Civil Investigative Demands." (Emphasis added.) The State's ultimate concern is that while the court used "reasonable cause" in its written order, what it really meant was "probable cause."

HN3[] Regardless of the language used during the hearing, the language in the **[**8]** court's final written order controls, and we will presume the order is correct unless affirmatively shown otherwise. *See Pena, 869 P.2d at 935-36*. However, the State does not assert, nor does the record indicate, that the State objected in a timely manner to the written order's use of "reasonable cause." [2] Rule 4-504(2) of the Utah Rules of Judicial Administration provides: "Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service." Utah Code of Judicial Admin. R4-504(2). Whether the district court erroneously referred to "probable cause" during the hearing is immaterial, because the State accepted the court's use of "reasonable cause" in the written order. Having failed to properly object, the State waived its right to challenge the order in this regard on appeal. We therefore hold that the trial court used the correct "reasonable cause" standard in its final written order.

[9]** While the district court used the correct statutory standard, we must still determine whether it correctly applied that standard to the facts in this case. This court has **[*181]** never expressly defined "reasonable cause" as that term is used in the Act. According to the Act, "the legislature intends that the courts, in construing this act, will be guided by interpretation given by the federal courts to comparable federal antitrust statutes and by other

[2] While the State filed an objection to the proposed order, prepared by Steven Evans' counsel, it apparently objected only to the order's conclusion that plaintiffs' conduct was exempt. The State proposed an order without a finding on the exemption issue; however, the court signed the order and denied the State's objection.

state courts to comparable state antitrust statutes." Utah Code Ann. § 76-10-926. Therefore, we will look to federal and state courts for guidance as to the proper definition of "reasonable cause" in the context of ***antitrust law***.

HN4[] Federal ***antitrust law*** authorizes the issuance of CIDs "whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has *reason to believe* that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation." *15 U.S.C. § 1312(a)* (emphasis added). The parties did not cite, nor has our research uncovered, any federal cases that explicitly define the "reason **[**10]** to believe" standard. However, the federal courts' application of that standard indicates that the burden is easily satisfied. *See, e.g.*, *Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53, 58 (2d Cir. 1983)*; *Finnell v. United States Dep't of Justice, 535 F. Supp. 410, 415 (D. Kan. 1982)*; *Blue Cross & Blue Shield v. Bingaman*, No. 1:94- CV2297, *1996 U.S. Dist. LEXIS 17091*, at *14 (N.D. Ohio June 24, 1996) (upholding CID because it was reasonably related to legitimate investigation). Specifically, in *Blue Cross* the court stated, "A court should not set aside a CID unless it would quash the same request contained in a subpoena or subpoena duces tecum issued by a district court in aid of a grand jury investigation." *Blue Cross, 1996 U.S. Dist. LEXIS 17091*, at *3. Moreover, federal courts have stated that the reason to believe standard is satisfied where the CID was issued merely for the purpose of ascertaining whether the antitrust laws have been violated. *See* *Associated Container Transp., 705 F.2d at 58*.

The notion that the reason to believe standard is a relatively low burden is further supported by the purposes behind the federal **[**11]** antitrust investigative provisions. One federal court has noted that such purposes are twofold: "(1) to enable the Attorney General to determine whether there has been a violation of the antitrust laws, and if so (2) to enable the Attorney General to allege properly the violations in a civil complaint." *Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 397 (D. Minn. 1963)*. Thus, CIDs simply facilitate the attorney general's investigations into antitrust violations and enable the attorney general to gather enough information to initiate a proper civil action. Likewise, the CIDs issued by the Utah Attorney General assist that agency in gathering enough information to make a proper determination as to whether a civil antitrust action should be initiated.

Turning to state courts' treatment of "reasonable cause," the State has cited to ten states that have antitrust laws requiring reasonable cause to issue CIDs. [3] **[**12]** While the State asserts that only five of those states' appellate courts have examined their statutes regarding the issuance of CIDs, only one state, Arizona, has given a meaningful review of the reasonable cause standard that can be applied to the case at bar. [4]

In *Babbitt v. Herndon, 119 Ariz. 454, 581 P.2d 688 (Ariz. 1978)*, the Arizona attorney general initiated an investigation to determine whether the sales and advertising practices of a business violated the Arizona Consumer Fraud Act. [5] In response to the investigation, **[*182]** the business argued that there was no reasonable cause to

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[3] *See* *Ariz. Rev. Stat. Ann. § 44-1406* (1994); *Iowa Code § 553.9* (1997); *Mass. Gen. L. ch. 93, § 8* (1994); Mich. Comp. Laws § 28.70(6) (1990); *Nev. Rev. Stat. § 598A.100* (1994); *N.M. Stat. Ann. § 57-1-5* (1995); N.D. Cent. Code § 51-08-1.06 (1989); *Ohio Rev. Code § 1331.16* (Supp. 1996); *R.I. Gen. Laws § 6-36-9* (1992); *S.D. Codified Laws § 37-1-11.1* (1994).

[4] The state appellate court decisions cited by the State are *Babbitt v. Herndon, 119 Ariz. 454, 581 P.2d 688 (Ariz. 1978)*, *Wilson Corp. v. State, 1996 NMCA 49, 916 P.2d 1344, 121 N.M. 677 (N.M. Ct. App. 1996)*, *Ida County Courier & Reminder v. Attorney General, 316 N.W.2d 846 (Iowa 1982)*, *Borden, Inc. v. State, 65 Ohio App. 2d 1, 413 N.E.2d 848 (Ohio Ct. App. 1979)*, and *Office of Attorney General v. M.J.D., 396 N.W.2d 757 (S.D. 1986)*.

[5] The Arizona Consumer Fraud Act, *Ariz. Rev. Stat. §§ 44-1521* to -1534, and the Arizona Uniform State Antitrust Act, *Ariz. Rev. Stat. §§ 44-1401* to -1416, are both codified under title 44, chapter 10 of the Arizona Revised Statutes, which governs competition and competitive practices in trade and commerce. The provisions of each Act governing the Arizona attorney general's power to investigate violations thereunder are substantially similar. *Compare id.* *§ 44-1406(B)* ("If the court finds that the demand is proper, that there is reasonable cause to believe there may have been a violation of this article and that the information sought or document or object demanded is relevant to the violation, it shall order the person to comply with the demand.") *with id.* § 44-1527(B) ("If the court determines that the attorney general has reasonable cause to believe that the

believe there had been a violation of the Act. In addressing the merits of the arguments, the court first discussed the policy considerations underlying a civil investigation by the state. In doing so, it reasoned that the reasonable cause standard operated to (1) impose an additional substantive limitation on **[**13]** the attorney general's power to engage in precomplaint discovery and (2) prevent abuses or excesses which might result from unlimited powers of investigation. *Babbitt, 581 P.2d at 690*. The court then established the following ***HN5***[] test to determine whether the attorney general had shown reasonable cause:

[14]** The decision is relatively uncomplicated, as it does not involve extensive weighing or testing of evidence or any resolution of conflicts on the evidence. *The question at hearing is not whether the state's information is true or uncontradicted, but whether, assuming its accuracy, the state has in its possession sufficient information to satisfy a judge that it is reasonable to believe that there has been a violation of the act*.

581 P.2d at 692 (emphasis added). We agree with the sound reasoning and the sensible definition of "reasonable cause" elucidated by the *Babbitt* court, which provide a workable framework in addressing challenges to CIDs issued under Utah's Antitrust Act.

Before turning to our application, we address the parties' arguments relating to the burden of proof required by the reasonable cause standard in relation to other standards. As the State asserts, "proof beyond a reasonable doubt" is the highest standard, while "reasonable cause" is the lowest, and the "clear and convincing," "preponderance of the evidence," and "probable cause" standards are somewhere in between. Plaintiffs agree that reasonable cause is lower than probable cause for preliminary **[**15]** hearings, which requires only "'a quantum of evidence sufficient to warrant submission of the case to the trier of fact.'" *State v. Pledger, 896 P.2d 1226, 1229 (Utah 1995)* (quoting *State v. Anderson, 612 P.2d 778, 783 (Utah 1980))*. [6] As one can reasonably infer from *Pledger*, the evidence required for binding a defendant over to district court is relatively low because the assumption is that the prosecution's case will only get stronger as the investigation continues. *Id.* Hence, the evidence fails to meet the probable cause standard only when it is "wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution's] claim." *Id.*

[16]** Reason dictates that an investigation based on the reasonable cause standard requires less evidence than the "quantum of evidence sufficient to warrant submission of the case to the trier of fact" required by the probable cause standard. Moreover, the reasonable cause standard would seem to allow an investigation to go forward on the assumption that the attorney general's case will only get stronger as the investigation proceeds.

Plaintiffs argue that the reasonable cause standard requires some showing of objective **[*183]** evidence that there was an illegal agreement or other antitrust violation. Requiring less, they assert, could lead to abuses in the investigative process and would allow the State to engage in "fishing expeditions."

We agree that the State must have some objective evidence that there has been a violation of the antitrust laws. However, as previously mentioned, the purpose of the investigative power is to aid the State in determining whether an enforcement action should even be initiated. The higher protections afforded by higher standards are not necessary because CIDs are part of an investigation rather than an enforcement action. Assuming that the investigation **[**17]** uncovers evidence, the State would initiate a civil action which would require the State to satisfy the higher standards before any sanctions are imposed. The statute therefore gives the State broad

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respondent has engaged in, is engaging in or is about to engage in any act . . . which is in violation of this article . . . the court shall grant the appropriate relief."). Therefore, we believe that the Arizona Supreme Court's discussion of the reasonable cause standard under the Consumer Fraud Act is applicable to the reasonable cause standard under the Uniform State Antitrust Act.

[6] Compare "probable cause" with our definition of "reasonable cause" in the context of warrantless arrests: "The requirement, as in so many areas of the law, is one of reason: that it be shown that under the facts and circumstances known to the officer, a reasonable and prudent man in his position would be justified in believing that the suspect had committed the offense." *State v. Lopez, 22 Utah 2d 257, 451 P.2d 772, 775 (1969)*.

discretion to investigate possible antitrust violations while at the same time protecting citizens from investigations not supported by reasonable cause.

In light of the aforementioned, the district court clearly erred in concluding that the State failed to meet its burden of showing that reasonable cause existed to warrant investigation of the activities described in the CIDs. The State set forth ample evidence at the hearing to satisfy the reasonable cause standard. To illustrate, the State submitted a certified copy of the articles of organization of DEE Properties, L.L.C. The articles describe the purpose of the company as follows: "To acquire, hold, develop, manage, operate and dispose of interests in real and personal property." Moreover, article IV expressly permits conflict of interest transactions between DEE and any company in which DEE's members have an interest. [7] As the State notes in its brief, the articles would seem to facilitate collusive agreements, and such provisions **[**18]** may have been necessary in light of DEE's influence over a radio station that competed against one of DEE's members.

In addition to the articles of organization, the State submitted the affidavit of an investigator for the Attorney General's office whose factual findings are undisputed and have been set forth earlier in this opinion. In the affidavit, the investigator stated:

As a result of this preliminary investigation, I concluded that having only two stations that run local advertising, and having a father own the station in one town and **[**19]** having the son working as the general manager of the other station *created a potential for anticompetitive conduct*. Given that we had received a complaint, with specific allegations of improper conduct, I concluded--based on my experience as an antitrust investigator--that further investigation was warranted.

(Emphasis added.) The investigator further concluded that joint ownership and management of the only two local radio stations in the broadcast area of Vernal and Roosevelt by Joseph Evans and his son Steve Evans, creates the potential for anticompetitive conduct. Further it appears the association between Joseph Evans and Steve Evans, and their radio stations, has resulted in collusion in the form of illegal price fixing and illegal tying arrangements whereby the purchase of one product (advertising on one station) is tied to the purchase of another product (advertising on the other station).

The affidavit and the DEE articles of organization provide specific evidence that the only two competitors in a well-defined geographic market (1) were owned or managed by father and son, (2) had identical prices, (3) offered discounts for merchants who were willing to advertise **[**20]** on the stations in both towns, and (4) joined in common ownership of land and buildings belonging to two of the radio stations.

[*184] Plaintiffs argue that each one of these facts alone is not sufficient to meet the reasonable cause standard. However, reasonable cause is determined by combining all of the evidence and then determining whether, taken as a whole, there is reasonable cause to believe that the Utah Antitrust Act has been violated. Considering the above evidence as a whole, we hold that the district court clearly erred in concluding that the State failed to show that there was reasonable cause to believe an antitrust violation had occurred.

II. THE EXEMPTION PROVISION--UTAH CODE ANN. § 76-10-915

We turn next to the second issue--whether the district court erred in concluding that plaintiffs' activities are exempt from investigation under Utah Code Ann. § 76-10-915(1)(a). The Act exempts certain activities from investigation if the activities are "subject to regulation" by the FCC:

HN6[] (1) No provision of this act shall be construed to prohibit:

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[7] Article IV provides in part:

No contract or other transaction between the Company and any firm or corporation shall be affected by the fact that a member or manager of the Company has an interest in, or is a director or officer of, such other firm or corporation. Any member or manager, individually or with others, may be a party to, or may have an interest in, any transaction of the Company or any transaction in which the Company is a party or has an interest.

(a) The activities of any public utility to the extent that those activities are *subject to regulation* by the Public **[**21]** Service Commission, the state or federal Department of Transportation, the Federal Energy Regulatory Commission, the *Federal Communications Commission*, the Interstate Commerce Commission, or successor agencies[.]

Utah Code Ann. § 76-10-915(1)(a) (emphasis added).

The State argues that the "subject to" language includes only those activities that are actively regulated by the FCC. Because the FCC does not actively regulate pricing for commercial radio advertising, the State argues, plaintiffs' activities are not exempt from the Act. Plaintiffs, on the other hand, assert that the "subject to" language means that any activity that could at some point be regulated by the FCC is exempt from the Act.

Initially, we note that we have serious questions as to whether plaintiffs' radio stations are "public utilities." Neither the State nor plaintiffs briefed the issue, the district court did not make a finding in this regard, the Utah Antitrust Act does not define the term, and the Code's general definition of "public utilities" does not include radio stations. [8] If the radio stations are not public utilities, section 76-10-915 would not apply to the case at bar. Nevertheless, **[**22]** because the issue was neither raised below nor briefed on appeal, we will not make that determination sua sponte. Therefore, while we address the merits of the parties' arguments, we emphasize that we do so without deciding whether plaintiffs' radio stations are public utilities.

HN7[] When we interpret statutes, our primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve. *Sullivan v. Scoular Grain Co. of Utah, 853 P.2d 877, 880 (Utah 1993)*. We therefore look first to the statute's plain language. *State v. Hunt, 906 P.2d 311, 312 (Utah 1995)* ("'The best evidence of the true intent and purpose of the Legislature in enacting **[**23]** the Act is the plain language of the Act.'" (citation omitted)); *CIG Exploration, Inc. v. State Tax Comm'n, 897 P.2d 1214, 1216 (Utah 1995)*. We need not look beyond its plain language unless we find some ambiguity in it. *Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1112 (Utah 1991)*. Statutory language is ambiguous if it can reasonably be understood to have more than one meaning. *Miller Welding Supply, Inc. v. State Tax Comm'n, 860 P.2d 361, 362 (Ct. App. 1993)*, *cert. denied*, *870 P.2d 957 (Utah 1994)*. However, if we find a provision ambiguous, which causes doubt or uncertainty as to its meaning or application, we must analyze the act in its entirety and "'harmonize its provisions in accordance with the legislative intent and purpose.'" *Beynon v. St. George-Dixie Lodge # 1743*, *854 P.2d 513, 518 (Utah 1993)* (quoting *Osuala v. Aetna Life & Casualty, 608 P.2d 242, 243 (Utah 1980))*.

[*185] Looking at the statute's language, we find that the term "subject to regulation" is ambiguous. Construed broadly, the term could encompass any activity over which the FCC has power to regulate, even though at present the FCC has chosen not to regulate the activity. Construed narrowly, **[**24]** the term should include only those activities that the FCC in fact regulates. Because "subject to regulation" carries several plausible connotations, we turn to the legislature's intent and purpose, which it clearly expressed within the Act itself. ***HN8***[] Section 76-10-912 provides as follows:

The Legislature finds and determines that competition is fundamental to the free market system and that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.

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[8] The Code defines "public utilities" to include "every railroad corporation, gas corporation, electrical corporation, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer." *Utah Code Ann. § 54-2-1* (Supp. 1997).

The purpose of this act is, therefore, to encourage free and open competition in the interest of the general welfare and economy of this state by prohibiting monopolistic and unfair trade practices, combinations and conspiracies in restraint of trade or commerce and by providing adequate penalties for the enforcement of its provisions.

Utah Code Ann. § 76-10-912 (emphasis added).

In light of the Act's clear purpose, we cannot accept plaintiffs' broad construction of **[**25]** the "subject to regulation" language in the exemption provision. Were we to do so, the exemption would effectively vitiate the State's ability to punish anticompetitive behavior in the radio broadcasting business. Stated another way, plaintiffs' interpretation would exempt the entire industry from the Utah Antitrust Act, thereby defeating the Act's purpose as it relates to public utilities.

Moreover, we are guided by the widely accepted principle that ***HN9***[] antitrust laws should be construed broadly and exemptions should be construed narrowly so as to give effect to their purposes. *See Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)* ("It is well settled that exemptions from the antitrust laws are to be narrowly construed."); *State v. Scioscia, 200 N.J. Super. 28, 490 A.2d 327, 333 (N.J. Super. Ct. App. Div. 1985)* (stating that purpose of "public utility" exemption is to prevent business entities from being subjected to conflicting sets of governmental regulations); *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297, 305 (Minn. 1980)* ("Since antitrust laws should be broadly construed to effectuate **[**26]** their purpose, such exceptions should be narrowly construed." (citing *Abbott Laboratories v. Portland Druggists Assoc. Inc., 425 U.S. 1, 11, 47 L. Ed. 2d 537, 96 S. Ct. 1305 (1976))*); Alter S. Fogel, Comment, *The 'Superstation,' the NBA, and Antitrust: An Analysis of Chicago Professional Sports Limited Partnership v. National Basketball Association*, *47 Rutgers L. Rev. 1195, 1226 (1995)* ("Courts have consistently acknowledged that antitrust exemptions should be construed narrowly.").

While the Act does not specify the reasoning behind exempting certain activities from antitrust laws, such reasons are obvious. For example, public utilities are often state or federally sanctioned monopolies. Hence, those anticompetitive activities that have been approved by the state or federal government should not be punished by the Act. Moreover, public utilities are highly regulated by both state and federal agencies. Exempting those activities that are regulated by state agencies avoids conflicts between different governmental bodies. Exempting those activities that are regulated by federal agencies avoids preemption issues. However, "concurrent regulation of the same subject matter is an **[**27]** acceptable arrangement where no conflict [between state and federal regulation] exists." *Sutherland's Statutory Construction*, § 36.08 (5th ed. 1993).

The notion that the exemption should be narrowly construed finds further support in the context of other provisions of the Code. For example, the chapter known as "Public **[*186]** Telecommunications Utility Law" [9] includes corporations operating radio stations in its definition of "telecommunications corporation." Such a corporation means "any corporation or person . . . owning, controlling, operating, managing, or reselling a public telecommunications service." *Utah Code Ann. § 54-8b-2(7)*. The chapter further defines "public telecommunications service" to mean "the transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, *radio*, lightwaves, or other electromagnetic means offered to the public generally." *Id. § 54-8b-2(6)* (emphasis added). However, the chapter expressly states, "Nothing in this chapter shall in any way preempt, modify, exempt, abrogate, or otherwise affect any right, cause of action, liability, duty, or obligation arising from any federal, state, **[**28]** or local law governing unfair business practices or antitrust, restraint of trade, or other anti-competitive activity." *Id.* § 54-8b-8.

This chapter clearly indicates the legislature's intent that corporations and persons operating radio stations must comply with the Utah Antitrust Act. If the legislature did not intend to exempt the entire radio broadcasting industry from the Act, the exemption obviously must be construed narrowly to exempt only those activities that are, in fact, regulated by the FCC. Hence, as the State points out in its brief, activities involving political campaign advertising rates arguably would be exempt from the Act, because they are regulated by the FCC. *See 47 U.S.C.S. § 315*

[9] *See Utah Code Ann. §§ 54-8b-1 to -13*.

(1995); *47 C.F.R. § 73.1942 (1996)* (requiring that political campaign advertising rates not exceed rates charged to commercial advertisers of radio station). However, given the language of section 54-8b-8, the legislature clearly intended that radio stations **[**29]** comply fully with the Act. Therefore, the State may enforce antitrust violations under the Utah Antitrust Act to the extent that no conflict exists between state and federal law and to the extent that the State is not preempted from doing so by the federal government.

In light of the foregoing, we hold that the district court erred in concluding that plaintiffs' radio stations were exempt from investigation by virtue of section 76-10-915(1)(a). We therefore reverse and remand for proceedings consistent with this opinion.

Chief Justice Howe, Associate Chief Justice Durham, Justice Stewart, and Justice Zimmerman concur in Justice Russon's opinion.

End of Document

North Star Steel Co. v. MidAmerican Energy Holdings Co.

United States District Court for the Southern District of Iowa, Central Division

June 23, 1998, Decided ; June 23, 1998, Filed

No. 4-97-CV-80782

Reporter
1998 U.S. Dist. LEXIS 22332 *

NORTH STAR STEEL CO., Plaintiff, vs. MIDAMERICAN ENERGY HOLDINGS CO., and MIDAMERICAN ENERGY CO., Defendants.

Disposition: [*1] Defendants' motion for summary judgment granted.

Core Terms

territories, transmission, abstention, parties, summary judgment, electric power, genuine, Energy, state action doctrine, electric service, declaratory, antitrust, customers, immune, summary judgment motion, statutory language, additional time, high voltage, state policy, third party, articulated, electricity, generates, Wheeling, assigned, displace, resisted, powers, retail, Steel

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. *Fed. R. Civ. P. 56*. Once the movant has demonstrated that no genuine factual dispute stands in the way of a judgment entry, the burden shifts to the resisting party to present specific admissible evidence showing a genuine dispute on that issue, precluding judgment.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN2[] **Antitrust & Trade Law, Exemptions & Immunities**

Private parties are immune from antitrust liability under the "state action doctrine" if their conduct satisfies two conditions. First, they must act pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition. Second, the policy must be "actively supervised" by the state itself.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Governments > Local Governments > Administrative Boards

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

HN3[] **Energy & Utilities, State Regulation**

Iowa has clearly articulated a state policy to prevent electricity suppliers from competing for retail customers. Other courts have held that statutory schemes less restrictive than Iowa's evince clear policies to displace competition. Iowa law confers on the Iowa Utilities Board (IUB) broad general powers to effect the purposes of this chapter notwithstanding the fact that certain specific powers are hereinafter set forth. *Iowa Code § 476.2(1)*. The IUB and its predecessor, the Iowa State Commerce Commission, have actively implemented the governmental policy that mandates exclusive service territories, including the assignment of exclusive service territories. They have adjudicated many cases applying and enforcing the policy of exclusive service territories. The IUB interprets "electric service" to mean the generated electricity as well as the maintenance of wires and poles that carry the commodity.

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For GARY STUMP, amicus: Gary Stump, IOWA UTILITIES BOARD, DEPT OF COMMERCE, DES MOINES, IA.

Judges: CHARLES R. WOLLE, JUDGE, UNITED STATES DISTRICT COURT.

Opinion by: CHARLES R. WOLLE

Opinion

Order Granting Summary Judgment in Favor of Defendants

Plaintiff North Star Steel Company (North Star) operates a steel mill near Wilton, Iowa. It is a customer of defendant MidAmerican Energy Company (MidAmerican), a power company that generates, transmits, and sells **[*2]** electric power and energy. Defendant MidAmerican Energy Holdings Company is a public utility holding company and parent of defendant MidAmerican. The court will refer to both defendants collectively as MidAmerican. North Star seeks to purchase from MidAmerican transmission service of electric power from power sources other than MidAmerican. It asserts in this action for declaratory and injunctive relief that MidAmerican monopolizes trade in violation of federal ***antitrust law***. Defendants contend they are immune from liability under the "state action doctrine."

On January 20, 1998, defendants filed a motion to dismiss that plaintiff subsequently resisted. The court held a hearing on the motion on March 13, 1998. The court then granted the parties additional time to file briefs addressing the applicability of the abstention doctrine. The court also granted the parties additional time to supplement the record and file supporting briefs on the pending motion, now deemed a summary judgment motion. The parties presented further argument on the motion on June 9, 1998. The matter is now deemed submitted for ruling.

I. *Abstention.* Following the hearing in March, the court invited the parties **[*3]** to address whether this is a case to which the doctrine of abstention should be applied. Plaintiff contends this case is not one that is appropriate for abstention. Amicus Iowa Utilities Board (IUB) supports abstention. On April 3, 1998, defendant MidAmerican alerted the court that it had filed with the IUB on April 1, 1998 a petition for declaratory ruling on issues stemming from this case. MidAmerican asked the court to stay proceedings in this case pending a Board ruling. But on May 29, 1998, the Board issued a declaratory ruling in response to the petition. The ruling is now part of this record. The federal antitrust issues presented in this case are not now pending before any state agency. The court does not abstain from deciding them.

II. *Summary Judgment Standard.* ***HN1***[] Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. *Fed.R.Civ.P. 56*. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-51, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; **[*4]** *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Once the movant has demonstrated that no genuine factual dispute stands in the way of a judgment entry, the burden shifts to the resisting party to present specific admissible evidence showing a genuine dispute on that issue, precluding judgment. *City of Mount Pleasant v. Associated Electric Cooperative, 838 F.2d 268, 273-74 (8th Cir. 1988)*.

III. *Facts.* Plaintiff has not pointed to a single genuine fact dispute or issue in this record. The Iowa General Assembly has enacted legislation authorizing the establishment of exclusive service territories in the provision of retail electric service. *Iowa Code §§ 476.22-476.26*. North Star's Wilton, Iowa facility is located within the exclusive service territory assigned to MidAmerican. MidAmerican owns and operates the only high voltage transmission lines capable of servicing North Star's plant. North Star seeks high voltage transmission wheeling of generated electric power that it will purchase from a third party. "Wheeling" refers to the transportation of bulk electric power produced **[*5]** by one party over the transmission facilities of another party for the benefit of the first party or a third party.

IV. *The applicable law.* The United States Supreme Court has established that ***HN2***[] private parties are immune from antitrust liability under the "state action doctrine" if their conduct satisfies two conditions. *Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*. First, they must act pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition. Second, the policy must be "actively supervised" by the state itself. *California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 63 L. Ed. 2d 233, 243, 100 S. Ct. 937 (1980)*.

HN3[] Iowa has clearly articulated a state policy to prevent electricity suppliers from competing for retail customers. *See* *Iowa Code § 476.22-.26* (assigned service territories) and § 476.25 (exclusive provision of electric service). Other courts have held that statutory schemes less restrictive than Iowa's evince clear policies to displace competition. *Municipal Utilities Board v. Alabama Power Co., 934 F.2d 1493 (11th Cir. 1991)* **[*6]** (statute permitted some competition for large industrial customers), *Fuchs v. Rural Elec. Convenience Co-op, Inc., 858 F.2d 1210 (7th Cir. 1988)*(statute similar to Iowa's except utilities authorized to determine exclusive service areas by agreement).

Iowa law confers on the IUB "broad general powers to effect the purposes of this chapter notwithstanding the fact that certain specific powers are hereinafter set forth". *Iowa Code § 476.2(1)*. The IUB and its predecessor, the Iowa State Commerce Commission, have actively implemented the governmental policy that mandates exclusive service territories, including the assignment of exclusive service territories. They have adjudicated many cases applying and enforcing the policy of exclusive service territories. The IUB interprets "electric service" to mean the generated electricity as well as the maintenance of wires and poles that carry the commodity. *See In re MidAmerican Energy Co.*, docket no. DRU-98-1, (IUB, May 29, 1998)(no statutory language limits the definition to transmission and generation only, statutory language means "something more").

Defendants have satisfied both prongs of the *Midcal* test; they are **[*7]** therefore immune under the "state action doctrine" from plaintiff's claims asserted in this lawsuit. The motion for summary judgment is granted. The clerk of court shall enter summary judgment in favor of defendants and against plaintiff, with costs assessed to plaintiff.

IT IS SO ORDERED.

Dated this 23d day of June, 1998.

CHARLES R. WOLLE, JUDGE

UNITED STATES DISTRICT COURT

End of Document

[Rebel Oil Co. v. Atlantic Richfield Co.]

United States Court of Appeals for the Ninth Circuit

February 10, 1998, Argued, Submitted, San Francisco, California ; June 23, 1998, Filed

No. 97-15449

Reporter

146 F.3d 1088 *; 1998 U.S. App. LEXIS 13236 **; 1998-1 Trade Cas. (CCH) P72,187; 49 Fed. R. Evid. Serv. (Callaghan) 1412; 98 Cal. Daily Op. Service 4831; 98 Daily Journal DAR 6824

REBEL OIL COMPANY, INC., a Nevada corporation, and AUTO FLITE OIL COMPANY, INC., a Nevada corporation, Plaintiffs-Appellants, v. ATLANTIC RICHFIELD COMPANY, Defendant-Appellee.

Subsequent History: **[**1]** Certiorari Denied November 30, 1998, Reported at: *1998 U.S. LEXIS 7602*.

Prior History: Appeal from the United States District Court for the District of Nevada. D.C. No. CV-90-0076-PMP/RLH. Philip M. Pro, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

prices, gasoline, costs, predatory, crude oil, district court, below-cost, summary judgment, rack, price discrimination, wholesale, stations, variable, marginal cost, measures, retail, market power, recoupment, sales, material fact, market price, competitors, marketers, output, antitrust, producing, expert testimony, law of the case, supracompetitive, discovery

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN1[] **Actual Monopolization, Anticompetitive & Predatory Practices**

An oligopoly is a market condition in which sellers are so few that the actions of any one of them will materially affect price and hence have a measurable impact upon competitors.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Standards of Review, De Novo Review**

The court of appeals reviews a grant of summary judgment de novo, evaluating the evidence in the light most favorable to the nonmoving party. Summary judgment is appropriate only when the pleadings, affidavits, and other materials in evidence present no genuine issue of material fact.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN3[] **Robinson-Patman Act, Claims**

The Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C.S. § 13(a)* prohibits price discrimination.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN4[] **Price Discrimination, Competitive Injuries**

See *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN5[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act, *15 U.S.C.S. § 13(a)* prohibits "primary-line" price discrimination, when the seller charges predatory, below-cost prices in one geographical market to eliminate competitors there, but charges supracompetitive prices in another market.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN6[] **Price Discrimination, Competitive Injuries**

To prove primary-line price discrimination, a competitor must prove two things: that the prices complained of are below an appropriate measure of its rival's costs and that the competitor had a reasonable prospect of recouping its investment in below-cost prices.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN7[] **Price Discrimination, Competitive Injuries**

Only below-cost prices suffice for recovery for price discrimination, and the court rejects the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN8[] **Price Discrimination, Competitive Injuries**

Prices are not predatory unless they are below a "relevant measure of cost."

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN9[] **Price Discrimination, Competitive Injuries**

It is generally agreed that the relation between the cost of producing a product and the price charged for it is the criterion for determining whether the price is predatory.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN10[] **Price Discrimination, Competitive Injuries**

Economists measure a firm's costs in a number of ways. Costs are divided into fixed costs (those that do not vary with changes in output) and variable costs (which do so vary). Total cost is the sum of fixed and variable costs. Marginal cost is the increment to total cost that results from producing an additional unit of output. Average cost, or average total cost, is obtained by dividing total cost by output. Likewise, average variable cost is the sum of all variable costs divided by output. Average cost is thus higher than average variable cost for all output levels.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN11[] **Price Discrimination, Competitive Injuries**

Marginal-cost pricing is the economically sound division between acceptable competitive behavior and unlawful, 'below-cost' predation," but because marginal costs are usually difficult to measure, average variable cost may be a substitute test.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN12[] **Preclusion of Judgments, Law of the Case**

Under the doctrine of "law of the case," a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case. The doctrine is not a limitation of a tribunal's power, but rather a guide to discretion. A court may have discretion to depart from the law of the case where the evidence on remand is substantially different. Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN13[] **Preclusion of Judgments, Law of the Case**

For the law of the case doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in the previous disposition. A significant corollary to the doctrine is that dicta have no preclusive effect.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Processing & Refining > General Overview

HN14[] **Robinson-Patman Act, Claims**

A swap of like products is not a "sale" for the purposes of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN15[] **Transportation, Common Carriers**

The use of the concept of opportunity costs to show predatory pricing is improper as a matter of law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN16[] **Entitlement as Matter of Law, Materiality of Facts**

Where the expert offers an opinion that courts have rejected as a matter of law, that opinion is not enough to create an issue of material fact that survives summary judgment.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN17[] **Actual Monopolization, Anticompetitive & Predatory Practices**

In the context of ***antitrust law***, if there are undisputed facts about the structure of the market that render the inference to be drawn from expert affidavits economically unreasonable, the expert opinion is insufficient to support a jury verdict. Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN18[] **Robinson-Patman Act, Claims**

If entities are considered a combined unit, then the appropriate consideration is the costs of the combined group to determine if the combined group sold below its costs, and 100 per cent ownership makes a firm and its subsidiary a single person under the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN19[] **Price Discrimination, Competitive Injuries**

Although conventional business records do provide information to use in calculating costs, the inclusion of other nonvariable costs in conventional records, such as depreciation, taxes, and licenses, means that a firm's marginal costs cannot be ascertained from conventional business records.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN20[] **Expert Witnesses, Daubert Standard**

The test for the admission of expert testimony under Daubert is not the correctness of an expert's conclusions but the soundness of his methodology.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN21[] **Price Discrimination, Competitive Injuries**

Whether an expert's cost analysis is an economically valid method is a different question from whether it is legally sufficient to support a price discrimination claim.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN22[] **Testimony, Expert Witnesses**

An expert witness may be qualified to testify even though the expert's conclusions are legally incorrect.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN23[] **Price Discrimination, Competitive Injuries**

Predatory intent alone, no matter how clear and convincing the evidence, cannot substitute for a plaintiff's failure to demonstrate a reasonable prospect of recoupment. If intent cannot substitute for the required element of recoupment, it likewise cannot establish an antitrust violation in the absence of evidence of below-cost pricing.

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Judges: Before: Dorothy W. Nelson, Robert Boochever, and Stephen Reinhardt, Circuit Judges. Opinion by Judge Boochever.

Opinion by: ROBERT BOOCHEVER

Opinion

[*1089] OPINION

BOOCHEVER, Circuit Judge:

Rebel Oil Company appeals from the district court's grant of summary judgment in favor of Atlantic Richfield Corporation, after this court remanded Rebel's antitrust action against ARCO. We affirm.

FACTS

The following statement of facts is taken in part from this court's decision in *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421* (9th Cir.), *cert. denied, 516 U.S. 987, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1995)*, and from **[*1090]** the district court opinion that is the subject of this appeal, *Rebel Oil Co. v. Atlantic Richfield Co., 957 F. Supp. 1184 (D. Nev. 1997)*.

Gasoline sold in the Las Vegas, Nevada area is first produced from crude oil in refineries **[**2]** in Los Angeles, California. Wholesale marketers then pump the gasoline to Las Vegas over a pipeline operated by the Cal-Nev Pipeline Co., which transports ninety-five percent of Las Vegas' gasoline. Wholesale marketers then sell the gasoline to Las Vegas retail marketers, who then sell the gasoline to consumers.

Rebel Oil Company, Inc. and Auto Flite Oil Company, Inc. (collectively "Rebel") are retail marketers of gasoline in Las Vegas, selling only self-serve, cash-only gasoline. Rebel has 16 retail stations. In addition to its retail sales, Rebel is also a wholesaler who ships gasoline refined in Los Angeles over the Cal-Nev pipeline, to be sold to retail marketers in Las Vegas. Atlantic Richfield Corporation ("ARCO") is both a wholesale and a retail marketer of gasoline in Las Vegas, and also drills and refines crude oil into gasoline. ARCO supplies gasoline to 53 retail stations in Las Vegas under the "ARCO" name, all of which sell only self-serve, cash-only gasoline. A subsidiary of ARCO, Prestige Stations ("PSI"), operates 15 of those 53 stations. The remaining 38 stations operating under the ARCO name are owned and operated by independent dealers.

Rebel and other discount **[**3]** marketers of gasoline saw their business grow in the 1970s, as cost-conscious motorists driving low-mileage vehicles saved money by buying self-serve, cash-only gasoline rather than visiting full-service stations. In 1982, ARCO adopted a nationwide strategy to respond to this change in the gasoline market. The strategy called for the elimination of full-serve and credit-card sales and offered dealers incentives for matching the prices of the discount independent stations. ARCO's strategy increased its sales and market share nationwide.

PROCEDURE

In 1990, Rebel filed an antitrust suit for damages against ARCO under Section 4 of the Clayton Act. Rebel alleged that between 1985 and 1989, ARCO charged predatory prices in an attempt to take away market shares from its competitors, with the goal of monopolizing the gasoline market in Las Vegas. Rebel claimed that the predatory pricing scheme forced competitors out of the Las Vegas market, and that Rebel lost sales as a result and had to concentrate on the wholesale market. Rebel also claimed that when ARCO's predation ended, ARCO had fifty-four percent of the market for self-serve, cash-only gasoline, and that ARCO then engaged in price **[**4]** gouging, charging prices in Las Vegas that were higher than Los Angeles prices to recoup its losses resulting from the previous low predatory prices.

The district court limited Rebel's discovery solely to the "more discrete" issues of ARCO's market share and the entry barriers in the relevant market, which would determine whether ARCO had sufficient market power to charge prices above competitive levels ("supracompetitive prices"). *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 133 F.R.D. 41, 45 (D. Nev. 1990)*. The court reserved discovery on the issue whether ARCO had engaged in predatory pricing until after Rebel made an adequate showing of market power, because "proving that a defendant has engaged in pricing below cost entails extensive discovery regarding virtually all aspects of a company's business." *Id.*

In the fall of 1992, both parties filed motions for summary judgment and the district court granted summary judgment for ARCO on all three antitrust claims. *Rebel Oil Co. v. Atlantic Richfield Co., 808 F. Supp. 1464 (D. Nev. 1992)*. The court concluded that ARCO's market share of the retail gasoline market in Las Vegas was insufficient as a matter of law to establish **[**5]** market power; that Rebel failed to show that barriers to entry prevented other retailers from entering the retail market; and that as a result of the lack of market share and entry barriers, ARCO lacked the power to charge supracompetitive prices to recoup any losses from predatory pricing.

Rebel appealed, and this court affirmed in part and reversed in part in *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421* (9th Cir.), *cert. denied, 516 U.S. 987, 116 S. Ct. 515, 133 L. Ed. 2d 424 (1995)* ("*Rebel I*"). *Rebel I* affirmed the district court's **[*1091]** summary judgment in favor of ARCO on the claims of attempted monopolization, because Rebel had not established the existence of a genuine issue of material fact whether ARCO had the market power required to support an attempted monopolization claim. *51 F.3d at 1443*.

Rebel I reversed the grant of summary judgment dismissing Rebel's claim that ARCO had practiced "primary line" price discrimination, by "charging predatory, below-cost prices in one [geographical] market in an attempt to eliminate competitors there, and charging supracompetitive prices in another market." *Id. at 1445*. Because a lesser showing of market **[**6]** power was required for a claim of price discrimination than for a claim of attempted monopolization, *id. at 1447*, the court concluded that Rebel had produced sufficient evidence to create a disputed question of material fact whether ARCO had enough market power to enforce supracompetitive pricing. *Id. at 1448*. Although Rebel had not shown that ARCO had sufficient market power for an attempted monopolization claim, for price discrimination Rebel needed only to prove that ARCO possessed a level of market power to threaten oligopolization. ***HN1***[] An oligopoly is "[a] market condition in which sellers are so few that the actions of any one of them will materially affect price and hence have a measurable impact upon competitors." American Heritage Dictionary of the English Language 916 (1970).

The economic forces at work in an oligopoly are very different than in a monopoly. A predator is able to establish and maintain supracompetitive prices in an oligopoly by making it too painful for its existing competitors to challenge its prices, and thus, 'disciplining' them. . . . Read in the most favorable light, Rebel's evidence tends to indicate that no new competition can enter the market **[**7]** to challenge ARCO, and that the existing competition, while it may be *able* to challenge ARCO, lacks the will to do so. *Rebel I, 51 F.3d at 1448*. The court remanded to the district court for further proceedings on the price discrimination claim. *Id. at 1448*.

On remand, the parties conducted discovery on the issue of predatory pricing. ARCO then moved for summary judgment. ARCO simultaneously filed a motion in limine to exclude Rebel's expert testimony under *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*, which the district court granted in part. [ER p. 281]

The district court also granted ARCO's motion for summary judgment. *Rebel Oil Co. v. Atlantic Richfield Co., 957 F. Supp. 1184, 1196-1204 (D. Nev. 1997)* ("*Rebel II*"). The court rejected Rebel's contention that, under the law of the case doctrine, our decision in *Rebel I* compelled a finding that Rebel had offered sufficient evidence to preclude summary judgment on its price discrimination claim. *957 F. Supp. at 1194-95*. The court acknowledged that *Rebel I* determined that material questions of fact existed regarding both ARCO's ability to recoup any losses **[**8]** from predatory pricing and Rebel's damages. The court concluded, however, that none of Rebel's measures of ARCO's costs was legally adequate to create an issue of material fact regarding whether ARCO priced its gasoline below its costs. *Id. at 1200-03*. The court also determined that Rebel had failed to present clear and convincing evidence of ARCO's predatory intent. *Id. at 1204*.

ANALYSIS

HN2[] This court reviews a grant of summary judgment de novo, evaluating the evidence in the light most favorable to the nonmoving party. *Rebel I, 51 F.3d at 1432*. Summary judgment is appropriate only when the pleadings, affidavits, and other materials in evidence present no genuine issue of material fact. *Id.*

HN3[] Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination:

> HN4[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, **[**9]** destroy, or prevent competition with any person who either grants or knowingly **[*1092]** receives the benefit of such discrimination, or with customers of either of them . . . .

15 U.S.C. § 13(a). HN5[] The statute prohibits "primary-line" price discrimination, when the seller charges predatory, below-cost prices in one geographical market to eliminate competitors there, but charges supracompetitive prices in another market. *Rebel I, 51 F.3d at 1445*. Rebel alleges primary-line price discrimination, contending that between 1985 and 1989, ARCO charged below-cost prices in the Las Vegas market to eliminate competition there, while charging higher prices in the Los Angeles market.

HN6[] To prove primary-line price discrimination, Rebel must prove two things: "that the prices complained of are below an appropriate measure of its rival's costs . . . .[and] that the competitor had a reasonable prospect . . . of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*; *USA Petroleum Co. v. Atlantic Richfield Co., 13 F.3d 1276, 1277 (9th Cir. 1994)*; *Rebel I, 51 F.3d at 1445*.

I. **[**10]** *Below-Cost Pricing*

Rebel presented expert testimony of below-cost pricing, using three different measures of ARCO's cost in Las Vegas: an exchange agreement between ARCO and Tosco Corporation; the Los Angeles "rack price" for gasoline, adjusted for transportation costs; and profit-and-loss statements from Prestige Stations, Inc. ("PSI"), a wholly-owned subsidiary of ARCO. The parties' central dispute on appeal is whether Rebel's evidence established a question of fact whether ARCO priced its Las Vegas gasoline below its costs.

HN7[] Only below-cost prices should suffice [for recovery for price discrimination], and we have rejected . . . the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. . . . As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.

Brooke Group, 509 U.S. at 223; **[**11]** *see* *USA Petroleum, 13 F.3d at 1285* ("above cost below-market level pricing even when coupled with a structural showing such as recoupment, cannot constitute predatory pricing.").

Rebel and ARCO agree that HN8[] prices are not predatory unless they are below a "relevant measure of cost," but they disagree on whether, as a matter of law, Rebel presented a relevant measure of cost.

Neither the Supreme Court nor this circuit has concluded what would be the appropriate measure of cost in a predatory pricing case. *See* *Brooke Group, 509 U.S. at 222 n.1* ("Because the parties in this case agree that the relevant measure of cost is average variable cost, however, we again decline to resolve the conflict among the lower courts over the appropriate measure of cost."); *see* *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc., 63 F.3d 1540, 1549 n.5 (10th Cir. 1995)* ("Unfortunately for litigants, neither the Supreme Court nor we have taken a position on which of various cost measures is the definitive one, although we have spoken of marginal and average variable costs as being relevant."), *cert. denied, 516 U.S. 1044, 116 S. Ct. 702, 133 L.* ***[**12]*** *Ed. 2d 659 (1996)*. ***HN9***[] It is generally agreed that "the relation between the cost of producing a product and the price charged for it is the criterion for determining whether the price is predatory," *Transamerica Computer Co., Inc. v. International Bus. Machs. Corp., 698 F.2d 1377, 1384* (9th Cir.), *cert. denied, 464 U.S. 955, 78 L. Ed. 2d 329, 104 S. Ct. 370 (1983)*.

HN10[] Economists, however, measure a firm's costs in a number of ways . . . . Costs are divided into fixed costs (those that do not vary with changes in output) and variable costs (which do so vary). Total cost is the sum of fixed and variable costs. Marginal cost is the increment to total cost that results from producing an additional unit of output. Average cost, or average total cost, is obtained by dividing total cost by output. Likewise, average variable cost is **[*1093]** the sum of all variable costs divided by output. Average cost is thus higher than average variable cost for all output levels.

698 F.2d at 1384-85; *see Vollrath Co. v. Sammi Corp., 9 F.3d 1455, 1461 (9th Cir. 1993)* (plaintiff used average variable cost to argue that prices were predatory), *cert. denied, 511 U.S. 1142, 128 L. Ed. 2d 886, 114 S. Ct. 2163* ***[**13]*** *(1994)*; 3 P. Areeda & H. Hovenkamp, ***Antitrust Law*** §§ 739-40 (1996) ("***HN11***[] marginal-cost pricing is the economically sound division between acceptable competitive behavior and unlawful, 'below-cost' predation," but because marginal costs are usually difficult to measure, average variable cost may be a substitute test).

We must determine whether Rebel presented evidence of *any* of these cost measures that creates a question of material fact on its predatory pricing claim.

A. *Law of the Case*

Rebel's first argument is that this panel does not even need to decide the cost issue, because it was decided by the panel in *Rebel I,* and the law of the case governs all further proceedings. *Rebel I* described expert testimony offered by Rebel: "The expert concluded that ARCO's retail prices in Las Vegas were consistently below the wholesale prices of all other wholesale suppliers in Las Vegas, and at times were 10 cents or more per gallon below ARCO's marginal cost." *Rebel I, 51 F.3d at 1431*. Rebel points to footnote 1 of *Rebel I,* which immediately follows the foregoing quotation, and states:

> Marginal cost is the cost that a firm incurs in the production of one additional **[**14]** unit of output. Herbert Hovenkamp, Economics and Federal ***Antitrust Law*** 10 (1985). Rebel measured ARCO's marginal cost based upon an agreement that ARCO signed with Tosco Corp. to purchase incremental supplies of gasoline. Rebel claims that ARCO bought the additional supplies of gasoline from Tosco because it was expanding output but was unable to obtain the additional output from its own refineries. *The cost of this "last barrel" of gasoline represents ARCO's marginal cost for gasoline.*

Id. at 1431 n.1 (emphasis added). Rebel claims that this footnote and the highlighted sentence conclusively establish that the Tosco agreement presents a material issue of fact regarding below-cost pricing. Rebel also points to the following statement in *Rebel I* as establishing that another potential measure of marginal cost (the "rack price") presented a material question of fact:

> Rebel's claim alleged primary-line discrimination. As proof, Rebel's expert relied on pricing data showing that for four years, between 1985 and 1989, ARCO charged predatory prices in Las Vegas that, when adjusted for transportation costs, were 6 to 14 cents below those charged in Los Angeles.

[15]** *Id. at 1445*.

HN12[] Under the doctrine of "law of the case,"

> a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case. The doctrine is not a limitation of a tribunal's power, but rather a guide to

> discretion. A court may have discretion to depart from the law of the case where . . . the evidence on remand is substantially different . . . . Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion.

United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (citations and quotations omitted). "***HN13***[] For the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in [the] previous disposition. A significant corollary to the doctrine is that dicta have no preclusive effect." *Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703, 715 (9th Cir. 1990)* (citations and quotations omitted).

We conclude that the two sections of *Rebel I* cited as establishing the law of the case were not explicit decisions on below-cost pricing, and therefore do not constitute a **[**16]** basis for the application of the law of the case doctrine. First, as the district court noted in *Rebel II,* "below cost pricing was not an issue before the Ninth Circuit Court of Appeals in *Rebel I*." *Rebel II, 957 F. Supp. 1184 at 1196 n.7*. The district court had bifurcated discovery, and "there was no discovery on predatory pricing, intent and collusion." **[*1094]** *Rebel I, 51 F.3d at 1432*. *Rebel I* reviewed a district court decision regarding market power. That decision did not evaluate Rebel's proposed measures of ARCO's costs, which related not to market power but to whether ARCO's prices were predatory. Second, as discussed below, the issue of the appropriate measure of cost is a thorny one, and the two brief references in *Rebel I* to the Tosco agreement and to "rack price" in Los Angeles hardly "decided explicitly" that either measure was sufficient to withstand ARCO's motion for summary judgment. Both statements are better read as descriptions rather than dispositions of Rebel's claims. "As the issue of below cost pricing was not before the court in *Rebel I,* any dicta addressing cost measurements is not law of the case or binding upon this Court." *Rebel II, 957* ***[**17]*** *F. Supp. at 1201*. [1]

[18]** B. *The Tosco Agreement*

As evidence to show that "the prices complained of [were] below an appropriate measure of [ARCO's] costs," *Brooke Group, 509 U.S. at 210*, Rebel presented a 1986 "Exchange Agreement" between ARCO and Tosco Corporation. [SER pp. 555-84] Because "ARCO is willing to exchange ANS [Alaska North Slope Crude Oil] for gasoline; and . . . Tosco is willing to exchange gasoline for ANS," the parties entered into a "buy/sell exchange of ANS for gasoline," [SER p. 555], providing that ARCO would deliver ANS to Tosco, and Tosco would deliver gasoline to ARCO. The quantities to be exchanged were established by a formula set forth in the agreement. The agreement also provided for cash payments by ARCO to Tosco and by Tosco to ARCO when crude oil or gasoline was delivered, and "the dollar amounts paid by each party will equal those paid by the other." [SER p. 567] The cash payments were tied to the market price of ANS. [SER pp. 563, 584]

Rebel argues there is at least a question of material fact whether the agreement is not an exchange but an agreement to purchase, and thus is a direct measure of ARCO's marginal cost of producing an additional unit

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[1] In *Areeda and Hovenkamp's, **Antitrust Law**, supra,* § 740, the authors describe footnote 1 of *Rebel I* (which stated "The cost of this 'last barrel' of gasoline [in the Tosco agreement, discussed supra] represents ARCO's marginal cost for gasoline.") as follows:

> In the Ninth Circuit's *Rebel Oil* case *the plaintiff alleged* that the defendant was unable to supply gasoline at the predatory price from its own refineries, so it contracted to purchase more from an independent supplier, and paid more than it charged upon resale. *If so,* the resulting price was clearly below marginal cost. Further, as the court noted, that would be true of *all* sales made at that price, not only for the sales of the gasoline bought at a high price. "Marginal" cost does not look at the average cost, but the incremental cost of the last unit produced, which in this case was the higher cost units procured from the independent supplier.

Id. at p. 378 (emphases added) (footnotes omitted). Rebel claims that this shows that footnote 1 established the law of the case. We disagree. Rebel's selection from ***Antitrust Law*** states only what Rebel *alleged*: that the Tosco agreement represented a "purchase" for which ARCO "paid," and that "if so," the agreement would serve as a measure of marginal cost.

of **[**19]** gasoline. This circuit has concluded that ***HN14***[] a swap of like products is not a "sale" for the purposes of the Robinson-Patman Act. *Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1191 (9th Cir. 1984)*, *cert. denied, 469 U.S. 1213, 84 L. Ed. 2d 331, 105 S. Ct. 1184 (1985)*; *see* *American Oil Co. v. McMullin, 508 F.2d 1345, 1353 (10th Cir. 1975)* (where oil company supplies petroleum products from its refinery in Salt Lake City to other oil companies, in return for petroleum products from the other companies' refineries in other areas, "the record does not show that these transactions are actually sales."). Because crude oil and gasoline, although related products, are not "fungible," the Tosco Agreement does not document an "exchange of the same product" or "like types of gasoline." *Airweld, 742 F.2d at 1192*. The agreement is therefore not a "swap," and we must examine ARCO's marginal cost.

ARCO submitted a declaration stating:

> The Exchange Agreement provided for cash payments by Tosco to ARCO, when crude was delivered, and by ARCO to Tosco, when gasoline was accepted, but those payments were security arrangements, and were in equal amounts. In substance, the Agreement **[**20]** was an in-kind transaction in which crude oil was exchanged for gasoline.

[*1095] [SER p. 455 n.7] ARCO's declaration also stated: "ARCO's cost for the gasoline delivered by Tosco was equal to ARCO's cost to produce and deliver the crude oil to Tosco since there were no net cash payments." [SER p. 455]

Rebel's expert witness, Dr. Keith Leffler, testified that In my Report I state that "the gasoline received by ARCO from Tosco represents an increment to the supply of ARCO gasoline. The effective economic costs of the gasoline to ARCO thus indicates the marginal cost of ARCO gasoline." The calculation of the "economic cost" in what is effectively a barter situation of course requires determination of the value of what ARCO gives up. Regardless of whether ARCO bought the crude oil, produced the crude oil or was given the crude oil, the marginal costs to ARCO of obtaining the additional gasoline from Tosco is given by the value of that crude oil that they gave up. [ER p. 194]. Leffler's statement echoes ARCO's labelling of the agreement as an in-kind transaction, but his cost measurement is different. ARCO states that the cost to it was the cost of producing and delivering the crude **[**21]** oil; Leffler states that the cost is instead the market price of the crude oil, i.e. what ARCO would have received for the crude oil if ARCO had sold it rather than traded it to Tosco.

The measure of cost proposed by Rebel - the market price of the crude oil - is problematic for two reasons. First, the market price for crude oil is not what ARCO spent in obtaining the crude oil: ARCO produced the crude oil, and did not purchase the crude oil on the market. Second, the market price represents only what ARCO *would have received* had ARCO sold the crude oil in the market rather than trading it to Tosco for gasoline. The measure of marginal cost proposed by Rebel is thus really the opportunity cost to ARCO of choosing to enter into the exchange agreement rather than selling the crude oil elsewhere. Opportunity costs are vastly different from ARCO's marginal or variable costs, and we agree that "***HN15***[] the use of the concept of opportunity costs [to show predatory pricing] must be held improper as a matter of law." *In re IBM Peripheral EDP Devices Antitrust Litig., 459 F. Supp. 626, 631 (N.D. Cal. 1978)*; *Continental Airlines, Inc. v. American Airlines, Inc., 824 F. Supp. 689, 701* ***[**22]*** *(S.D. Tex. 1993)* (opportunity cost is not one of the costs of implementing a particular business choice, and cannot be included in considering average variable price).

Rebel's expert, Dr. Leffler, admitted that "it's accepted that ARCO was a low cost producer of crude in this era so, if anything, I would expect it to have lower cost than what was reflected in the market value of that barrel." [SER p. 202] Aside from this admission that ARCO's cost of producing the crude oil was low, Rebel presented no evidence of the actual costs of production. Nevertheless, Leffler argued for the use of market price as a measure of ARCO's cost, taking strong issue with the "courts' language in rejecting . . . the economic concept of opportunity costs for measuring below cost sales in predatory pricing cases." [ER p. 193 n.5] Because Rebel offered "evidence" (Leffler's expert opinion) in its opposition to ARCO's summary judgment motion, and ARCO did not offer conflicting expert opinion, Rebel argues that "the district court acted as a finder of fact," impermissibly weighing Rebel's evidence and effectively conducting a bench trial. ***HN16***[] But where, as here, the expert offers an opinion that courts have **[**23]** rejected as a matter of law, that opinion is not enough to create an issue of material fact that survives summary judgment. "***HN17***[] In the context of ***antitrust law***, if there are undisputed facts about the structure of the market that render the inference [to be drawn from expert affidavits] economically unreasonable, the expert opinion is insufficient to support a jury verdict." *Rebel I, 51 F.3d at 1435-36* (citing *Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 468-69, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*). "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Brooke Group, 509 U.S. at 242*; *Wallace v. Bank of Bartlett, 55 F.3d 1166, 1170 (6th Cir. 1995)*, *cert. denied, 516 U.S. 1047, 133 L. Ed. 2d 664, 116 S. Ct. 709 (1996)*.

We conclude that using the Tosco agreement as a measure of ARCO's cost in the **[*1096]** way urged by Rebel would require equating ARCO's cost of the crude oil to market price, which is counter to legal definitions of cost. Therefore, the agreement cannot provide a legally sufficient measure of ARCO's cost.

C. *The Los Angeles "Rack Price"*

Rebel alleges that ARCO's wholesale prices **[**24]** in Las Vegas were below the wholesale "rack price" in Los Angeles, and were therefore predatory.

"Rack prices" are the prices charged by marketers for gasoline deliveries "at the rack," sales in small tanker-truck quantities at loading-rack distribution points. Leffler acknowledged that "ARCO doesn't post a rack price or make sales at a rack price," [SER p. 219] but stated that the cost of buying gasoline at the Los Angeles rack plus transportation costs (over the Cal-Nev pipeline) equalled the cost an efficient seller would face in Las Vegas. Rebel contends that this rack price is an adequate proxy for ARCO's marginal cost, and because ARCO sold wholesale gasoline in Las Vegas below that price/cost, ARCO's price was predatory.

The district court concluded that Rebel's comparison of wholesale prices in Las Vegas and Los Angeles showed only that ARCO charged a lower price in Las Vegas. Because "Rebel has made no showing of ARCO's actual costs of producing gasoline," however, Rebel still had not created a factual issue regarding whether the Las Vegas price was below ARCO's costs. *Rebel II, 957 F. Supp. at 1203-04*.

Using the rack price as a measure of cost would substitute a market **[**25]** price for ARCO's actual costs. We affirm the district court's conclusion that the evidence of rack price was insufficient to create a material question of fact whether ARCO's Las Vegas prices were predatory.

D. *Losses at PSI Outlets*

Another Rebel witness, Harry Holcombe, reviewed the income statements of ARCO's PSI stations and concluded that almost all the stations lost money during the alleged predatory period. Because ARCO sold PSI wholesale gas and PSI stations lost money, Holcombe stated that this demonstrated that ARCO was willing to lose money by pricing gas at its PSI outlets below the outlets' cost of obtaining the gas.

There are a number of reasons why this does not present a triable issue. First, the district court *excluded* Holcombe's testimony regarding "economic measurements and concepts such as the measurement of below marginal or average variable cost selling, recoupment, and data supporting price discrimination." [ER p. 274] His testimony was restricted to general industry practices. Nevertheless, the district court in *Rebel II* chose to address his testimony so as to address the PSI method of determining cost. *Rebel II, 957 F. Supp. at 1203 n.20*. **[**26]**

Second, PSI is a wholly-owned subsidiary of ARCO, and Holcombe stated that PSI had no independent existence. Under these circumstances, the price paid by PSI to ARCO is a transfer price, not a sale. *Brown v. Hansen Publications, Inc., 556 F.2d 969, 971 (9th Cir. 1977)*. If PSI and ARCO are a combined unit, the costs of ARCO and PSI together must be considered, not simply PSI's costs versus its sales. *Vollrath, 9 F.3d at 1460-61* (***HN18***[] if entities are considered a combined unit, "then the appropriate consideration is the costs of the combined group to determine if the combined group sold below its costs"); *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 749 (1st Cir. 1994)* (100% ownership makes firm and subsidiary single person under Robinson-Patman Act). Finally, income statements such as those analyzed by Holcombe may show that PSI stations lost money, but such statements alone are not sufficient to show that below-cost sales were made. *Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 858 (9th Cir. 1978)* (as amended), *cert. denied, 439 U.S. 829,* *58 L. Ed. 2d 122, 99 S. Ct. 103 (1978)* (***HN19***[⬆] although conventional business records do **[**27]** provide information to use in calculating costs, the inclusion of other nonvariable costs in conventional records, such as depreciation, taxes, and licenses, means that "a firm's marginal costs cannot be ascertained from conventional business records").

II. *Daubert Ruling*

In its ruling on Rebel's expert witness testimony, a week before its summary **[*1097]** judgment ruling, the district court held that Leffler's opinions were admissible under *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*. Rebel contends that the later grant of summary judgment in ARCO's favor and the district court's rejection of Leffler's conclusions is irreconcilable with the admission of Leffler's testimony.

"***HN20***[⬆] The test [for the admission of expert testimony] under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1318* (9th Cir.), *cert. denied, 516 U.S. 869, 133 L. Ed. 2d 126, 116 S. Ct. 189 (1995)* (on remand from *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993))*. As the district court's *Daubert* order **[**28]** explicitly stated, "***HN21***[⬆] Whether Leffler's cost analysis is an economically valid method is [a] different question from whether it is legally sufficient to support a price discrimination claim." [ER p. 275] The district court's conclusion at summary judgment that Leffler's testimony was not legally sufficient evidence to create a question of material fact regarding whether ARCO priced its gasoline below its costs is not inconsistent with its conclusion following the *Daubert* hearing that Leffler's methodology was sound. ***HN22***[⬆] An expert witness may be qualified to testify even though the expert's conclusions are legally incorrect. *See General Elec. Co. v. Joiner, 139 L. Ed. 2d 508, 118 S. Ct. 512, 519 (1997)* (district courts may reject expert testimony that is based on sound methodology when "there is simply too great an analytical gap between the data and the opinion proffered").

The *Daubert* ruling did not require the district court to deny ARCO's motion for summary judgment.

III. *Predatory Intent*

Rebel complains that the district court *sua sponte* raised the issue whether ARCO had predatory intent and then decided that Rebel had not produced evidence that would allow **[**29]** a jury to find "clear and convincing evidence" of that intent. *See Rebel II, 957 F. Supp. at 1203-04*. Rebel claims this was improper because it had no notice that intent was in issue because ARCO did not address intent in its motion, and Rebel therefore had no opportunity to address the issue. Because we conclude that a showing of predatory intent is not sufficient in the absence of below-cost pricing to establish an antitrust violation, we do not decide this issue.

In *Brooke Group,* the Supreme Court made it clear that ***HN23***[⬆] predatory intent alone, no matter how clear and convincing the evidence, cannot substitute for a plaintiff's failure to demonstrate a reasonable prospect of recoupment. *See 509 U.S. 209 at 222-23, 113 S. Ct. 2578, 125 L. Ed. 2d 168* (below-cost pricing and reasonable prospect of recoupment required). In reviewing the sufficiency of the evidence, the Court stated:

> the record contains sufficient evidence from which a reasonable jury could conclude that Brown & Williamson envisioned or intended this anticompetitive course of events. There is also sufficient evidence in the record from which a reasonable jury could conclude that for a period of approximately 18 months, Brown & Williamson's **[**30]** prices on its generic cigarettes were below its costs, and that this below-cost pricing imposed losses on Liggett . . . . Liggett has failed to demonstrate . . . that in pursuing this scheme, Brown & Williamson had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics. . . .
>
> No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson - *whatever its intent in introducing black-and-whites [generics] may have been* - was likely to obtain the power to raise the prices for generic cigarettes above a competitive level.

Id. at 231-32 (citations and quotations omitted) (emphasis added).

If intent cannot substitute for the required element of recoupment, it likewise cannot establish an antitrust violation in the absence of evidence of below-cost pricing. Rebel did not establish a question of material fact regarding ARCO's below-cost pricing. The district court's discussion of intent was therefore **[*1098]** unnecessary, and we need not discuss whether it was erroneous. [2]

[31]** *AFFIRMED.*

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[2] Because we affirm the grant of summary judgment on below-cost pricing, we do not address ARCO's challenge to the district court's decision on recoupment, nor do we address Rebel's argument regarding the measure of its damages.

United States v. Microsoft Corp.

United States Court of Appeals for the District of Columbia Circuit

April 21, 1998, Argued ; June 23, 1998, Decided

No. 97-5343 Consolidated with 98-5012

Reporter
147 F.3d 935 *; 1998 U.S. App. LEXIS 13242 **; 331 U.S. App. D.C. 121; 1998-1 Trade Cas. (CCH) P72,188; 41 Fed. R. Serv. 3d (Callaghan) 216

UNITED STATES OF AMERICA, APPELLEE v. MICROSOFT CORPORATION, APPELLANT

Subsequent History: **[**1]** As Amended July 7, 1998.

Prior History: Appeals from the United States District Court for the District of Columbia. (No. 94cv01564).

Disposition: Reversed and remanded. The reference to the master was in effect the imposition on the parties of a surrogate judge and either a clear abuse of discretion or an exercise of wholly non-existent discretion. Granted mandamus to vacate the reference.

Core Terms

integrated, operating system, products, functionalities, district court, software, consent decree, Internet, markets, anti trust law, browser, preliminary injunction, contempt, decree, technological, license, Explorer, benefits, parties, injunction, combining, proviso, install, mandamus, courts, user, suggests, clarification, purchasers, antitrust

LexisNexis® Headnotes

Civil Procedure > Judgments > Entry of Judgments > Compelling Specific Acts

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN1[] **Entry of Judgments, Compelling Specific Acts**

A party seeking to hold another in contempt faces a heavy burden, needing to show by "clear and convincing evidence" that the alleged contemnor has violated a "clear and unambiguous" provision of a consent decree.

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Entry of Judgments, Consent Decrees**

The a clarification of a consent decree may properly take the form of an injunction. As a consent decree contains an injunction already, a clarification naturally acquires the same character. If the supplementary language goes beyond the consent decree, it is a modification rather than a clarification, and is governed by different standards.

Civil Procedure > Remedies > Injunctions > Contempt

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Injunctions, Contempt**

Fed. R. Civ. P. 65(a)(1) provides that no preliminary injunction shall be issued without notice to the adverse party.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Injunctions, Grounds for Injunctions**

For a preliminary injunction, equitable standards would require the government to show substantial likelihood of success on the merits, plus risk of irreparable injury, lack of substantial injury to the opposing party, and consistency with the public interest.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5[] **Injunctions, Grounds for Injunctions**

If a statute confers a right to an injunction once a certain showing is made, no plaintiff need show more than the statute specifies.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN6[] **Injunctions, Grounds for Injunctions**

When a governmental entity sues to enforce a statute, irreparable injury is presumed to flow from the violation itself.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN7[] **Injunctions, Grounds for Injunctions**

The purpose of *Fed. R. Civ. P. 65(a)(1)*'s notice requirement is to allow the opposing party a fair opportunity to oppose the preliminary injunction, and compliance is mandatory. Preliminary injunctions entered without notice to the opposing party are generally dissolved. Appellate courts have, however, on occasion allowed a procedurally flawed injunction to remain in place pending a proper hearing on remand if the equities support such a disposition.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN8[] **Settlements, Consent Judgments**

The court's review of a district court's interpretation of a consent decree is de novo.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN9[] **Settlements, Consent Judgments**

Consent decrees are generally interpreted as contracts. Interpretation of an ambiguous contract term on the basis of extrinsic evidence is generally treated as a question of fact, and the district court's findings as to the parties' intent are reviewed deferentially. This court, however, has regularly engaged in de novo review of district court interpretations of concededly ambiguous provisions which the parties sought to clarify with evidence from outside the decree itself.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN10[] **Standards of Review, De Novo Review**

De novo review of legal analysis is in principle compatible with deference to factual findings.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN11[] **Settlements, Consent Judgments**

An antitrust consent decree cannot be read as though its animating spirit were solely the antitrust laws. The decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. A court's task, then, is to discern the bargain that the parties struck; this is the sense behind the proposition that consent decrees are to be interpreted as contracts. To find the meaning of an ambiguous provision a court looks for the intent of the parties, just as it would with a contract. In that quest we may rely on the same aids to construction as a court would when interpreting an ambiguous contract, including the circumstances surrounding the formation of the consent order.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN12[] **Tying Arrangements, Defenses**

Integration may be considered genuine if it is beneficial when compared to a purchaser combination. It is not proposed that in making this inquiry a court should embark on product design assessment. In ***antitrust law***, the courts have recognized the limits of their institutional competence and have on that ground rejected theories of "technological tying." A court's evaluation of a claim of integration must be narrow and deferential. Such a violation must be limited to those instances where the technological factor tying the hardware to the software has been designed for the purpose of tying the products, rather than to achieve some technologically beneficial result. Any other conclusion would enmesh the courts in a technical inquiry into the justifiability of product innovations.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

Civil Procedure > Judicial Officers > Masters > General Overview

Civil Procedure > Judicial Officers > References

HN13[] **Justiciability, Mootness**

Fed. R. Civ. P. 53(b) provides in part that a reference to a master shall be the exception and not the rule. In actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

Civil Procedure > Remedies > Writs > General Overview

HN14[] **Remedies, Writs**

Adequacy of remedy defeats mandamus.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Judicial Officers > Masters > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN15[] **Trials, Bench Trials**

Fed. R. Civ. P. 52(e)(2) instructs that in non-jury trials, the court shall accept the master's findings of fact unless clearly erroneous.

Counsel: Richard J. Urowsky argued the cause for appellant. With him on the brief were John L. Warden, Steven L. Holley, Richard C. Pepperman, II, Andrew C. Hruska, James R. Weiss, William H. Neukom and David A. Heiner, Jr.

A. Douglas Melamed, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for appellee. With him on the briefs were Joel I. Klein, Assistant Attorney General, Catherine G. O'Sullivan and Mark S. Popofsky, Attorneys.

Daniel E. Lungren, Attorney General of California, James E. Ryan, Attorney General of Illinois, Carla J. Stovall, Attorney General of Kansas, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General for the Commonwealth of Massachusetts, Jeremiah W. (Jay) Nixon, Attorney General of Missouri, Joseph P. Mazurek, Attorney General of Montana, Frankie Sue **[**2]** Del Papa, Attorney General of Nevada, Tom Udall, Attorney General of New Mexico, and W.A. Drew Edmondson, Attorney General of Oklahoma, members of the Bar of this Court, were on the brief of certain States as amici curiae, with whom appeared the various other Attorneys General of the participating States.

Judges: Before: WALD, WILLIAMS and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge WILLIAMS. Opinion concurring in part and dissenting in part filed by Circuit Judge WALD.

Opinion by: WILLIAMS

Opinion

[*938] WILLIAMS, *Circuit Judge*: The district court entered a preliminary injunction prohibiting Microsoft Corporation from requiring computer manufacturers who license its operating system software to license its internet browser as well. In granting the preliminary injunction the court also referred the government's motion for a permanent injunction to a special master. Microsoft appeals the preliminary injunction and applies for a writ of mandamus revoking the reference to a master. We find that the district court erred procedurally in entering a preliminary injunction without notice to Microsoft and substantively in its implicit construction of the consent decree on which **[**3]** the preliminary injunction rested. We also grant the petition for mandamus and direct the district court to revoke or revise its reference.

I.

This case arises from Microsoft's practices in marketing its Windows 95 operating system. An operating system is, so to speak, the central nervous system of the computer, controlling the computer's interaction with peripherals such as keyboards and printers. Windows 95 is an operating system that integrates a DOS shell with a graphical user interface, i.e., a technology by which the operator performs functions not by typing at the keyboard but by clicks of his mouse. Operating systems also serve as "platforms" for application software such as word processors. As the word "platform" suggests, the operating system provides a basic support structure for an application via "application programming interfaces" ("APIs"), **[*939]** which provide general functions on which applications can rely. Each operating system's APIs are unique; hence applications tend to be written for particular operating systems. The primary market for operating systems consists of original equipment manufacturers ("OEMs"), which make computers, install operating systems and other **[**4]** software that they have licensed from vendors such as Microsoft, and sell the package to end users. These may be either individual consumers or businesses.

In an earlier opinion, also arising from litigation generated by the Justice Department's 1994 antitrust suit against Microsoft, we briefly described Microsoft's role in the software industry and some of the industry's economics. *United States v. Microsoft Corp., 312 U.S. App. D.C. 378, 56 F.3d 1448, 1451-52 (D.C. Cir. 1995)*. Because IBM chose to install Microsoft's operating system on its personal computers, Microsoft acquired an "installed base" on millions of IBM and IBM-compatible PCs. That base constituted an exceptional advantage, and created exceptional risks of monopoly, because of two characteristics of the software industry--increasing returns to scale and network externalities. First, because most of the costs of software lie in the design, marginal production costs are negligible. Production of additional units appears likely to lower average costs indefinitely. (I.e., the average cost curve never turns upward.) Second, an increase in the number of users of a particular item of software increases the number of other **[**5]** people with whom any user can share work. As a result, Microsoft's large installed base increases the incentive for independent software vendors to write compatible applications and thereby increases the value of its operating system to consumers.

The Department's 1994 complaint alleged a variety of anticompetitive practices, chiefly in Microsoft's licensing agreements with OEMs. Along with it, the Department filed a proposed consent decree limiting Microsoft's behavior, the product of negotiations between Microsoft, the Department and European competition authorities. Most relevant here is § IV(E) of the decree:

> Microsoft shall not enter into any License Agreement in which the terms of that agreement are expressly or impliedly conditioned upon:
>
>> (i) the licensing of any other Covered Product, Operating System Software product or other product (provided, however, that this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products); or
>>
>> (ii) the OEM not licensing, purchasing, using or distributing any non-Microsoft product.

The Department sees a violation of § IV(E)(i) in Microsoft's marketing of Windows 95 and its **[**6]** web browser, Internet Explorer ("IE").

The Internet is a global network that links smaller networks of computers. The World Wide Web ("the Web") is the fastest-growing part of the Internet, composed of multimedia "pages" written in Hypertext Markup Language ("HTML") and connected to other pages by hypertext links. Browsers enable users to navigate the Web and to access information.

Most browsers are designed according to a "multiplatform" approach, with different versions for each of a variety of different operating systems. Joint Appendix ("J.A.") 81. Browsers also have the potential to serve as user interfaces and as platforms for applications (which could then be written for the APIs of a particular browser rather than of a particular operating system [1]), providing some of the traditional functions of an operating system. Widespread use of multi-platform browsers as user interfaces has some potential to reduce any monopoly-increasing effects of network externalities in the operating system market. Browsers can enable the user to access applications stored on the **[*940]** Internet or local networks, or to operate applications that are independent of the operating system. J.A. 103-05.

[7]** Microsoft has developed successive versions of IE, the first of which was initially released with Windows 95 in July 1995. Microsoft's Windows 95 license agreements have required OEMs to accept and install the software package as sent to them by Microsoft, including IE, and have prohibited OEMs from removing any features or functionality, i.e., capacity to perform functions such as browsing. J.A. 86-89.

The first three versions of IE were actually included on the Windows 95 "master" disk supplied to OEMs. Department Br. at 4; J.A. 1277-78. IE 4.0, by contrast, was initially distributed on a separate CD-ROM and OEMs were not required to install it. Microsoft intended to start requiring OEMs to preinstall IE 4.0 as part of Windows 95

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[1] Similarly, Sun Microsystems's "Java" programming language allows programmers to write applications that will run on any computer, regardless of the operating system, as long as certain Java-related software (a Java "virtual machine" and Java "class libraries") is present. Internet browsers incorporate the necessary Java-related software, and hence allow Java programs to live up to their "write once, run anywhere" billing.

in February 1998. On learning of Microsoft's plans, the Department became concerned that this practice violated § IV(E)(i) by effectively conditioning the license for Windows 95 on the license for IE 4.0, creating (in its view) what ***antitrust law*** terms a "tie-in" between the operating system and the browser. [2] (It is not clear why extension of Microsoft's established IE policy to IE 4.0 aroused the Department's concern.) It filed a petition seeking to **[**8]** hold Microsoft in civil contempt for its practices with respect to IE 3.0, and requesting "further" that the court explicitly order Microsoft not to employ similar agreements with respect to any version of IE.

HN1[] A party seeking to hold another in contempt faces a heavy burden, needing to show by "clear and convincing evidence" that the alleged contemnor has violated **[**9]** a "clear and unambiguous" provision of the consent decree. *Armstrong v. Executive Office of the President, 303 U.S. App. D.C. 107, 1 F.3d 1274, 1289 (D.C. Cir. 1993)*. Finding § IV(E)(i) ambiguous, the district court denied the Department's contempt petition. But that left open the possibility that Microsoft's practices might in fact violate the consent decree (though not so clearly as to justify contempt), and the district court continued the proceedings in order to answer that question, appointing a special master not only to oversee discovery but also to propose findings of fact and conclusions of law. For the meantime, the court entered a preliminary injunction forbidding Microsoft

> from the practice of licensing the use of any Microsoft personal computer operating system software (including Windows 95 or any successor version thereof) on the condition, express or implied, that the licensee also license and preinstall any Microsoft Internet browser software (including Internet Explorer 3.0, 4.0, or any successor versions thereof).

J.A. 1300.

A detour is necessary to explore what this injunction meant. In some of its papers before the court the Department had **[**10]** argued for an order barring Microsoft from "forcing OEMs to accept and preinstall the software code" that it separately distributes at retail as IE 3.0. J.A. 996. Microsoft had responded that a Windows 95 operating system without IE software code simply would not function. The government characterized that assertion as "greatly overblown." J.A. 1237. The district court, in its justifying memorandum, referred to the injunction as barring Microsoft from "forcing OEMs to accept and preinstall the software code" separately distributed as IE 3.0, J.A. 1296-97; i.e., it employed the Department's exact words on the subject. After the injunction was issued, Microsoft and the Department had further consultations, at the end of which they entered a stipulation that Microsoft would be in compliance with the injunction if it extended to OEMs the options of (1) running the Add/Remove Programs utility with respect to IE 3.x and (2) removing the IE icon from the desktop and from the **[*941]** Programs list in the Start menu and marking the file IEXPLORE.EXE "hidden." J.A. 1780-81. It appears not to be disputed that these alternate modes of compliance do *not* remove the IE software code, which indeed continues **[**11]** to play a role in providing non-browser functionality for Windows. In fact, browser functionality *itself* persists, and can be summoned up either by entering four lines of code or by running any application (such as Quicken) that contains the code necessary to invoke the functionality. J.A. 1649-55. The agreed-upon means of compliance simply enable the OEMs to make user access to IE more difficult. [3]

Microsoft appealed, as authorized by *28 U.S.C. § 1292(a)(1)*, and also sought mandamus directing the district court to revoke the reference to the special master.

II.

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[2] The Department's language suggests that two products, and indeed, two license agreements are at issue. See, e.g., the Department Br. at 4 ("Microsoft conditioned its OEM licenses to Windows 95 on OEMs' licensing Internet Explorer.") It is undisputed that OEMs enter into only one license agreement, which covers IE as part of Windows 95. J.A. 1274. Microsoft's central argument, of course, is that there is only one product. The terminology used in our introductory recitation of facts is of course not intended to resolve, or to reflect any resolution of, contested issues, and no inference as to those issues should be drawn from the wording of this section.

[3] Additionally, by allowing OEMs to conceal IE, rather than to refuse it, the remedy fits poorly with the Department's tying theory. A tie-in is not affected by the purchaser's ability to discard the tied good.

Microsoft claims at the outset that the district court, after finding no contempt, should simply have dismissed the Department's petition. But although the petition was styled simply as one for an order to show cause "Why Respondent Microsoft **[**12]** Corporation Should Not Be Held in Civil Contempt," its prayer for relief sought not only pure contempt remedies (such as the attention-grabbing request for $ 1,000,000 a day in damages), but also an order directing Microsoft to cease and desist from requiring "OEMs to license any version of Internet Explorer as an express or implied condition of licensing Windows 95." J.A. 41. This was plainly a request for clarification of the consent decree, pinning down its application to the browser issue. ***HN2***[] Such a clarification may properly take the form of an injunction. See *Brewster v. Dukakis, 675 F.2d 1, 3-4 (1st Cir. 1982)*. Indeed, as a consent decree contains an injunction already, a clarification naturally acquires the same character. (Of course, if the supplementary language goes beyond the consent decree, it is a modification rather than a clarification, and is governed by different standards. See, e.g., *United States v. Western Elec. Co., 282 U.S. App. D.C. 271, 894 F.2d 430, 435 (D.C. Cir. 1990)* ("*Manufacturing Appeal*").) Although the framing of this request as part of a *remedy* for contempt may have been odd, Microsoft does not contest that the proceeding put in controversy **[**13]** the meaning of § IV(E)(i) as applied to its browser technology.

This government request for clarification appeared in its petition shortly after its primary request--that the court adjudge Microsoft to be in contempt--and the word "further." Following "further" are a raft of requests for orders, this being just one. Microsoft says this clearly shows that the request was contingent on a finding of contempt. It further (here, in the sense of "additionally") presses on us some lines from a colloquy between the district court and a Department lawyer during the final hearing (December 5, 1997) before the court made its decision to issue a preliminary injunction:

> THE COURT: All right. Let me go to the relief that you have requested here. Your petition is in terms phrased only as a petition for a finding of contempt.
> MR. MALONE: That's correct, Your Honor.
> THE COURT: We've have [sic] gone beyond the show cause [stage]. They have shown cause, and we're now at the contempt stage.
> Is that the only relief that you're looking for, or am I
> to read the petition as what I am inclined to read it as, and that is a petition for specific enforcement?
>
> MR. MALONE: I think that is exactly **[**14]** how the Court should read it, Your Honor. I think we have said, very clearly, in arguing since the beginning that we want the Court--we believe the Court can find Microsoft in contempt and can impose this specific relief to remedy the contempt, and should quickly.
> Microsoft has opposed that on merits grounds, but I don't think Microsoft has come along and said, "You can't do that. This is just an order to show cause or something else."
>
> **[*942]** The merits are very much before the Court, and what we're asking is for the specific relief that we requested in the petition.
> That really boils down to, Your Honor, simply an order telling Microsoft, "You may no longer force OEMs to take Internet Explorer as a condition of getting your Windows 95 license."

J.A. 1235-36.

In fact we think this dialogue suggests either that the Department's request was always in the alternative or that it modified the request to make it such. "I think that is exactly how the Court should read it" comes in response to a suggestion that the petition be read as a request for specific enforcement, and the interest in clarification is presented as the Department's central concern. J.A. 1295. Given the district **[**15]** court's participation in the colloquy, we might be inclined, if necessary, to defer to its understanding of the Department's prayer for relief.

Even if we found that the Department's request was in fact contingent on a finding of contempt, however, we do not think the district court would have erred in clarifying the decree *sua sponte* as an incident to its denial of the contempt petition. Contempt motions are often accompanied by requests for clarification in the alternative. But they also often elicit declaratory clarifications, and sometimes even amendments, as accompaniments to denials even without (so far as appears) explicit alternative requests for clarification. See, e.g., *Wilder v. Bernstein, 49 F.3d 69, 71-72 (2d Cir. 1995)*; *Thermice Corp. v. Vistron Corp., 832 F.2d 248, 250-51 (3d Cir. 1987)*; *Gov't of the Virgin Islands v. Sun Island Car Rentals, Inc., 819 F.2d 430, 431 (3d Cir. 1987)*; *Movie Systems, Inc. v. MAD Minneapolis*

Audio Distributors, Inc., 717 F.2d 427, 429-30 (8th Cir. 1983); Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 888 n.2, 892 (9th Cir. 1982); Stolberg v. Board of Trustees for State Colleges, 541 F.2d **[**16]** 890, 892 (2d Cir. 1976); Red Ball Int. Demolition Corp. v. Palmadessa, 947 F. Supp. 116, 121 (S.D.N.Y. 1996); Johnson v. Heckler, 604 F. Supp. 1070, 1075-76 (N.D. Ill. 1985).

We are aware of no case raising doubts about the propriety of clarification incident to the denial of a contempt petition. Indeed, at oral argument Microsoft conceded "in principle" the court's authority to continue the proceeding in order to clarify the decree. Transcript at 11. [4] Of course, the above cases characteristically did not explicitly affirm the district court's authority, although one did just that. See Vertex, 689 F.2d at 892 ("The district court could properly clarify that ambiguous language, and this it did, requiring defendants to change their future advertising to comply with the consent judgment, as clarified.").

[17]** Microsoft points out that the question of district court authority is jurisdictional, so that mere practice may not be enough. But much repeated practice illumines the generally understood meaning of petitions for contempt citations. A court granting a clarification that the parties have not explicitly requested has at most construed the petition to contain an implicit request for declaratory relief. This construction seems altogether reasonable where, as here, the petition clearly puts the meaning of the consent decree in issue and the petition makes the standard request (in the rather typical words of this petition) for "such further orders as the nature of the case may require and as the Court may deem just and proper to compel obedience to and compliance with the orders and decrees of this Court." J.A. 43. Cf. Johnson, 604 F. Supp. at 1075-76 (denying contempt petition but clarifying decree in response to request for further relief under 28 U.S.C. § 2202).

Because it was not error for the court to address the issue of clarification, we must decide whether the preliminary injunction was correctly granted.

[*943] III.

Microsoft argues that the district court failed to comply with **[**18]** ***HN3***[] Federal Rule of Civil Procedure 65(a)(1)'s command, "No preliminary injunction shall be issued without notice to the adverse party." We agree. Obviously the Department's request for a contempt citation provided no such notice, for the governing criteria are completely different. To defeat the contempt petition, all Microsoft had to do was to show that the Department failed to meet its burden of showing that the consent decree unambiguously barred its conduct. ***HN4***[] For a preliminary injunction, by contrast, traditional equitable standards would require the government to show substantial likelihood of success on the merits (here, that the decree, properly construed, barred the conduct), *plus* risk of irreparable injury, lack of substantial injury to the opposing party, and consistency with the public interest. See CityFed Financial Corp. v. Office of Thrift Supervision, 313 U.S. App. D.C. 178, 58 F.3d 738, 746 (D.C. Cir. 1995). The contempt petition did not alert Microsoft to contest these factors.

Nor could the Department's request for a *permanent* injunction serve as notice--even putting aside Microsoft's argument that the request was contingent on a situation that never arose **[**19]** (see section II). The request for a permanent injunction amounted to no more than a request for a clarification, and thus would require only a showing that the Department's reading of the consent decree was correct. It did not put into play the equitable factors of interim irreparable injury to the requester, harm to the party to be enjoined, and effects on the public interest. But resolution of these is essential in granting a *preliminary* injunction; the proponent must make a showing about the interim risks precisely in order to counterbalance the lack of any final ruling in its favor on the merits.

At oral argument the Department claimed that when the government seeks a preliminary injunction under a statute, its showing of a likelihood of success on the merits supplants the normal need for assessment of the interim risks.

[4] Microsoft then grounded its objection on the fact that the Department had urged the court "not to permit discovery, not to conduct an evidentiary hearing and to decide the matter on the papers before the District Court." Id. at 12. These objections, however valid, are completely independent of the theory we address here. As we find the preliminary injunction procedurally defective on other grounds, we need not reach them.

This is true under some circumstances. First, it is clear that **HN5**[] if a statute confers a *right* to an injunction once a certain showing is made, no plaintiff--neither governmental agencies nor private parties--need show more than the statute specifies. See, e.g., *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 740 F.2d 566, 571 (7th Cir. 1984)* **[**20]** (irreparable injury not required for preliminary injunction under *47 U.S.C. § 401(b)*, which provides that court "shall enforce" FCC order upon showing of disobedience). The statutory specification displaces the traditional equitable standards, but this displacement is "not lightly assumed." *Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982)*. Plaintiffs must show that Congress intended to "intervene and guide or control the exercise of the courts' discretion." *Id. at 313*. See also *Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 541-45, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987)*.

Second, and not entirely distinct in the cases, lurks the proposition that **HN6**[] when a governmental entity sues to enforce a statute, irreparable injury is presumed to flow from the violation itself. See, e.g., *United States v. Diapulse, 457 F.2d 25, 27-28 (2d Cir. 1972)* ("The passage of the statute is, in a sense, an implied finding that violations will harm the public and ought, if necessary, [to] be restrained."). It is unclear, however, whether such decisions actually turn on the identity of the plaintiff, or whether they are simply instances **[**21]** where the court read the statute as providing for injunction on a reduced showing and mentioned the enforcing agency because it happened to be the plaintiff before the court. As the cases did not purport to apply the doctrine to all statutes under which a government agency might seek relief, but limited it, for example, to "remedial" ones, [5] **[*944]** see, e.g., *Commodity Futures Trading Comm'n v. Muller, 570 F.2d 1296, 1300 (5th Cir. 1978)*, the latter seems more probable.

Some cases antedating *Romero-Barcelo* took the view **[**22]** that mere statutory authorization of injunctive relief displaced equitable standards, see, e.g., *Atchison, Topeka & Santa Fe Railway Co. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981)* (citing cases). Under this view *§ 4* of the Sherman Act, *15 U.S.C. § 4*, authorizing such temporary injunctive relief "as shall be deemed just," but setting no standards for its award, would evidently be enough. But such cases seem outmoded by *Romero-Barcelo*'s view that displacement of the usual equitable standards requires a "clear and valid legislative command." *456 U.S. at 313*, quoting *Porter v. Warner Holding Co., 328 U.S. 395, 398, 90 L. Ed. 1332, 66 S. Ct. 1086 (1946)*. In fact, even before *Romero-Barcelo* the Court construed *§ 4*'s grant as controlled by the ordinary principles of equity courts. *De Beers Consol. Mines v. United States, 325 U.S. 212, 218-19, 89 L. Ed. 1566, 65 S. Ct. 1130 (1945)*.

In any event, the Department's suggestion is irrelevant. The preliminary injunction was entered in a suit to enforce a consent decree, not a statute. As the settlement of a litigation, the decree may require less than the statute under which the suit was brought, or more, *United States* ***[**23]*** *v. Armour & Co., 402 U.S. 673, 681-82, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)*; *Ass'n for Retarded Citizens v. Thorne, 30 F.3d 367, 369 (2d Cir. 1994)*, so the violation of one is not necessarily a violation of the other. Thus a finding of probable violation of the consent decree could not support a presumption of irreparable harm even under the most extravagant version of the doctrine the government invokes.

So the district court did need to find irreparable injury before granting the preliminary injunction. The absence of notice had the effect of precluding the introduction of evidence and argument on this requirement, and the omission was far from trivial. At oral argument the Department conceded that it had offered no evidence on the subject, and Microsoft suggested that it could have forcefully contested anything the Department might have offered, alluding to information--obviously not in the record--that no OEM had, since entry of the preliminary injunction, sought to take advantage of its terms. Transcript at 10, 61. [6]

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[5] We have noted recently, and more than once, that the concept of a "remedial" statute is unhelpful. All statutes, unless purely declaratory, seek to "remedy" something about the pre-existing state of affairs. The cases seem bereft of references to "destructive" statutes. See *East Bay Municipal Utility Dist. v. United States Dep't of Commerce, 142 F.3d 479, 1998 U.S. App. LEXIS 8346, 1998 WL 210612* *5-*6 (D.C. Cir. 1998); *Ober United Travel Agency, Inc. v. United States Dep't of Labor, 328 U.S. App. D.C. 410, 135 F.3d 822, 825 (D.C. Cir. 1998)*.

[6] The district court mentioned irreparable harm, but not in any terms suggesting focus on the relevant concern--whether denial of relief would result in harm to the competitive interests asserted by the government. It said that the Department is threatened with

[24]** ***HN7***[]

The purpose of *Rule 65(a)(1)*'s notice requirement is to allow the opposing party a fair opportunity to oppose the preliminary injunction, see *Weitzman v. Stein, 897 F.2d 653, 657 (2d Cir. 1990)*, and compliance is mandatory, *Parker v. Ryan, 960 F.2d 543, 544 (5th Cir. 1992)*. Preliminary injunctions entered without notice to the opposing party are generally dissolved. See, e.g., *Williams v. McKeithen, 939 F.2d 1100, 1105-06 (5th Cir. 1991)*; *Weitzman, 897 F.2d at 657-68*; *Phillips v. Chas. Schreiner Bank, 894 F.2d 127, 130-31 (5th Cir. 1990)*. Appellate courts have, however, on occasion allowed a procedurally flawed injunction to remain in place pending a proper hearing on remand if the equities support such a disposition. See, e.g., *Rosen v. Siegel, 106 F.3d 28, 33 (2d Cir. 1997)*.

The Department urges us to do so here. Evaluating such a request requires the court to consider the traditional equitable factors as apparent on the existing record. See, e.g., *Inverness Corp. v. Whitehall Laboratories, 819 F.2d 48, 51 (2d Cir. 1987)*. We do not believe that a reviewing court *must* entertain such a request; if the record were so deficient as to make effective **[**25]** evaluation of the equities impossible, a court might do better simply to vacate the injunction as a matter of course--especially where, as here, the injunction was sought only rather obliquely. As later sections will show, however, the record here is enough for us at least to make a reasonable appraisal of the Department's eventual likelihood of success on the merits, and this factor proves dispositive. Silence at this stage would risk considerable **[*945]** waste of litigative resources. "When the district court's estimate of the probability of success depends on an incorrect or mistakenly applied legal premise, 'the appellate court furthers the interest of justice by providing a ruling on the merits to the extent that the matter is ripe, though technically the case is only at the stage of application for preliminary injunction.' " *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc., 274 U.S. App. D.C. 202, 863 F.2d 891, 895 (D.C. Cir. 1988)* (quoting *Natural Resources Defense Council, Inc. v. Morton, 148 U.S. App. D.C. 5, 458 F.2d 827, 832 (D.C. Cir. 1972)*. When reviewing preliminary injunctions we have generally not been hesitant to offer interpretation and guidance on the substantive **[**26]** legal issues. See, e.g., *Defenders of Wildlife v. Andrus, 201 U.S. App. D.C. 252, 627 F.2d 1238, 1243 (D.C. Cir. 1980)*; *Energy Action Educational Found'n v. Andrus, 203 U.S. App. D.C. 169, 631 F.2d 751, 761 (D.C. Cir. 1979)*; *Maryland-National Capital Park & Planning Comm'n v. U.S. Postal Service, 159 U.S. App. D.C. 158, 487 F.2d 1029, 1041 (D.C. Cir. 1973)*. We thus turn to the interpretation of § IV(E)(i), on which the merits of the Department's case depend. ***HN8***[] Our review of a district court's interpretation of a consent decree is de novo. [7] See, e.g., *Richardson v. Edwards, 326 U.S. App. D.C. 429, 127 F.3d 97, 101 (D.C. Cir. 1997)*; *United States v. Western Elec. Co., 304 U.S. App. D.C. 199, 12 F.3d 225, 229 (D.C. Cir. 1993)*; *United States v. Western Elec. Co., 283 U.S. App. D.C. 299, 900 F.2d 283, 293 (D.C. Cir. 1990)* ("*Triennial Review* ").

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irreparable harm because "the cost of a compulsory unbundling of Windows 95 and IE in the future could be prohibitive," J.A. 1297, which seems rather more like a risk to Microsoft if it continues its current practice and ultimately loses in court.

[7] We agree with Judge Wald's suggestion, see Sep. Op. at 13-14, that there is something unusual about de novo review of a district court interpretation of an ambiguous provision of a consent decree. ***HN9***[] Consent decrees are generally interpreted as contracts. See *United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975)*. Interpretation of an ambiguous contract term on the basis of extrinsic evidence is generally treated as a question of fact, and the district court's findings as to the parties' intent are reviewed deferentially, i.e., reversed only for clear error. See, e.g., *NRM Corp. v. Hercules, 244 U.S. App. D.C. 356, 758 F.2d 676, 682 (D.C. Cir. 1985)*. This court, however, has regularly engaged in de novo review of district court interpretations of concededly ambiguous provisions which the parties sought to clarify with evidence from outside the decree itself. See, e.g., *United States v. Western Electric Co., 304 U.S. App. D.C. 199, 12 F.3d 225, 229, 231 (D.C. Cir. 1993)* (announcing de novo review despite admitted ambiguity); *United States v. Western Electric Co., 283 U.S. App. D.C. 299, 900 F.2d 283, 293, 296 (D.C. Cir. 1990)* ("*Triennial Review*") (same); see also *900 F.2d at 294* (characterizing issue as "pure question of law"). Nor does the Supreme Court's opinion in *ITT,* which relies on the presence of ambiguity to distinguish *Armour,* see *ITT, 420 U.S. at 238* & n.11, give any indication of deference. Of course, ***HN10***[] de novo review of legal analysis is in principle compatible with deference to factual findings. See *Triennial Review,* 900 F.2d at 293-94 (explaining that "aside from fact-finding, we owe no deference to the district court's decisions"); *North Shore Laboratories Corp. v. Cohen, 721 F.2d 514, 518-19 (5th Cir. 1983)* (reviewing de novo while also noting deference to factual findings of parties' intent). This mixed approach may be the correct one, although the centrality of intent would often make the deference swallow the de novo review, a result our cases do not seem to contemplate. But here it would amount to de novo review anyway, as the district court made no findings of fact as to intent to which we could defer.

[27]** IV.

Section IV(E) arose from a 1993 complaint filed with the Directorate General IV of the European Union ("DG IV") (the principal competition authority in Europe). Novell, a rival software vendor, alleged that Microsoft was tying its MS-DOS operating system to the graphical user interface provided by Windows 3.11. Before the introduction of Windows 95, which integrated the two, Microsoft marketed the DOS component and the Windows component of the operating system separately, and Windows 3.11 could be operated with other DOS products. But Novell, which marketed a competing DOS product, DR-DOS, complained that by means of specific marketing practices--particularly "per processor and per system licenses," J.A. 754--Microsoft was creating economic incentives for OEMs to preinstall MS-DOS as well as Windows 3.11, thereby using its power in the market for DOS-compatible graphical user interfaces (where it commanded a near 100% market share) to affect OEM choice in the DOS market. [8] J.A. 839-48.

[28]** During June 1994 negotiations with the Department, Microsoft proposed the possibility of a joint settlement, and representatives **[*946]** of DG IV participated in meetings in Brussels and later in Washington, D.C. On July 15, 1994, the three sides reached agreement and Microsoft and the Department signed a stipulation agreeing to entry of the consent decree, including § IV(E). Both Microsoft and the Department characterize § IV(E) as an "anti-tying" provision.

Microsoft and the Department engage in a brief battle over the extent to which ***antitrust law*** may be relevant to this dispute. Without wasting time on the parties' somewhat exaggerated positions, we can simply say that Microsoft is clearly right that the decree does not embody either the entirety of the Sherman Act or even all "tying" law under the Act, and the Department is equally right to point out that the consent decree emerged from antitrust claims, unresolved though they were, so that we must keep procompetitive goals in mind in the interpretive task.

As *Armour* makes clear, however, ***HN11***[] an antitrust consent decree cannot be read as though its animating spirit were solely the antitrust laws. "The decree itself cannot be said **[**29]** to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *402 U.S. at 681-82*.

The court's task, then, is to discern the bargain that the parties struck; this is the sense behind the proposition that consent decrees are to be interpreted as contracts. See, e.g., *ITT Continental Baking Co., 420 U.S. at 236-37*; *Richardson, 127 F.3d at 101*; *Western Elec., 282 U.S. App. D.C. 347, 894 F.2d 1387 at 1390*. To find the meaning of an ambiguous provision we look for the intent of the parties, just as we would with a contract. See *Western Elec. Co., 12 F.3d at 231-32* (reading ambiguous provision of consent decree "in light of the parties' *jointly intended* purpose" (internal quotation omitted)); *NRM Corp. v. Hercules, Inc., 244 U.S. App. D.C. 356, 758 F.2d 676, 681-82 (D.C. Cir. 1985)* (contract interpretation). In that quest we may rely on the same aids to construction as we would when interpreting an ambiguous contract, including "the circumstances surrounding the formation of the consent order." See *ITT, 420 U.S. at **[**30]** 238*.

Section IV(E)(i) represented the parties' agreed "solution" to the problem posed by the Novell complaint. The practices complained of there, coupled with the decree's explicit acceptance of Windows 95, establish the competing models that guide our resolution of the present dispute. Whatever else § IV(E)(i) does, it must forbid a tie-in between Windows 3.11 and MS-DOS, and it must permit Windows 95. Thus if the relation between Windows 95 and IE is similar to the relation between Windows 3.11 and MS-DOS, the link is presumably barred by § IV(E)(i). On the other hand, a counter-analogy is Windows 95 itself, which the decree explicitly recognizes as a single "product" (it defines it as a "Covered Product," § II(1)(v)), even though, as we have said, Windows 95 combines the functionalities of a graphical interface and an operating system. If the Windows 95/IE combination is like the MS-DOS/graphical interface combination that comprises Windows 95 itself, then it must be permissible.

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[8] The indirect nature of the alleged tie may explain why § IV(E)(i) bars an agreement whose terms are "expressly or *impliedly* conditioned upon … the licensing of any other Covered Product."

The parties offer us little help in picking the correct analogy. Both propose readings of § IV(E)(i) that fail to reconcile its language with the facts of the Novell complaint and the later permissible **[**31]** release of Windows 95. The Department claims that § IV(E)(i) prohibits Microsoft from bundling together a Covered Product and anything that "Microsoft simultaneously treats" and "***antitrust law*** regards" as "a distinct commercial product." Department Br. at 37-38. It says that the browser-Windows pair is caught in the first filter (Microsoft's treatment of IE as a separate product) because Microsoft provides it separately to end users, sells versions of IE 4 for different operating systems, advertises IE 4, tracks its performance in a "browser market," and distributes it on a separate CD-ROM. J.A. 32-37. For antitrust criteria, the Department draws on *Jefferson Parish Hosp. District No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*, for the proposition that products are distinct for tying purposes if consumer demand exists for each separately. (The Department notes correctly that this does not require demand **[*947]** for one product without the other but simply demand for the two products from different sellers. See *id. at 19* & n.30.)

We are not convinced that these indicia necessarily point to separateness, especially those that depend on Microsoft's treatment. Microsoft **[**32]** plausibly characterizes the IE that it provides to end users as an operating system upgrade, as does its rival Netscape, J.A. 589, and the Department offers no means of distinguishing an upgrade from a separate product. Versions developed for different operating systems may be better understood as different products altogether; hence, their relevance to separateness is obscure. Distribution of software code on a separate CD-ROM shows nothing at all about whether the code is integrated into an operating system (software for an operating system that is clearly a single product may take up many disks).

The Department's interpretation of the "integrated products" proviso does nothing to remedy its reading of the body of § IV(e)(i). On the Department's account, the proviso allows Microsoft to incorporate new features into an operating system and offer the package to OEMs--as long as it and ***antitrust law*** do not simultaneously treat those features as "a distinct commercial product." Department Br. at 37-38. But these are just the criteria deployed to argue that IE is an "other product"; if the proviso merely reiterates them (to say that what is not an "other product" is "integrated"), it **[**33]** does nothing. And while the Department says that the proviso would protect Microsoft from a charge that it had violated the decree by adopting a technology incompatible with other firms' products, Department Br. at 37 n.17, it is not apparent how § IV(E)(i)'s ban might prohibit such conduct nor how, if it did, the proviso on integration would help it. In short, the Department effectively reads the proviso out of § IV(e)(i).

But the most immediate problem with this reading is that it produces the wrong result on the Novell allegations. In its attempts to define the "product" IE, the Department consistently invokes the concept of "browser functionality." Department Br. at 10; Department Motion for Contempt, J.A. 1317-19; Department Reply Memorandum in Support of Motion for Contempt, J.A. 1424, 1429. But if functionality is the criterion of identity (which the Department asserts so as to claim that the "browser functionality" in Windows 95 is the same product as IE 4 for other operating systems), Windows 95 looks like a tie-in of two products (MS-DOS and Windows 3.11) that were sold separately in the market: it contains the functionalities of both. On the Department's reading, it should **[**34]** thus be prohibited unless Microsoft refrains from marketing MS-DOS separately. There is some suggestion that Microsoft has in fact continued to license MS-DOS separately, at least to end users. Microsoft Reply Br. at 1516. More significantly, the consent decree does not condition its approval of Windows 95 on Microsoft's marketing behavior with respect to MS-DOS. The failure to produce the right result when applied to Windows 95, one of the situations clearly resolved by the decree, is a fatal flaw. [9]

[35]** The interpretation that Microsoft advances most strongly suffers mirror-image defects: it lacks much logical sense and it fails to fit the decree's setting, the disposition of the Novell complaint. Microsoft stresses § IV(E)(i)'s

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[9] In rejecting the Department's use of functionality here we do not mean to suggest that it is never an appropriate criterion of identity. In some contexts it may be appropriate to treat as equivalent two products that supply the same functionality, if they meet the same demand. Computer programs written for different operating systems, however, do not seem to meet the same demand, so that acceptance of functionality as a sufficient criterion of identity would lead to odd results. Here, of course, the decree's acceptance of Windows 95 as *a* "product" rebuts the Department's view of what is forbidden; one possible explanation might be that functionality works as an initial screen for defining products, but one that is trumped by the "integrated products" proviso.

"integrated products" proviso, saying that the addition of any feature to an operating system, as by simply putting the disk containing a compatible application in the same box with the operating system disk and requiring an OEM to install both, creates an integrated product--unless Microsoft **[*948]** also licenses the feature on a stand-alone basis "in the OEM channel."

This interpretation neatly matches the failure of the Department's theory to account for the permissibility of Windows 95: Microsoft's reading would provide zero relief to Novell, for it would allow Microsoft to bundle MS-DOS with Windows 3.11 as long as it did not license MS-DOS separately to OEMs. In short, the Department's reading does not permit Windows 95, and Microsoft's does not prohibit a bundle of Windows 3.11 and MS-DOS. Neither can be the correct interpretation of a provision that was intended to do both.

Curiously, in both parties' readings Microsoft's behavior determines the permissibility **[**36]** of conditioned licensing. This would be no defect if the behavior were in some way relevant to the economic principles of tie-ins. But it is not. The Department offers no theory as to how a seller's abstaining from separate marketing of the tied good might blunt the possible anticompetitive effects of bundling. [10] It seems especially beside the point where the goods are complements used in fixed proportions. A monopolist who ties two such goods has no obvious reason to market the tied good separately: since all buyers of the tying good will also take the tied good, the residual market for the tied good will be minimal. If the concern is that the tie-in makes it more difficult for competitors to enter the market for the *tying* good (because they must also offer the tied good), see *Grappone, Inc. v. Subaru of New England, 858 F.2d 792, 795-96 (1st Cir. 1988)* (Breyer, J.), separate marketing of the tied good actually mitigates the posited harm by facilitating new entry into the market for the tying good. Thus both readings allow legitimation by behavior that is either irrelevant or actively harmful.

[37]** We think it quite possible, however, to find a construction of § IV(E)(i) that is consistent with the antitrust laws and accomplishes the parties' evident desires on entering the decree. The Department and DG IV were concerned with the alleged anticompetitive effects of tie-ins. Microsoft's goal was to preserve its freedom to design products that consumers would like. Antitrust scholars have long recognized the undesirability of having courts oversee product design, and any dampening of technological innovation would be at crosspurposes with ***antitrust law***. Thus, a simple way to harmonize the parties' desires is to read the integration proviso of § IV(E)(i) as permitting any genuine technological integration, regardless of whether elements of the integrated package are marketed separately.

This reading requires us, of course, to give substantive content to the concept of integration. We think that an "integrated product" is most reasonably understood as a product that combines functionalities (which may also be marketed separately and operated together) in a way that offers advantages unavailable if the functionalities are bought separately and combined by the purchaser.

The point **[**38]** of the test is twofold and may be illustrated by its application to the paradigm case of the Novell complaint and the subsequent release of Windows 95. First, "integration" suggests a degree of unity, something beyond merely placing disks in the same box. If an OEM or end user (referred to generally as "the purchaser") could buy separate products and combine them himself to produce the "integrated product," then the integration looks like a sham. If Microsoft had simply placed the disks for Windows 3.11 and MS-DOS in one package and covered it with a single license agreement, it would have offered purchasers nothing they could not get by buying the separate products and combining them on their own. [11]

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[10] The hospital in *Jefferson Parish* surely did not offer the tied good (anesthesia) separately from the tying good (surgery), but this fact played no role in the Court's decision.

[11] The same analysis would apply to peripherals. If, for example, Microsoft tried to bundle its mouse with the operating system, it would have to show that the mouse/operating system package worked better if combined by Microsoft than it would if combined by OEMs. This is quite different from showing that the mouse works better with the operating system than other mice do. Compare Sep. Op. at 1-2. See X Areeda, Elhauge & Hovenkamp, ***Antitrust Law*** P 1746b. Problems seem unlikely to arise with peripherals, because their physical existence makes it easier to identify the act of combination. It seems unlikely that a plausible

[39]** **[*949]** Windows 95, by contrast, unites the two functionalities in a way that purchasers could not; it is not simply a graphical user interface running on top of MS-DOS. Windows 95 is integrated in the sense that the two functionalities--DOS and graphical interface--do not exist separately: the code that is required to produce one also produces the other. Of course one can imagine that code being sold on two different disks, one containing all the code necessary for an operating system, the other with all the code necessary for a graphical interface. But as the code in the two would largely overlap, it would be odd to speak of either containing a discrete functionality. Rather, each would represent a disabled version of Windows 95. The customer could then "repair" each by installing them both on a single computer, but in such a case it would not be meaningful to speak of the customer "combining" two products. Windows 95 is an example of what Professor Areeda calls "physical or technological interlinkage that the customer cannot perform." X Areeda, Elhauge & Hovenkamp, ***Antitrust Law*** § 1746b at 227, 228 (1996).

So the combination offered by the manufacturer must be different from what the purchaser could **[**40]** create from the separate products on his own. The second point is that it must also be better in some respect; there should be some technological value to integration. Manufacturers can stick products together in ways that purchasers cannot without the link serving any purpose but an anticompetitive one. The concept of integration should exclude a case where the manufacturer has done nothing more than to metaphorically "bolt" two products together, as would be true if Windows 95 were artificially rigged to crash if IEXPLORE.EXE were deleted. Cf. *ILC Peripherals Leasing Corp. v. International Business Machines Corp., 448 F. Supp. 228, 233 (N.D. Cal. 1978)* ("If IBM had simply bolted a disk pack or data module into a drive and sold the two items as a unit for a single price, the 'aggregation' would clearly have been an illegal tying arrangement.") *aff'd per curiam sub nom.* *Memorex Corp. v. International Business Machines Corp., 636 F.2d 1188 (9th Cir. 1980)*; X Areeda, Elhauge & Hovenkamp, ***Antitrust Law*** P 1746 at 227 (discussing literal bolting). Thus if there is no suggestion that the product is superior to the purchaser's combination in some respect, it cannot be deemed integrated. [12]

[41]** It might seem difficult to put the two elements discussed above together. If purchasers cannot combine the two functionalities to make Windows 95, it might seem that there is nothing to test Windows 95 against in search of the required superiority. But purchasers can combine the functionalities in their stand-alone incarnations. They can install MS-DOS and Windows 3.11. The test for the integration of Windows 95 then comes down to the question of whether its integrated design offers benefits when compared to a purchaser's combination of corresponding stand-alone functionalities. The decree's evident embrace of Windows 95 as a permissible single product can be taken as manifesting the parties' agreement that it met this test.

The short answer is thus that ***HN12***[] integration may be considered genuine if it is beneficial when compared to a purchaser combination. But we do not propose that in making this inquiry the court should embark on product design assessment. In ***antitrust law***, from which this whole proceeding springs, the courts have recognized the limits of their institutional competence and have on that ground rejected theories of "technological tying." A court's evaluation of a claim **[**42]** of integration **[*950]** must be narrow and deferential. [13] As the Fifth Circuit put it, "Such a violation must be limited to those instances where the technological factor tying the hardware to the software has been designed for the purpose of tying the products, rather than to achieve some technologically beneficial result. Any other conclusion would enmesh the courts in a technical inquiry into the justifiability of product innovations." *Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1330 (5th Cir. 1976)*.

claim could be made that a mouse and an operating system were integrated in the sense that neither could be said to exist separately. An operating system used with a different mouse does not seem like a different product. But Windows 95 without IE's code will not boot, J.A. 1623, and adding a rival browser will not fix this. If the add/remove utility is run to hide the IE 4 technologies, Windows 95 reverts to an earlier version, OEM service release ("OSR") 2.0. J.A. 1660-61.

[12] Thus of course we agree with the separate opinion that "commingling of code … alone is not sufficient evidence of true integration." Sep. Op. at 4. Commingling for an anticompetitive purpose (or for no purpose at all) is what we refer to as "bolting."

[13] The separate opinion seems to take this reluctance to engage in the evaluation of product design as deference to Microsoft's interpretation of the consent decree. See Sep. Op. at 2-3. It is nothing of the sort. We defer to neither party in interpreting the consent decree; in fact, we reject both parties' readings. We suggest here only that the limited competence of courts to evaluate high-tech product designs and the high cost of error should make them wary of second-guessing the claimed benefits of a particular design decision.

[43]** In fact, Microsoft did, in negotiations, suggest such an understanding of "integrated." In response to the Department and DG IV's statement of concern about tying, it asserted its right to "continue to develop integrated products like [Windows 95] *that provide technological benefits to end users.*" J.A. 756 (emphasis added). Microsoft later withdrew this qualifying phrase, J.A. 760, in order, it claims, to avoid the application of "vague or subjective criteria"--though why the absence of criteria should cure a vagueness problem is unclear. But we do not think that removing the phrase can drain the word "integrated" of all meaning, and we do not accept the suggestion that the Department and DG IV bargained for an "integrated products" proviso so boundless as to swallow § IV(E)(i). Significantly, Microsoft assured the Department and DG IV that the elimination of the qualifying phrase "did not represent a substantive change." J.A. 761.

We believe this understanding is consistent with tying law. The Court in *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*, for example, found parts and service separate products because sufficient **[**44]** consumer demand existed to make separate provision efficient. See *id. at 462*. But we doubt that it would have subjected a self-repairing copier to the same analysis; i.e., the separate markets for parts and service would not suggest that such an innovation was really a tie-in. (The separate opinion, we take it, makes roughly the same point by its observation about digital cameras. See Sep. Op. at 3-4.) Similarly, Professor Areeda argues that new products integrating functionalities in a useful way should be considered single products regardless of market structure. See X Areeda, Elhauge & Hovenkamp, ***Antitrust Law*** P 1746b. [14]

We emphasize that this analysis does not require a court to find that an integrated product is superior to its stand-alone rivals. See *ILC Peripherals Leasing Corp. v. International Business Machines Corp., 458 F. Supp. 423, 439 (N.D. Cal. 1978)* ("Where there **[**45]** is a difference of opinion as to the advantages of two alternatives which can both be defended from an engineering standpoint, the court will not allow itself to be enmeshed 'in a technical inquiry into the justifiability of product innovations.'") (quoting *Leasco, 537 F.2d at 1330*), *aff'd per curiam sub nom. Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980)*. We do not read § IV(E)(i) to "put[] judges and juries in the unwelcome position of designing computers." IX Areeda, ***Antitrust Law*** P 1700j at 15 (1991). The question is not whether the integration is a *net* plus but merely whether there is a plausible claim that it brings some advantage. Whether or not this is the appropriate test for ***antitrust law*** generally, we believe it is the only sensible reading of § IV(E)(i).

On the facts before us, Microsoft has clearly met the burden of ascribing facially plausible benefits to its integrated design as compared to an operating system combined with a stand-alone browser such as Netscape's Navigator. [15] **[**47]** Incorporating browsing **[*951]** functionality into the operating system allows applications to avail themselves of that functionality without starting up a separate browser **[**46]** application. J.A. 944, 965. [16] Further,

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[14] The antitrust question is of course distinct. The parties agree that the consent decree does not bar a challenge under the Sherman Act.

[15] This issue is peripheral on the Department's interpretation of § IV(E)(i), and the Department may not have contested it as vigorously as it might. The guidance this opinion seeks to provide is limited to setting out the legal framework for analysis. The ultimate sorting out of any factual disputes is a different question, and one we of course cannot resolve on the limited record before us.

[16] It is possible, of course, for applications vendors to bring about this Microsoft-created integration by distributing IE with their applications, which is apparently a relatively common practice. See J.A. 953, 966. Distribution by application vendors does not affect the conclusion that the integrated *design* brings benefits, nor does it suggest that IE has an existence apart from Windows 95. The consequence of this practice is simply that such applications upgrade the purchaser's operating system to the Windows 95/IE level. The customer's act of installing the application implements Microsoft's prior integration of IE into Windows 95.

The record also suggests that there are some inefficiencies associated with application vendors' redistribution of IE code. Application vendors' affidavits assert that if the browser is installed in computers before sale, "installation of our product is faster, we have reduced product support issues, the perceived footprint (memory use) of our product is smaller, and in general customer perception of our product is better." J.A. 953, 966. Although the drawbacks of installation by applications vendors can be alleviated by OEMs' preinstalling an integrated operating system containing IE technologies, the drawbacks are not necessary consequences of a standalone design, but rather incidental costs of a particular method of bringing about the benefits components of IE 3.0 and even more IE 4-especially the HTML reader--provide system services not directly related to Web browsing, enhancing the functionality of a wide variety of applications. J.A. 607-22, 1646-48. Finally, IE 4 technologies are used to upgrade some aspects of the operating system unrelated to Web browsing. For example, they are used to let users customize their "Start" menus, making favored applications more readily available. J.A. 490-95; 1662-64. They also make possible "thumbnail" previews of files on the computer's hard drive, using the HTML reader to display a richer view of the files' contents. J.A. 1664-69. Even the Department apparently concedes that integration of functionality into the operating system can bring benefits; responding to a comment on the proposed 1994 consent decree (which the Department published in the Federal Register as required by the Tunney Act), it stated that "a broad injunction against such behavior generally would not be consistent with the public interest." *59 Fed. Reg. 59426, 59428* (Nov. 17, 1994).

[48]** The conclusion that integration brings benefits does not end the inquiry we have traced out. It is also necessary that there be some reason Microsoft, rather than the OEMs or end users, must bring the functionalities together. See X Areeda, Elhauge & Hovenkamp, ***Antitrust Law*** P 1746b at 227; P 1747 at 229. Some more subtleties emerge at this stage, parallel to those encountered in determining the integrated status of Windows 95. Microsoft provides OEMs with IE 4 on a separate CD-ROM (a fact to which the Department attaches great significance). It might seem, superficially, that the OEM is just as capable as Microsoft of combining the browser and the operating system.

But the issue is not which firm's employees should run particular disks or CD-ROMs. A program may be provided on three disks--Windows 95 certainly could be--but it is not therefore three programs which the user combines. Software code by its nature is susceptible to division and combination in a way that physical products are not; if the feasibility of installation from multiple disks meant that the customer was doing the combination, no software product could ever count as integrated. The idea that in installing IE 4 an OEM is combining **[**49]** two stand-alone products is defective in the same way that it would be nonsensical to say that an OEM installing Windows 95 is itself "combining" DOS functionality and a graphical interface. As the discussion above indicates, IE 3 and IE 4 add to the operating system features that cannot be included without also including browsing functionality. See J.A. 1661-68. Thus, as was the case with Windows 95, the products--the full functionality of the operating system when upgraded by IE 4 and the "browser functionality" of IE **[*952]** 4-do not exist separately. [17] **[**50]** This strikes us as an essential point. If the products have no separate existence, it is incorrect to speak of the purchaser combining them. Purchasers who end up with the Windows 95/IE package may have installed code from more than one disk; they may have taken the browser out of hiding; [18] they may have upgraded their operating system--indeed, Netscape characterizes the installation of IE 4 as "really an OS [operating system] upgrade." J.A. 589. But they have not combined two distinct products.

What, then, counts as the combination that brings together the two functionalities? Since neither fully exists separately, we think the only sensible answer is that the act of combination is the creation of the design that knits the two together. OEMs *cannot* do this: if Microsoft presented them with an operating system and a stand-alone browser application, rather than with the interpenetrating design of Windows 95 and IE 4, the OEMs could **[**51]**

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of integration, namely, distribution of code by applications vendors. Thus they are not relevant to our comparison of the stand-alone and integrated designs.

[17] Our colleague's separate opinion suggests that IE may be separated from Windows 95 by treating some or all of the code that supplies operating system functionality as part of the operating system. Sep. Op. at 15. But apart from that code, there is nothing more to IE than the four lines of programming required to summon browsing functionality from code that also supplies operating system functionality. J.A. 1654. Those four lines look more like a key to opening IE than anything that could plausibly be considered IE itself.

[18] The preliminary injunction, as construed by the parties' later stipulation, treats Microsoft as in compliance if it allows the options of (1) running the Add/Remove Programs utility with respect to IE 3.x and (2) removing the IE icon from the desktop and from the Programs list in the Start menu and marking the file IEXPLORE.EXE "hidden." See above at p. 7. The injunction's evidently unique status as a remedy for a "tying" complaint, requiring the defendant merely to allow an intermediary to hide the allegedly tied product, suggests the oddity of treating as separate products functionalities that are integrated in the way that Windows 95 and IE are.

not combine them in the way in which Microsoft has integrated IE 4 into Windows 95. They could not, for example, make the operating system use the browser's HTML reader to provide a richer view of information on the computer's hard drive, J.A. 1665--not without changing the code to create an integrated browser. This reprogramming would be absurdly inefficient. Consequently, it seems clear that there is a reason why the integration must take place at Microsoft's level. This analysis essentially replays our comparison of Windows 95 to a bundle of MS-DOS and Windows 3.11 and concludes that the Windows 95/IE package more closely resembles Windows 95 than it does the bundle. The factual conclusion is, of course, subject to reexamination on a more complete record. On the facts before us, however, we are inclined to conclude that the Windows 95/IE package is a genuine integration; consequently, § IV(E)(i) does not bar Microsoft from offering it as one product.

* * *

A few words with respect to our colleague's separate opinion may clarify our position. Judge Wald suggests that "the prohibition and the proviso could reasonably be construed to state that Microsoft may offer an 'integrated' **[**52]** product to OEMs under one license only if the integrated product achieves synergies great enough to justify Microsoft's extension of its monopoly to an otherwise distinct market." Sep. Op. at 3. We are at a loss to understand how a section that (1) articulates a prohibition and (2) sets a limit on the reach of the prohibition [19] can be read to state a balancing test. Apart from the lack of textual support, we think that a balancing test that requires courts to weigh the "synergies" of an integrated product against the "evidence of distinct markets," Sep. Op. at 5, is not feasible in any predictable or useful way. Courts are ill equipped to evaluate the benefits of high-tech product design, [20] and even could they place **[*953]** such an evaluation on one side of the balance, the strength of the "evidence of distinct markets," proposed for the other side of the scale, seems quite incommensurable. Both *Jefferson Parish* and *Eastman Kodak* use their "distinct markets" analysis in a binary fashion: markets are distinct or they are not. See *466 U.S. at 21-22*; *504 U.S. 451 at 462*. If, as the record suggests, Microsoft proposed modification of the integration proviso because of concern about "vague **[**53]** or subjective criteria," J.A. 760, an interpretation requiring courts to weigh evidence that establishes distinctness (or does not) against a sliding scale of net synergistic value looks like the most total transvaluation one can imagine.

Institutional **[**54]** competence may not have been foremost in the parties' minds in drafting the consent decree, and judicial inability to apply a test does not ipso facto mean that the parties did not intend it. But if they did intend a balancing test, they kept that intent well hidden. Nothing in their contemporaneous conduct (or in the conduct of anyone, at any time) suggests that they contemplated a balancing inquiry. Windows 95 was not subjected to any such analysis, though the markets it unified were substantial and obviously distinct. J.A. 790-96. Indeed, one might think that an especially compelling case would be required to "justify Microsoft's extension of its monopoly," Sep. Op. at 3, via Windows 95. Windows 95 leveraged Microsoft's Windows 3.11 market power into the operating system market, where network externalities are most apparent. See *Microsoft, 56 F.3d at 1451*. According to the separate opinion, Windows 95 should have required the utmost justification. But nothing suggests that it was analyzed that way, and it seems more likely that it passed muster not because the synergies of its integration outweighed the evidence of distinct markets but because it was, simply, integrated.

The **[**55]** view expressed in the separate opinion seems sure to thwart Microsoft's legitimate desire to continue to integrate products that had been separate--and hence necessarily would have been provided in distinct markets. By its very nature "integration" represents a change from a state of affairs in which products were separate, to one in which they are no longer. By focusing on the historical fact of separate provision, the separate opinion puts a thumb on the scale and requires Microsoft to counterbalance with evidence courts are not equipped to evaluate. We do not

[19] The proviso may be read to do this either by clarifying the concepts of "Covered Product" and an "other product" to prevent an "integrated" product from constituting a forbidden duo, or by carving out an exception for integrated products even if they otherwise represent such a duo. We do not believe that the choice of approach makes a substantive difference.

[20] Our colleague seems to hint that one way to perform this evaluation is to examine whether the integrated product "overwhelms" the separate market. Sep. Op. at 10. But data on market performance will obviously not be available when the new product is introduced, and in any case, the overwhelming of the separate market is precisely what is feared and may simply indicate anticompetitive practices.

think that this makes sense in terms of the text of the consent decree, the evidence of the parties' intents, the values the decree was presumably intended to promote, or the competence of the judiciary.

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At this stage, then, the Department has not shown a reasonable probability of success on the merits. Given this failure, there is no reason to allow the preliminary injunction to remain in effect pending a proper hearing, and we reverse the district court's grant.

V.

Though the proceedings below may continue, they must do so without the preliminary injunction. With respect to the continuation, Microsoft argues that **[**56]** the "blanket" reference to a special master violates Article III, and, in the alternative, that the case does not present the exceptional circumstances required under ***HN13***[] *Federal Rule of Civil Procedure 53(b)* [21] and *La Buy v. Howes Leather Co., 352 U.S. 249, 1 L. Ed. 2d 290, 77 S. Ct. 309 (1957)*, to justify a nonconsensual reference. Future developments may moot this problem. In view of our interpretation of the consent decree, tentative though it be, see *University of Texas v. Camenisch, 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981)*; *Taylor v. FDIC, 328 U.S. App. D.C. 52, 132 F.3d 753, 766 (D.C. Cir. 1997)*, the Department may well regard further pursuit of the case as unpromising, especially given the alternate avenues **[*954]** developing in its recently launched separate attacks on Microsoft's practices, Nos. 98-1232 and 98-1233. But no such mooting has yet occurred. Accordingly, we address the questions of whether mandamus is available to correct the asserted illegality in the reference and, if so, whether it should issue in this case. We answer yes to both.

[57]** The Department claims that mandamus jurisdiction is lacking. Its primary theory is evidently that an unlawful reference can be reached by mandamus only if it is so outrageous as to fail to "comport[] with Article III." Supplemental Br. of United States 9. But *La Buy,* the Supreme Court's authoritative pass at the use of mandamus to correct illegal references, rests simply on the presence of "an abuse of [the judge's] power under *Rule 53(b)*," *352 U.S. at 256*, and on that abuse being "clear," *id. at 257*. To be sure, *La Buy* observed that the court of appeals there confronted a district court "practice" of freewheeling references to masters: "There is an end of patience." *Id. at 258*. But we have explicitly rejected the idea that mandamus is available only to correct "persistent disregard" of the limits on references. *In re Bituminous Coal Operators' Ass'n, 292 U.S. App. D.C. 309, 949 F.2d 1165, 1168 n.4 (D.C. Cir. 1991)*.

Of course it may be that the boundaries of *Rule 53(b)* and Article III are close, so that the *La Buy* Court, in addressing the *Rule 53* "exceptional conditions" criterion, was actually finding unconstitutional conduct. If true, this helps the **[**58]** Department not at all. If mandamus is available only to correct unconstitutional abdications of Article III power, but a clear abuse of discretion under *Rule 53* amounts to such an abdication, we may properly exercise mandamus jurisdiction if we find the same sort of clear abuse of discretion that the *La Buy* Court found.

It is objected that a challenge at the end of the proceeding provides ample remedy, and black-letter mandamus law tells us that such ***HN14***[] adequacy of remedy defeats mandamus. *In re Minister Papandreou, 139 F.3d 247, 1998 WL 163561* at *1 (D.C. Cir. 1998) (discussing mandamus criteria). See also *Stauble v. Warrob, Inc., 977 F.2d 690, 693 & n.4 (1st Cir. 1992)* (dictum to effect that "improvident" reference presents no danger of irreparable harm); *In re Thornburgh, 276 U.S. App. D.C. 184, 869 F.2d 1503, 1508 (D.C. Cir. 1989)* (reference to a master for purposes of determining relief is not an "abdication of the total judicial power" such as to justify mandamus). But the Court's action in *La Buy* appears necessarily to depend on the view that, at least at some point, even the temporary subjection of a party to a Potemkin jurisdiction so mocks the party's rights as to render **[**59]** end-of-the-line correction inadequate.

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[21] The rule provides in relevant part: "A reference to a master shall be the exception and not the rule. In actions … to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

On the merits, the Department defends the reference on three grounds. First, it asserts that it falls within the wellrecognized category of references for purely remedial determinations, such as the accountings and computations of damages, which Rule 53(b) expressly permits. Second, it claims that the technological complexity of the case and need for speed constitute "exceptional conditions" under the Rule. And third, it says that the order contains an implicit reservation by the district court of a power of *de novo* review, and that that unstated reservation saves the order.

In saying that the reference was merely for purposes of supervising remediation the Department invokes the wellestablished tradition allowing use of special masters to oversee compliance. See generally *Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089, 1097 (3d Cir. 1987)* (citing cases). But this is not such a situation. The issue here is interpretation, not compliance; the parties' rights must be determined, not merely enforced. The matters referred to the master are no more "remedial" than would be those of any total referral of a contract case. The concern **[**60]** about nonconsensual references turns on the determination of rights, not on a formalistic division of the juridical universe into pre-trial, trial and post-trial. It is for this reason that special masters may not decide dispositive pretrial motions. See *In re United States, 816 F.2d 1083, 1090 (6th Cir. 1987)*.

The Department also proposes that this is a case of such technological complexity as to be "exceptional." So far as the *meaning* of the consent decree is concerned, that **[*955]** is clearly false; the words are in plain English, and if their meaning is not clear it is not because of some deep technological issue but because of uncertainties in the purposes of the parties that drafted the decree, the sort of uncertainties that pervade contract actions. As for *application* of that meaning, we have just stated our interpretation, an interpretation that we regard as grounded, as are the related antitrust doctrines, in a realistic assessment of the institutional limits of the judiciary. Application of our reading of § IV(E)(i) does not require a software expert; it precludes Microsoft from any purely artificial "bolting" of functionalities but is otherwise deferential to entrepreneurs' **[**61]** product design choices. [22]

More broadly, if *La Buy* was not complex, with its six defendants and nearly 100 plaintiffs (87 in one suit, six in another), 27 pages of docket entries in one of the cases for preliminary pleas and motions, over 50 depositions, and intricate charges of monopolization and Robinson-Patman violations, *352 U.S. at 251-52*, we see no reason to think of this case as especially complicated. In fact, it is very doubtful that complexity tends to legitimate references to a master at all. *La Buy* noted that the complexity of an antitrust **[**62]** case, rather than justifying a reference, "is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work." *Id. at 259*.

Thus the only remaining question is whether some implicit district court reservation of a power of *de novo* review of the special master's report, as to both fact and law, could save the reference. First, we find no such implied reservation. The order itself recites that "the Special Master shall receive evidence and legal authority presented by the parties at such times and places, and in such manner as he shall prescribe, and shall *propose* findings of fact and conclusions of law for consideration by the Court on the issues raised by this case." J.A. 1301 (emphasis added). The Department suggests that the use of "propose" is somehow helpful, and distinguishes the reference from that in *Bituminous Coal,* which invited "*recommended* findings of fact and conclusions of law." *949 F.2d at 1166* (emphasis added). The difference in wording is immaterial, and in any event a special master's findings and conclusions are **[**63]** *always* advisory. Thus, even if we thought that a reservation of *de novo* review could save the reference we would have to vacate it, subject to possible re-issuance with an unequivocal commitment to non-deferential review. But we think, in fact, that no such rescue mechanism is available.

Microsoft notes ***HN15***[↑] *Rule 53(e)(2)*'s instruction that in non-jury trials, "the court *shall* accept the master's findings of fact unless clearly erroneous." (emphasis added). It reads this, as have courts and commentators, as making deferential review mandatory. See, e.g., *Williams v. Lane, 851 F.2d 867, 884 (7th Cir. 1988)*; *Apex*

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[22] To the extent that adjudication may lead the court into deep technological mysteries, we note the court's power under Rule of Evidence 706 to appoint expert witnesses. Whether such an expert is appointed by agreement of the parties or not, the expert's exposure to cross-examination by both sides, see Rule 706(a), makes the device a far more apt way of drawing on expert resources than the district court's unilateral, unnoticed deputization of a vice-judge.

Fountain, 818 F.2d at 1097; *In re Crystal Palace Gambling Hall, 817 F.2d 1361, 1364 (9th Cir. 1987)*; *In re United States, 816 F.2d at 1087, 1088*; 9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2605 at 670 (1995).

The Department counters with a footnote from *Stauble* to the effect that a district court may refer fundamental issues of liability if he affords *de novo* review. *977 F.2d at 698 n.13*. But compare *id. at 698 n.12* (explaining that, because the parties have agreed that if the reference were constitutionally **[**64]** deficient the remedy would be remand for a full trial before the district court, the court will leave for "another day" the possibility that a master's findings on liability might "perhaps be salvaged, even after appeal, by having the district court conduct a deeper, more participatory sort of review."). At most, however, the thought reflected in the *Stauble* footnote might save a reference from invalidation under the *Constitution;* **[*956]** that possibility would do little to make it any less the sort of clear abuse of discretion that is fatal under *La Buy.* The same is equally true of the observation in *United States v. Raddatz, 447 U.S. 667, 683 n.11, 65 L. Ed. 2d 424, 100 S. Ct. 2406 (1980)*, saying that the Court itself, in the exercise of its original Article III jurisdiction, acts on the basis of special masters' reports. Clearly that practice tells us nothing about the presence of a clear abuse of discretion under *Rule 53(b)*.

We note some ambiguity on this point in our decision in *Bituminous Coal.* Our concluding directive told the judge to "revise his order of reference … and to decide *de novo,* without deferring to a special master, all potentially dispositive **[**65]** questions of fact or law." *949 F.2d at 1169*. The Department thinks that this implicitly endorsed the possibility of a non-deferential reference. We think not. In *Bituminous Coal* we rejected the coal operators' suggestion that "*any* unconsented-to reference would constitute an abuse of judicial power," *id.* (emphasis added), but our rejection of that broad claim was based *not* on variations in scope of district court review but on our endorsement of the established and legitimate practice of using unconsented-to references for pretrial preparation or for implementation of remedies, *id.* And in the introductory summary of our disposition we said that the judge must "revise the order of reference to reserve for himself, and not delegate to the special master, the core function of making dispositive rulings, including findings of fact and conclusions of law on issues of liability." *Id. at 1166*. In short, when we said in *Bituminous Coal* that we were granting the writ "not because the district judge simply abused his discretion, but because he has no discretion to impose on parties against their will 'a surrogate judge,' " *id. at 1168* (citations omitted), we effectively **[**66]** ruled out nonconsensual references in nonjury cases except as to peripheral issues such as discovery and remedy. Compare *In re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985)* ("Beyond matters of account, difficult computation of damages, and unusual discovery, it is difficult to conceive of a reference of a nonjury case that will meet the rigid standards of the *La Buy* decision.") (internal quotations omitted).

In short, finding the case devoid of anything remotely "exceptional" within the meaning of *Rule 53(b)*, we believe the reference to a master must be vacated. We do not, accordingly, reach Microsoft's claims that the specific referee is biased or has conducted the proceedings on referral improperly.

VI.

The preliminary injunction was issued without adequate notice and on an erroneous reading of § IV(E)(i) of the consent decree. We accordingly reverse and remand. The reference to the master was in effect the imposition on the parties of a surrogate judge and either a clear abuse of discretion or an exercise of wholly non-existent discretion. We grant mandamus to vacate the reference.

So ordered.

Concur by: WALD (In Part)

Dissent by: WALD (In Part)

Dissent

WALD, Circuit Judge, **[**67]** concurring in part and dissenting in part: I depart from my colleagues only as to their interpretation of the consent decree, which I believe unnecessarily narrows the scope of the inquiry that the district court may conduct on remand. First, the majority opinion appears to decide that there is only one reasonable interpretation of section IV(E)(i), notwithstanding the fact that we are remanding for further factual development that may well be relevant to the most faithful interpretation of the section. Second, although the majority claims to have rooted its interpretation in ***antitrust law*** in accordance with the intent of the parties, it interprets section IV(E)(i) in a way that is, in fact, inconsistent with at least some governing precedent. For these reasons, I write separately to suggest that there may be an interpretation of section IV(E)(i) more consonant with the intent of the drafters and the weight of ***antitrust law***. If facts are found on remand to support such an alternative interpretation, it should not be foreclosed by the majority opinion.

Under the majority's interpretation, the proviso of section IV(E)(i), which says that **[*957]** section IV(E)(i) "in and of itself shall not **[**68]** be construed to prohibit Microsoft from developing integrated products," is too safe a harbor with too easily navigable an entrance: So long as Microsoft has created a design to combine functionalities in a way that offers the ultimate user some "plausible" advantage otherwise unavailable, Microsoft may require OEMs to install the resulting creation in its entirety, without fear of running aground on the main prohibition of section IV(E)(i) (which prohibits Microsoft from entering into any license agreement "in which the terms of that agreement are expressly or impliedly conditioned upon" the licensing of any "other product"). To my mind, this reading does not impose nearly enough scrutiny on "integration" and renders the central prohibition of section IV(E)(i) largely useless. *Cf.* *Beal Mortgage, Inc. v. FDIC, 328 U.S. App. D.C. 30, 132 F.3d 85, 88 (D.C. Cir. 1998)* (noting the "cardinal interpretive principle that we read a contract to give meaning to all of its provisions and to render them consistent with each other") (internal quotation omitted). The majority's interpretation would not, for example, appear to prevent Microsoft from requiring OEMs to license the right to sell computer peripherals (**[**69]** *e.g.,* mice) as a condition of licensing Windows 95 so long as Microsoft had the prescience to include code in Windows 95 that made the cursor more responsive to the enduser's touch than it would be with other mice. I think the majority would agree, however, that under any reasonable reading of section IV(E)(i), the tying of mice to Windows 95 would clearly be prohibited. [1] I fail to see why the analysis should be so different for software than for peripherals or why our "evaluation of a claim of integration must be [any more] narrow and deferential," Maj. Op. at 25, for software than for other computer-related products. *See, e.g., Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989)* (courts construe contractual provisions "without deferring to either party's interpretation"). Our role, after all, is to interpret the consent decree as we would a contract: in a manner that is "grounded in the text of the agreement and contemporaneous understandings of its purposes, not in our own conception of wise policy." *United States v. Western Elec. Co., Inc., 269 U.S. App. D.C. 436, 846 F.2d 1422, 1427 (D.C. Cir. 1988)*.

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[1] The majority asserts that if Microsoft tried to bundle its mouse with the operating system, "it would have to show that the mouse/operating system package worked better if combined by Microsoft than it would if combined by OEMs," a test that is "different from showing that the mouse works better with the operating system than other mice do." Majority Opinion ("Maj. Op.") at 23 n.11. But this seems to me to misstate the majority's own test, which asserts that "the act of combination is the creation of the design that knits the two together" and not which firm's employees effect the physical combination. *Id. at 28-30*. If this is the case, then the majority's test would consider whether the design that "knits together" Microsoft's mouse and the operating system offers advantages unavailable through the combination of a competitor's mouse and the operating system. This is, I think, a standard easily met. For instance, Microsoft could develop a mouse with a patented, modestly useful feature, design its operating system to work best when used with a mouse that had this feature, and then require OEMs to buy the two products together. The mouse and the operating system would qualify as integrated under the majority's test. The majority says that IE 4.0 and Windows 95 are integrated because the "full functionality of the operating system when upgraded by IE 4 and the 'browser functionality' of IE 4 … do not exist separately." *Id. at 29*. Likewise, the full functionality of the patented mouse and Microsoft's mouse-friendly operating system would not exist separately; the two would be designed for each other, and their full functionality would only exist when combined. Thus, under the majority's test, Microsoft would have avoided the effect of section IV(E)(i) altogether, even if its patented mouse was of little extra value to the user. I would not think that the proviso was intended to swallow the consent decree in this way.

[70]** Another--some might say more--reasonable reading of section IV(E)(i) would give much greater weight to the main prohibition of the section. On its face, that prohibition forbids Microsoft from requiring OEMs to accept under one agreement any offering that is in reality two products: a "Covered Product" and, for purposes of this case, an "other product." The proviso, on the other hand, permits Microsoft to develop and license "integrated" products. [2] Read together, I think the prohibition and the proviso **[*958]** could reasonably be construed to state that Microsoft may offer an "integrated" product to OEMs under one license only if the integrated product achieves synergies great enough to justify Microsoft's extension of its monopoly to an otherwise distinct market.

As I explain below, and as I read the majority opinion to agree, the consent **[**71]** decree was drafted against a backdrop of ***antitrust law***. Under ***antitrust law***, two products are considered distinct if there exists "sufficient consumer demand so that it is efficient for a firm to provide [the first product] separately from [the second]." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*. The difficulty in this case is that technological evolution can change the boundaries of what is "efficient." For example, *Eastman Kodak* cites cameras and film as examples of two functionally linked products for which there exist separate markets. *See* *id. at 463*. But ***antitrust law*** presumably would not bar the development of digital cameras, which do not require film in any conventional sense.

Thus, ***antitrust law*** cannot avoid determining whether a particular technological development has occurred because it is efficient or merely because it permits a monopolist to extend its monopoly to a new market. Software code is a particularly stark example of why such analysis is essential if antitrust concepts are to survive at all. Here, the majority effectively exempts software products from antitrust analysis by **[**72]** stating that "software code by its nature is susceptible to division and combination in a way that physical products are not." Maj. Op. at 28. But this to me is an argument for closer, rather than more relaxed, scrutiny of Microsoft's claims of integration. An operating-system designer who wished to turn two products into one could easily commingle the code of two formerly separate products, arranging it so that "Windows 95 without IE's code will not boot," *id. at 23 n.11*, so that Windows 95 without Internet Explorer would "represent a disabled version of Windows 95," *id. at 23*, and so that Internet Explorer instructs the Add/Remove function to leave so much of that program in place that "four lines of programming" will suffice to activate it, *see* *id. at 29 n.17*. This is not to say that commingling of code is *per se* pernicious or even suspicious. Rather, the point is that commingling alone is not sufficient evidence of true integration; the courts must consider whether the resulting product confers benefits on the consumer that justify a product's bridging of two formerly separate markets.

Although this task is difficult, it is by no means the impossible project that **[**73]** the majority suggests. As I explain below, traditional antitrust analysis, and the usual methods of the law, provide the courts with a range of ways to address the ultimate question of efficiency. *See, e.g., PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 817 (6th Cir. 1997)*, *cert. denied*, *138 L. Ed. 2d 195, 117 S. Ct. 2434 (1997)* (citation omitted) ("While we are mindful of the various efficiency gains that can accrue to both suppliers and consumers from bundling certain products together, we are confident that the antitrust laws provide the tools to distinguish between meritorious and non-meritorious claims."). As I see it, the efficiency calculus takes two factors into account. The first is evidence that there are real benefits to the consumer associated with integrating two software products; I call these benefits "synergies." [3] The second is independent evidence, of the type that is usually employed in antitrust analysis, that a genuine market exists for the two products provided separately. For example, Windows 95 includes a **[*959]** built-

[2] The proviso states only that Microsoft is permitted to "develop" integrated products, but the parties agree that "develop" should not be limited to mere research and development.

[3] The majority questions the institutional competence of the courts to judge the level of synergy provided by an "integrated" product. *See* Maj. Op. at 25. By no means do I endorse routine judicial intervention in the details of product design. But I also do not endorse (as the majority comes close to doing) judicial abdication in the face of complexity. The courts are certainly capable of determining whether a particular integration offers any synergistic benefits at all and whether these benefits are minimal, significant, or great. As this is a factual determination, they may be guided in this effort by, for example, affidavits, consumer surveys, and other evidence presented by the parties as well as testimony from experts selected by the parties or by the court. Certainly this approach is preferable to the majority's proposal, under which ***antitrust law*** surrenders to any bona fide assertion of a "plausible" benefit of integration.

in calculator program with relatively few functions. Although there may be few synergies associated with building this program into **[**74]** the operating system, there is also not likely to be much of a market for this program provided separately, and this factor must be taken into account. Market evidence of demand for independent products will spare the courts from the need to speculate in the abstract about considerations of efficiency.

[75]** Taken together, then, these two factors generate a balancing test. The greater the evidence of distinct markets, the more of a showing of synergy Microsoft must make in order to justify incorporating what would otherwise be an "other" product into an "integrated" whole. If the evidence of distinct markets is weak, then Microsoft can get by with a fairly modest showing (although perhaps not the minimal showing required by the majority). But if there are clearly two distinct markets, then Microsoft would need to demonstrate substantial synergies in order to compel OEMs to accept a new "integrated" product that bridges those markets. In other words, the decree does not purport to chill Microsoft's technological development of its products by prohibiting a product outright merely because it incorporates new features--the proviso makes clear that Microsoft is free to design such products and to market their benefits to OEMs such that OEMs overwhelmingly choose the new product over a competitor's product. [4] **[**76]** The proviso thus becomes a safe harbor only for those integrations in which the "other product" has been (legitimately) technologically subsumed in a greater whole. [5]

[77]** Thus, the real question for purposes of determining if a violation of the degree has taken place is whether a new combination of formerly separate functionalities still contains an "other product" or if the two functionalities have been legitimately blended, or "integrated," and so have lost their former identities and become one product to which the prohibition no longer applies. (This, of course, is a factual question to be explored on remand.) As I have already suggested, and as the majority agrees, given the context in which section IV(E)(i) arose, it is appropriate to look to ***antitrust law*** as a guide to determining when such integration occurs. Although the majority opinion claims that its construction is consistent with ***antitrust law***, *see* Maj. Op. at 22, it does not, in my view, give due weight to the Supreme Court's holding in *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80* ***[*960]*** *L. Ed. 2d 2 (1984)*, the leading guide to the separate product determination. [6] In *Jefferson Parish,* the Court

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[4] During his tenure as special master in this case, Lawrence Lessig offered a similar, although not identical, interpretation of section IV(E)(i) in a letter that has been made part of the record in this appeal. *See* Letter from Lessig to Malone *et al.,* January 19, 1998 (asserting that the prohibition of section IV(E)(i) forbids only tying through contract; it does not, as the proviso makes clear, forbid tying through technological efforts). The fact that Professor Lessig has proposed this quite plausible alternate interpretation of section IV(E)(i) does not, of course, suggest that his interpretation is the only acceptable one--that is a matter for the proceedings on remand to determine.

[5] The majority expresses puzzlement as to how a section "that (1) articulates a prohibition and (2) sets a limit on the reach of the prohibition" can be read to state a balancing test. Maj. op. at 31. As I read section IV(E)(i), its application turns on distinguishing two products from a single, integrated product. The section surely requires that the product be *legitimately* integrated; otherwise, section IV(E)(i) would have no force. One plausible interpretation of the decree is that it refers the court to ***antitrust law*** to decide whether a product is legitimately integrated; in these circumstances, the antitrust analysis requires balancing. For my part, I am at a loss to understand how a consent decree that is clearly intended to limit Microsoft's conduct could be read to impose so little scrutiny of that conduct.

One might ask why, under my proposed reading, section IV(E)(i) contains a proviso at all. I think it possible that the proviso was intended, "in the intensely lawyered atmosphere surrounding this decree, to make assurance doubly sure," *United States v. Western Elec. Co., Inc., 304 U.S. App. D.C. 199, 12 F.3d 225, 238 (D.C. Cir. 1993)* (Williams, J., dissenting)--in other words, that it was a lawyerly redundancy. I do not think, however, that it is necessary to read the proviso as serving so limited a function. Under my reading, the proviso serves to clarify that the prohibition of section IV(E)(i) is not boundless--that a product is not barred simply because it contains new combinations of previously existing functionalities. The proviso thus functions to eliminate one possible reading of section IV(E)(i). Given that the proviso is cast in terms of interpretation-it says that section IV(E)(i) "shall not be construed" to bar integrated products--it is appropriate to accord it this limited, interpretive function.

[6] The majority rejects DOJ's contention that a product is separate if Microsoft so treats it, *see* Maj. Op. at 19-20, but it does not address the government's associated contention that a product is separate if ***antitrust law*** so treats it, *see* *id. at 19* (noting DOJ's citation of *Jefferson Parish*).

considered whether anesthesiological services, which a hospital had required patients to take only from certain anesthesiologists, were in fact separate **[**78]** products from the other services provided by the hospital or, rather, were part of what the hospital claimed was a "functionally integrated package of services." *Id. at 19*. In rejecting the hospital's argument that such a package did not involve a tying arrangement, the Court held that "the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Id.* Thus, the fact that the hospital provided "the space, equipment, maintenance, and other supporting services necessary to operate the anesthesiology department," purchased the necessary drugs and supplies, and furnished the required nursing personnel, *id. at 6*, did not prevent a finding of separateness, nor did the district court's conclusion that the hospital believed that a "closed system" anesthesiology department "resulted in the best quality of patient care." *Hyde v. Jefferson Parish Hosp. Dist. No. 2, 513 F. Supp. 532, 540 (E.D. La. 1981)*. In other words, despite the overlap between the services provided by the hospital and those provided by the anesthesiologist, and despite the claimed benefits **[**79]** of an "integrated" relationship, the Court held that the proper focus of analysis was whether the arrangement tied two distinct markets for products that are separate from the buyer's perspective. *See* *Jefferson Parish, 466 U.S. at 19-20* (citing *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*, and *Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969))*. It is not clear to me why this analysis should be markedly less applicable in the technological context; indeed, the post-*Jefferson Parish* trend is to apply its test even in the technological realm. *See, e.g.,* *Allen-Myland, Inc. v. International Bus. Machs. Corp., 33 F.3d 194, 211-12 (3d Cir. 1994)* (computer parts and installation); *Service & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 684 (4th Cir. 1992)* (diagnostic software and maintenance/repair service); *Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1339 (9th Cir. 1984)* (central processing units and operating system); *cf.* *Jefferson Parish, 466 U.S. at 25 n.42* ("In the past, we have refused to tolerate manifestly anticompetitive conduct simply because **[**80]** the health care industry is involved.").

The tying analysis is, of course, a pragmatic one. For example, no one would claim that tying law was violated by the practice of selling shoes in pairs despite the possible existence of some market for only left shoes (among those with only one foot, for example, or with differently sized feet). Likewise, it is in all likelihood not a tying violation for *Jefferson Parish*'s hospital to require that patients accept the hospital's receptionists (instead of bringing their own) and accept the cleaning services and meals provided in their rooms (instead of making other arrangements) and to charge patients for these services. This is so even though there might be a **[**81]** limited group of patients who would prefer to make their own arrangements for receptionists, cleaning, and meals. *Cf.* *Jefferson Parish., 466 U.S. at 22 n.36* (noting that the antitrust analysis might differ for "radiologists, pathologists, and other types of hospital-based physicians"); *see also* *Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 703 (7th Cir. 1984)* (noting that "the practice has been to classify a product as a single product if there are rather obvious economies of joint provision"). In the case of the shoes, the receptionist, and the cleaning, a judgment is made that the benefits of joint provision clearly predominate over what is undoubtedly a minimal separate market (if one can be said to exist at all). In the case of the anesthesiologist, by contrast, the Court found that the claimed benefits--24-hour anesthesiology coverage, **[*961]** flexible scheduling, and facilitation of work routine, professional standards, and equipment maintenance--were not sufficient to justify joint provision because there was a very substantial market for anesthesiologists' services and because these benefits could be achieved without the forced tie (by, for example, promoting **[**82]** the benefits of the hospital's anesthesiologists to patients and setting standards of compatibility). *See* *Jefferson Parish, 466 U.S. at 25 n.42*. Under this doctrine, then, an "integrated" product cannot simply be one where *some* benefit exists as a result of joint provision, since the hospital easily met this standard. Rather, "integration" must mean something more: a combination of functionalities in which the synergies created predominate over the existence of a separate market--in other words, where the benefits of the combination dissuade consumers from seeking and suppliers from providing the alleged "tied" product. [7]

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[7] As to the majority's observation that a product is not "integrated" if OEMs could perform the integration equally well on their own, my only comment is that this is an obvious point, and I am unclear what it adds to the analysis. A synergy should only count as such if it has benefits that the purchaser could not achieve equally well on his own. For example, there are synergistic benefits to combining cookies and milk, but a consumer can achieve them perfectly well at home. Thus, a supermarket could not ordinarily invoke this synergy as a justification for requiring cookies and milk to be bought together.

[83]** This alternative interpretation of section IV(E)(i) also accommodates the majority's "paradigm" case. The mere provision of Windows 3.11 and DOS 6.22 as a single product may have created some benefits--reduction of transaction costs, guaranteed compatibility, and a single source of customer support services, for example. These benefits were not, however, enough to overwhelm the existence of a separate operating system market--indeed, the very presence of Novell's product as an operating system to be used with Windows 3.11 suggests the existence of such a market. *See, e.g.,* J.A. 845 (DG IV Statement of Objections) ("Such tying affects the competitive freedom of the licensee to find a better substitute or obtain better terms for the operating system to be used with Windows."). Windows 95, however, is a different matter. In that case, the whole is clearly greater than the sum of its parts--as the majority notes, "it is not simply a graphical user interface running on top of MS-DOS." Maj. Op. at 23. And it is clear on the present record that Microsoft, at least, understood Windows 95 to provide such benefits. *See, e.g.* J.A. 1101 (Microsoft's "Windows 95 Feature Review") ("When **[**84]** you first boot Windows 95 it is immediately apparent that the old world of Windows running on top of MS-DOS is no more."). Thus, the synergistic benefits appear to have been large enough so that it would have been reasonable for DOJ to agree to treat Windows 95 as an integrated product. [8]

The majority's interpretation, however, departs from this precedent by accepting any "plausible claim" that the combination (*i.e.,* the design) offers "some advantage." Maj. Op. at 26-27. Of course, both the majority's interpretation and my alternative proposal would discredit any specious claims of integration--Microsoft's **[**85]** claim that it could simply put two disks in the same box and claim integration, for example, *see* *id. at 21*, would hardly merit a second thought. But the majority's considerable deference to Microsoft's plausible claims of advantage, coupled with Microsoft's privileged knowledge of the inner workings of its operating system, barely raises the bar of section IV(E)(i) above ground level. It is difficult to imagine how Microsoft could not conjure up *some* technological advantage for any currently separate software product it wished to "integrate" into the operating system. [9] And for **[*962]** the majority, the chase ends there: Internet Explorer, it contends, shares code with the operating system in a way that other browsers do not, and therefore it is integrated. But the fact that parts of Internet Explorer share code with the operating system and thus with other applications should not end the analysis any more than did the fact that the anesthesiologists in *Jefferson Parish* shared hospital equipment and personnel with the hospital and its staff (or that the hospital could identify some minor practical benefits to requiring the use of only certain anesthesiologists). The analysis **[**86]** must also consider whether Internet Explorer is a separate product under ***antitrust law***, that is, whether "consumers differentiate between [Internet Explorer] and [Windows 95]" such that consumers desire to purchase--and hence that manufacturers desire to supply--a substitute for Internet Explorer from another manufacturer; in other words, whether there is "a distinct product market in which it is efficient to offer [the tied product] separately from [the tying product]." *Jefferson Parish, 466 U.S. at 22*; *see also* *Digidyne, 734 F.2d at 1339* ("the undisputed facts summarized in the district court's opinion establish that a demand existed for NOVA instruction set CPUs [central processing units] separate from defendant's RDOS [operating system], and that each element of the NOVA computer system could have been provided separately and selected separately by customers if defendant had not compelled purchasers to take both"). Whether such a market exists, and whether it is significant enough to outweigh the particular synergies associated with integrating IE 3.0 and/or IE

[8] The majority objects that there is no evidence that Microsoft and DOJ subjected Windows 95 to a balancing analysis. Maj. Op. at 31-32. Because of the procedural posture of this case, however, there is little evidence of any kind in the record as to what the parties to the consent decree intended. There is certainly no indication that Microsoft and DOJ subjected Windows 95 to the majority's minimal test.

[9] The majority's test would seem to permit Microsoft to "integrate" word-processing programs, spreadsheets, financialmanagement software, and virtually any other now-separate software product into its operating system by identifying some minimal synergy associated with such "integration." In effect, the majority has fashioned a broad exemption from the antitrust laws for operating system design, apparently because an operating system is not like a peripheral, whose "physical existence makes it easier to identify the act of combination." Maj. Op. at 23 n.11. Surely, however, physical existence cannot serve as a limitation to the application of ***antitrust law***--the provision of services, for example, is a mutable "product" without tangible existence and yet has often been the subject of antitrust analysis. *See, e.g.,* *Jefferson Parish, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551* (anesthesiological services); *Allen-Myland, 33 F.3d 194* (installation of computer parts); *Service & Training, 963 F.2d 680* (computer maintenance and repair services).

4.0 into Windows 95, is, of course, a factual determination within the province of the district court. **[**87]** Relevant indicators in the market analysis, however, would surely include (1) whether manufacturers of other operating systems require OEMs to include a particular browser, *see, e.g., Jefferson Parish, 466 U.S. at 23 n.39* (noting that "other hospitals often permit anesthesiological services to be purchased separately"); X AREEDA, ***ANTITRUST LAW*** P 1746, at 225 (1996) (suggesting comparison of alleged tie with practices in analogous competitive markets); (2) whether Microsoft's own actions reflect a perception of a competitive market for "Internet Explorer" separate from the market for Windows 95, *see, e.g., AllenMyland, 33 F.3d at 208-09* (noting probative value of internal reports in determining distinct product markets); and even (3) the very existence of competitor browser manufacturers, *see, e.g., Eastman Kodak, 504 U.S. at 462* (noting that "the development of the entire high-technology service industry is evidence of the efficiency of a separate market for service"). The majority opinion, however, relies on none of these considerations. By discounting the relevance of such analysis, the majority in fact shorts traditional ***antitrust law***.

[88]** Despite the plausibility of this alternative interpretation, the extent to which ***antitrust law*** was intended to inform the interpretation of the decree--specifically the interpretation of the terms "integrated product" and "other product"--is another question best left open to the district court on remand. Everyone agrees, I believe, that section IV(E)(i) of the decree is ambiguous--indeed, had it been unambiguous, the district court could have fished or cut bait, *i.e.,* it could have determined either that Microsoft's actions constituted contempt or that they did not violate the decree at all. Thus, I do not read the majority opinion to say at any point that there is a plain meaning of section IV(E)(i) that can be located in the text alone. To the contrary, we are relegated to ordinary principles of contract law: searching for the parties' intent and guided in that adventure by "conventional 'aids to construction,' including **[*963]** the 'circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree.' " *United States v. Western Elec. Co., 282 U.S. App. D.C. 271,* ***[**89]*** *894 F.2d 430, 434 (D.C. Cir. 1990)* (quoting *United States v. ITT Continental Baking Co., 420 U.S. 223, 238, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975))*. Under these principles, the interpretation of an ambiguous contract involves factual findings as to the parties' intent. *See, e.g., Bennett Enters., Inc. v. Domino's Pizza, Inc., 310 U.S. App. D.C. 192, 45 F.3d 493, 497 (D.C. Cir. 1995)*; *Carey Canada, Inc. v. Columbia Cas. Co., 291 U.S. App. D.C. 284, 940 F.2d 1548, 1553-54 (D.C. Cir. 1991)*. In non-plain meaning cases such as this one, appellate courts generally decline to embark on their own factfinding mission, deferring to the district court's role as the primary factfinder and reviewing its findings only for clear error. *See, e.g., United States v. Insurance Co. of N. Am., 327 U.S. App. D.C. 383, 131 F.3d 1037, 1042-43 (D.C. Cir. 1997)* (declining to determine intent of parties to contract on the basis of incomplete record and remanding for further findings). While the district court below did conclude that "reading [section] IV(E)(i) in light of its avowed purpose raises a logical inference that the parties anticipated the use of [tying law] antitrust precedents **[**90]** in determining the application of [section IV(E)(i)] to the conduct the government challenges here," *United States v. Microsoft Corp., 980 F. Supp. 537, 542 (D.D.C. 1997)*--a conclusion that suggests that *Jefferson Parish,* decided well before the parties' agreement, is indeed relevant to the construction of the decree--it is not inconceivable that, given notice and an adequate opportunity to present evidence and arguments, the parties will succeed in persuading the district court otherwise. [10] The majority opinion, however, leaves little room for such efforts--its interpretation seems clearly meant to be the last word. [11]

[91]** Finally, and relatedly, I note that when the parties' contemporaneous understanding of section IV(E)(i) is ultimately revealed, there is further work to be done on *how* the parties intended that understanding to be applied. Should the district court conclude that whether something is an "other product" depends on the existence of a separate market for that product, it must still determine how that "something" is defined--in this case, "Internet Explorer." Here, again, the majority relies heavily on a presumption that "Internet Explorer" contains code that upgrades the operating system as well as code that enables end-users to access the Internet and therefore

[10] Indeed, the district court acknowledged that "disputed issues of technological fact, as well as contract interpretation, abound as the record presently stands." *Microsoft, 980 F. Supp. at 543*.

[11] The majority's assertion that "the district court made no findings of fact as to intent to which we could defer," Maj. Op. at 15 n.7, makes restraint particularly appropriate.

concludes that there is no "separate" product for any tie-in analysis. *See* Maj. Op. at 29. [12] The validity of that perception is not so evident to me. The fact that the supplies and equipment that made the anesthesiologist's job possible in *Jefferson Parish* remained at the hospital--that, in a manner of speaking, the anesthesiologist was something of an interface between the end-user patient and the hospital's "operating system"--did not prevent the Court from concluding that his portion of the service constituted **[**92]** a separate product. Unfortunately, perhaps due to the irregular nature of the preliminary injunction proceedings, the district court made little in the way of findings concerning what the linchpin product "Internet Explorer" is intended to encompass. [13] **[**94]** It would not be unreasonable, **[*964]** as the prior discussion suggests, to approach the problem from the perspective of a typical end-user, who most likely regards "Internet Explorer" as a particular vehicle for accessing information on the Internet, regardless of the underlying code associated with that process. The fact that, as the majority suggests, *see* Maj. Op. at 29-30, "Internet Explorer" distributes certain code to the operating system may simply suggest that some or all of this code should not be considered part of "Internet Explorer" at all but part of the operating system. Or perhaps the work that this code does could be done equally well by similar code written by Netscape or some other competitor, in which case the code's function is not necessarily an operating system function at all. [14] Which approach to the meaning of "product" was the contemporaneous understanding of the parties to the decree, however, remains to be determined. **[**93]**

Furthermore, the record suggests that many of the benefits that the majority asserts for the incorporation of Internet Explorer into Windows 95, including customizing of "Start" menus and "thumbnail" previews, *see* *id. at 27-28*, are provided only by Internet Explorer 4.0 and not by Internet Explorer 3.0. *See, e.g.,* J.A. 490-95, 1664-69. The majority seems to conclude that IE 3.0 and Windows 95 are "integrated" on the basis of little or no evidence. Should more evidence on this point come to light, the district court thus cannot be bound by the **[**95]** majority's conclusions. As to IE 4.0, the district court's preliminary conclusions seemed to hinge on the fact that Microsoft had offered the program only on a separate disk and not on the technology involved, *see* *Microsoft, 980 F. Supp. at 544*, thus suggesting that more factfinding also needs to be done as to IE 4.0.

Because I believe there is significant further factfinding as to intent and operation to be accomplished by the district court on remand, I would not rule out its authority to reissue a preliminary injunction. [15] That is why I am troubled by

[12] Notably, the majority's assertion to this effect relies on testimony presented by Microsoft during hearings on whether Microsoft had failed to comply with the preliminary injunction, testimony that was challenged by the government. *See* Maj. Op. at 29 (citing, *e.g.,* J.A. 1661-68). The parties' eventual settlement of this dispute, *see* J.A. 1780 (Stipulation and Order), obviated any need for factual findings on this issue by the district court. Given that much of the testimony involved in-court demonstrations, *see, e.g.,* J.A. 1661-72, I believe that it would be premature for this court to weigh in with its own resolution of this factual dispute.

[13] The district court's opinion does refer to one unit of analysis as "the software code that Microsoft itself now separately distributes at retail as 'Internet Explorer 3.0,' " *Microsoft, 980 F. Supp. at 544*, but the usefulness of this description was called into question in subsequent proceedings. *See* J.A. 1619 (assertion by Microsoft executive that it distributed no product at retail titled "Internet Explorer 3.0"); J.A. 1780 (agreement by DOJ and Microsoft that removal of only certain files would comply with preliminary injunction).

[14] A word-processing program, for example, may contain a dictionary feature as well as update certain operating-system code once installed. The fact that other applications may call on the dictionary files, or that if the word-processing program were removed in its entirety, certain operating-system files would be "degraded," does not necessarily mean that the word-processing program is integrated with the operating system. It may be that only part of the program is so integrated, or it may be that none of it performs an operating-system function.

[15] In this respect, I note that this court has rejected the notion that the requirement that the government show a "substantial likelihood of success" means "to a certainty" or even "to 51 percent." *See* *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 182 U.S. App. D.C. 220, 559 F.2d 841, 844 (D.C. Cir. 1977)*. Rather, because the district court is to assess the propriety of a preliminary injunction in light of the relative strengths of all four factors (likelihood of success on the merits, irreparable injury, harm to other parties, and furtherance of the public interest), "the necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." *559 F.2d at 843*.

the seemingly authoritative nature of the interpretation of section IV(E)(i) in the majority opinion, which would appear to foreclose any other interpretation of the section and proviso that might evolve in further proceedings and justify either a preliminary or a permanent injunction. To that extent, I respectfully dissent from the majority opinion.

[96]**

George Haug Co. v. Rolls Royce Motor Cars

United States Court of Appeals for the Second Circuit

May 27, 1998, Argued ; June 24, 1998, Decided

Docket No. 97-9238

Reporter

148 F.3d 136 *; 1998 U.S. App. LEXIS 13467 **; 1998-1 Trade Cas. (CCH) P72,191

GEORGE HAUG CO., INC., Plaintiff-Appellant, v. ROLLS ROYCE MOTOR CARS INC., Defendant-Appellee.

Prior History: [1]** Appeal from judgment of the United States District Court, Southern District of New York, entered on an Order granting a motion pursuant to *Federal Rule of Civil Procedure 12(b)(6)* dismissing the amended complaint for failure to state a cognizable claim under the Sherman Act *§ 1*, Sherman Act *§ 2*, and of the Robinson-Patman Act *§§ 2(a)*, *(d)* and *(e)*, and consequently dismissing pendent state law claims for violation of *N.Y. General Business Law § 340* and breach of contract.

Disposition: Affirmed in part and remanded with instructions to reinstate the claim under the Robinson-Patman Act and the pendent state law claims.

Core Terms

price discrimination, amended complaint, Robinson-Patman Act, purchasers, customers, allegations, secondary-line, Sherman Act, antitrust, commerce, differential, primary-line, competitor, commodity, cases, discounts, terms, anti trust law, Clayton Act, discriminate, competed, competitive injury, prohibitions, dealerships, facilities, pricing, repair

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's decision to dismiss an amended complaint under *Fed. R. Civ. P. 12(b)(6)*. Dismissal of a complaint should not be upheld unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. When a federal court reviews the sufficiency of a complaint, before the reception of any evidence, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. In antitrust cases in particular, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Nonetheless, it is not proper to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN2[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. *15 U.S.C.S. § 1*. *Section 2* of the Sherman Act provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states shall be deemed guilty of a felony. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

A private plaintiff seeking to state a claim for violation of *§§ 1* or *2* of the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, must allege that it has suffered antitrust injury. The antitrust injury requirement obligates a plaintiff to demonstrate, as a threshold matter, that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. The antitrust laws have been enacted for the protection of competition, not competitors.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN4[] **Robinson-Patman Act, Claims**

Anti-competitive injury need not be alleged to sustain a claim for violation of the Robinson-Patman Act (Act); a price differential, direct or indirect, between secondary-line competitors is enough. The Act requires that each purchaser be given an equal opportunity by the seller to receive the benefit of higher or lower prices.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN5[] **Robinson-Patman Act, Claims**

Section 2(a) of the Robinson-Patman Act provides, in pertinent part, that it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. 15 U.S.C.S. § 13(a).

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN6[] **Defenses, Cost Justification Defense**

In order to establish secondary-line price discrimination under § 2(a) of the Robinson-Patman Act, 15 U.S.C.S. § 13(a), a plaintiff has the burden of establishing four facts: (1) that seller's sales were made in interstate commerce; (2) that the seller discriminated in price as between the two purchasers; (3) that the product or commodity sold to the competing purchasers was of the same grade and quality; and (4) that the price discrimination had a prohibited effect on competition. A private plaintiff who has proved a violation of § 2(a) must, in order to recover damages under § 4 of the Clayton Act, demonstrate that it suffered actual injury to its business or property as a result of the price discrimination. Moreover, § 2(a) affords defendants two defenses based on certain cost justifications and/or changing conditions, respectively.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN7[] **Robinson-Patman Act, Claims**

Price discrimination claims under *§ 2(a)* of the Robinson-Patman Act, *15 U.S.C.S. § 2(a)*, generally fall into three categories. The first, primary line price discrimination, occurs when a seller's price discrimination harms competition with the seller's competitors. The second, secondary-line price discrimination, occurs when a seller's discrimination impacts competition among the seller's customers; i.e. the favored purchasers and disfavored purchasers. The third, tertiary-line violation, occurs when the seller's price discrimination harms competition between customers of the favored and disfavored purchasers, even though the favored and disfavored purchasers do not compete directly against another.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

HN8[] **Robinson-Patman Act, Claims**

The language in *§ 2(a)* of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, relating to injury to competition is the key to the legality of most differential pricing practices and has engendered significant legal uncertainty as courts have struggled to determine what degree and type of market consequences will constitute the proscribed statutory effect on competition in various commercial situations. As a prerequisite to establishing competitive injury in a secondary line price discrimination case, a plaintiff must prove that it was engaged in actual competition with the favored purchasers as of the time of the price differential.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN9[] **Price Discrimination, Competitive Injuries**

Determining the presence or absence of functional competition between purchasers of a commodity is simply a factual process which focuses on whether these purchasers were directly competing for resales among the same group of customers.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > Robinson-Patman Act Exemptions

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10[] Price Discrimination, Defenses

Section 2(a) of the Robinson-Patman Act, 15 U.S.C.S. § 13(a), does not categorically exempt price discrimination between parties competing at different functional levels. To satisfy this competitive nexus requirement, it must be shown that, as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market. The hypothetical predicate for allowing functional discounts is that price differential merely accords due recognition and reimbursement for actual marketing functions.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN11[] Robinson-Patman Act, Claims

Section 2(a) of the Robinson-Patman Act (Act), 15 U.S.C.S. § 13(a), does not provide a safe harbor for any and all functional discounts. While generally functional discounts are permissible under the Robinson-Patman Act, defendant may be liable under § 2(a) where functional discounts are untethered to supplier's savings or the wholesaler's costs.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN12[] Robinson-Patman Act, Claims

Once the existence of a competitive relationship has been established, the plaintiff must demonstrate a reasonable possibility that competition has been harmed as a result of the price differential. The Robinson-Patman Act (Act) is especially concerned with protecting small businesses, and therefore § 2(a) of the Act, 15 U.S.C.S. § 13(a) is intended to justify a finding of injury to competition by a showing of injury to the competitor victimized by the discrimination. Competitive injury may be inferred from evidence demonstrating injury to an individual competitor.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN13[] Robinson-Patman Act, Claims

The Robinson-Patman Act should be reconciled with other antitrust laws.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN14[] **Robinson-Patman Act, Claims**

Price discrimination within the meaning of *§ 2(a)* of the Robinson-Patman Act (Act), *15 U.S.C.S. § 13(a)*, is merely a price difference. By its terms, the Act condemns price discrimination only to the extent that it threatens to injure competition.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN15[] **Robinson-Patman Act, Claims**

The statutory structure under the Robinson-Patman Act that prohibits primary-line price discrimination stands on an entirely different footing than the statutory scheme that proscribes secondary-line discrimination. Primary-primary discrimination is prohibited under the Clayton Act of 1914, which originally condemned discrimination that might substantially lessen competition or tend to create a monopoly in any line of commerce. The statutory intent is to prevent large corporations from invading markets of small firms and charging predatory prices for the purpose of destroying market wide competition, and thus specifically applied only to primary-line injury.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN16[] Robinson-Patman Act, Coverage

Secondary-line discrimination is forbidden by the Robinson-Patman Act, *15 U.S.C.S. §§ 13-13b* and *21a*, which amends the original Clayton Act of 1914's price discrimination proscriptions. Congress has clearly intended the Robinson-Patman Act's provision to apply only to secondary-line cases, not to primary-line cases. In contrast to the Sherman Act and the Clayton Act, which are intended to proscribe only conduct that threatens consumer welfare, the Robinson-Patman Act's framers have intended to punish perceived economic evils not necessarily threatening to consumer welfare per se. In particular, the Robinson-Patman Act's amendments to the Clayton Act stem from dissatisfaction with the original Clayton Act's inability to prevent large retail chains from obtaining volume discounts from big suppliers, at the disadvantage of small retailers who competed with the chains.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN17[] Robinson-Patman Act, Remedies

While the Clayton Act of 1914 only proscribes conduct that may substantially lessen competition or tend to create a monopoly, the Robinson-Patman Act adds the following passage: or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. The purpose of this passage is to relieve secondary-line plaintiffs, small retailers who are disfavored by discriminating suppliers, from having to prove harm to competition market wide, allowing them instead to impose liability simply by proving effects on individual competitors.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN18[] Antitrust & Trade Law, Robinson-Patman Act

See *15 U.S.C.S. §§ 13(d)*, *13(e)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN19[] Robinson-Patman Act, Claims

Sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C.S. §§ 13(d) and 13(e), are designed to prohibit indirect price discrimination in the form of advertising and other promotional allowances made available to purchasers on disproportionate terms. Sections 2(d) and 2(e) differ in that in the former, the purchaser supplies the services or facilities and the supplier repays the purchaser; in the latter, the seller supplies the services and facilities for use of the customer in facilitating resales.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN20[] Price Discrimination, Competitive Injuries

Some of the substantive elements of §§ 2(d) and 2(e) of the Robinson-Patman Act (Act), 15 U.S.C.S. §§ 13(d), 13(e), mirror those of § 2(a) of the Act, 15 U.S.C.S. § 13(a). Courts have read in the in commerce requirement into both §§ 2(d) and (e). The plaintiff must demonstrate that the goods or commodity apply only to offers to customers competing in the same geographic area and reselling at the same functional level. In addition, the plaintiff must demonstrate actual injury. Sections 2(d) and 2(e) differ from § 2(a) in that no injury to competition need be demonstrated. In addition, neither §§ 2(d) or 2(e) has any built-in defensive matter, as does § 2(a). the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the § 2(b) of the Act, 15 U.S.C.S. § 13(b), proviso.

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Judges: Before: Hon. Guido Calabresi, Circuit Judge, Hon. Milton Pollack [*] and Hon. Christopher F. Droney [**] **[**2]** , District Judges [***].

Opinion by: MILTON POLLACK

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[*] The Honorable Milton Pollack, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

[**] The Honorable Christopher F. Droney, District Judge of the United States District Court for the District of Connecticut, sitting by designation.

[***] Pursuant to 28 U.S.C. § 46(b) and an order of the chief judge of this Court certifying a judicial emergency, this case was heard by an emergency panel consisting of one judge from this court and two judges of the United States District Court sitting by designation.

Opinion

[*138] Milton Pollack, *Senior District Judge*

From 1967 until November 10, 1995, plaintiff ("Haug") was an authorized parts and service dealer of Rolls Royce automobiles in New York County. The defendant, Rolls Royce Motorcars, Inc. ("Rolls Royce") is an importer and wholesaler of Rolls Royce automobiles and parts and is the distributor thereof. Rolls Royce controlled the market for parts with respect to its automobiles known as the "after market parts". This action was commenced on August 16, 1996. The amended complaint alleged that at the instigation of a competitor of plaintiff, namely Carriage House, Rolls Royce conspired and agreed to drive plaintiff out of the business of repairing and servicing Rolls Royce automobiles as an authorized service center, to restrain trade and monopolize trade for parts and services, and to discriminate against plaintiff so as to prevent **[**3]** plaintiff from competing effectively. The amended complaint asserts that Rolls Royce officials were paid commercial bribes to do so. In furtherance of the conspiracy, the amended complaint further asserts that preferences were given by Rolls Royce to Carriage House consisting of more favorable credit and price terms to Carriage House with respect to parts; payment of the rent of Carriage House; allowing Carriage House a price differential and allowing Carriage House a more favorable basis for reimbursements for warranty work; and also enabling Carriage House to offer customers free work paid for by Rolls Royce while requiring Haug to charge similarly situated customers. The amended complaint alleges that during the four years prior to termination, the plaintiff was injured to a substantial monetary degree.

None of the allegations of the amended complaint were disputed by defendant. No depositions were taken, no discovery was had, and no supporting affidavits were filed by defendant; the motions were decided solely on the allegations of the amended complaint and the notice of the claims appearing from the pleading.

The District Court ruled that the amended complaint was insufficient **[**4]** as a claim for violation of the Sherman Act on the grounds that it did not allege "antitrust injury." Further, the District Court rejected Haug's attempt to assert Sherman Act claims on behalf of Rolls Royce dealerships due to lack of standing because Haug did not deal in new cars.

[*139] As to the Robinson-Patman claim, the District Court found that Haug failed to invoke any of the prohibitions contained in the statute therein. The District Court ruled that the amended complaint's allegation that Haug was harmed by price differentials given to Carriage House was insufficient in law as basis under *Section 2(a)* for a Robinson-Patman claim in the absence of some allegation of a threat thereby to competition as a whole. Haug's claim under *Section 2(d)* and *(e)* of the Act were dismissed for failure to plead that Haug is "functionally equivalent" to Carriage House. Supplemental jurisdiction over the additional State law claims was declined in the absence of a federal claim.

DISCUSSION

We first address Haug's argument that the District Court improperly dismissed its Sherman Act claims. We hold that the District Court properly dismissed these claims because the amended complaint **[**5]** does not sufficiently allege "antitrust injury." Next, we address Haug's contention that the District Court erred in dismissing its Robinson-Patman Act claim. We hold that the amended complaint adequately asserts causes of action under *Sections 2(a)* and *2(d)* of the Robinson-Patman Act.

A. Standard of Review

HN1[] This Court reviews *de novo* the District Court's decision to dismiss Haug's amended complaint under *Fed. R. Civ. P. 12(b)(6)*. *Electronics Communications Corp. v. Toshiba America Consumer Products, Inc., 129 F.3d 240, 242 (2d Cir. 1997)*. Dismissal of a complaint should not be upheld "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence. . ., its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*. In antitrust **[**6]** cases in particular, the Supreme Court has stated that "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*. Nonetheless, "it is not. . .proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*.

B. Sherman Act

HN2[] *Section 1* of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ." *15 U.S.C. § 1*. *Section 2* of the Sherman Act provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States. . .shall be deemed guilty of a felony." *15 U.S.C. § 2*.

HN3[] A private plaintiff seeking to state a claim for violation **[**7]** of *sections 1* or *2* of the Sherman Act must allege that it has suffered "antitrust injury." See *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*; *G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 766 (2d Cir. 1995)*. The antitrust injury requirement obligates a plaintiff to demonstrate, as a threshold matter, "that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." *Capital Imaging v. Mohawk Valley Med. Assoc., 996 F.2d 537, 543 (2d Cir. 1993)*. "The antitrust laws. . .were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502* [1962]).

[*140] Haug's amended complaint alleges that "[Haug] and Carriage House accounted for 80% of all repairs of Rolls Royce automobiles when both were in existence in New York County, New York." Haug further alleges that as a result of its *de facto* termination, **[**8]** "competition [was] eliminated for the repair and servicing of Rolls Royce automobiles for 80% of the market in New York City."

The District Court concluded that the amended complaint did not sufficiently allege "antitrust injury":

> Plaintiff has failed to plead its own market share [for the repair and servicing of Rolls Royce automobiles in New York County] or the market share purportedly absorbed by Carriage House as a result of plaintiff's "*de facto* termination." . . .Thus, plaintiff has alleged no facts from which I could conclude that plaintiff's elimination from the marketplace resulted in a decrease of Roll Royce service outlets. [1]

[9]**

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[1] Note, we need not at this time advert to the District Court's discussion of exclusive distributorships in which the court found that "exclusive distributorships are perfectly legal under the Sherman Act." *George Haug Co. Inc. v. Rolls Royce Motor Cars Inc., 1997 U.S. Dist. LEXIS 13650*, No. 96 Civ. 3140,1997 WL 563806 at *3 (S.D.N.Y. Sept. 10, 1997). Exclusive distributorships are not per se authorized under the Sherman Act. Instead, we have heretofore held that an exclusive distributorship agreement, standing alone, is not illegal. See *Electronics Communications Corp. v. Toshiba America Consumer Products, Inc., 129 F.3d 240, 245 (2d Cir. 1997)*; *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133 (2d Cir. 1978)*. In order to succeed, a plaintiff must demonstrate that the exclusive distributorship had an "actual adverse effect on competition market-wide. . . ." *Electronics Communications Corp. at 244*. That is, the focus remains on market effect. Haug has not alleged the existence of an exclusive distributorship, and we are not assured that had it done so, it would not have alleged that the exclusive distributorship resulted in antitrust injury.

In addition, the amended complaint asserts antitrust injury on behalf of authorized Rolls Royce dealerships. Specifically, Haug alleges that its elimination as a service outlet makes it less likely that consumers who are current or prospective owners of Rolls Royce automobiles living in New York County will purchase a Rolls Royce automobile from a dealer other than the Carriage House. Haug bases this allegation on the premise that these customers "would believe that they would have to go to Carriage House for warranty work and would probably not receive good treatment if they bought their Rolls Royce automobiles from a dealer other than Carriage House." Haug does not contend that it was a Rolls Royce dealership at any time during its existence. We agree with the District Court's determination that under applicable Supreme Court precedent, Haug does not have standing to assert any antitrust injury suffered by Rolls Royce dealerships. See *Associated General Contractors of California, Inc. V. California State Council of Carpenters, 459 U.S. 519, 539, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (dismissing claim of a plaintiff because plaintiff "was neither a consumer nor a competitor **[**10]** in the market in which trade was restrained").
In short, plaintiff had failed to satisfy the pleading requirements for a claim under the Sherman Act, and these claims were properly dismissed.

C. Robinson-Patman Act

It is hornbook law as cited hereinafter that ***HN4***[] anti-competitive injury need not be alleged to sustain a claim for violation of the Robinson-Patman Act; a price differential, direct or indirect, between secondary-line competitors is enough. The Act requires that each purchaser be given an "equal opportunity" by the seller to receive the benefit of higher or lower prices.
The amended complaint includes allegations which invoke three of the five basic prohibitions contained in the Robinson-Patman Act. Each of these prohibitions are discussed separately below.

1. Section 2(a)

HN5[] *Section 2(a)* of the Robinson-Patman Act provides, in pertinent part, as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade **[*141]** and quality. . .where the effect of such discrimination may be substantially to lessen competition **[**11]** or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

15 U.S.C. § 13(a).

HN6[] In order to establish secondary-line price discrimination [2] under *section 2(a)*, a plaintiff has the burden of establishing four facts: (1) that seller's sales were made in interstate commerce; (2) that the seller discriminated in price as between the two purchasers; (3) that the product or commodity sold to the competing purchasers was of the same grade and quality; and (4) that the price discrimination had a prohibited effect on competition. See *Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990)*. A private plaintiff who has proved a violation of *section 2(a)* must, in order to recover damages under § 4 of the Clayton Act, demonstrate that it suffered actual injury to its business or property as a result of the price

[2] ***HN7***[] Price discrimination claims generally fall into three categories. The first, primary line price discrimination, occurs when a seller's price discrimination harms competition with the seller's competitors. See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*. The second, secondary-line price discrimination, occurs when a seller's discrimination impacts competition among the seller's customers; i.e. the favored purchasers and disfavored purchasers. See, e.g., *F.T.C. v. Sun Oil Co., 371 U.S. 505, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*. The third, tertiary-line violation, occurs when the seller's price discrimination harms competition between customers of the favored and disfavored purchasers, even though the favored and disfavored purchasers do not compete directly against another. See, e.g., *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 436, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*.

discrimination. *J. Truett Payne, Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*. Moreover, *section 2(a)* affords defendants **[**12]** two defenses based on certain cost justifications and/or changing conditions, respectively. See *15 U.S.C. § 13(a)*.

[13]**
Haug alleges that Rolls Royce discriminated against it "by in effect selling parts for Rolls Royce automobiles at a lower price to Carriage House"; and "by giving Carriage House more favorable credit terms on parts than given to plaintiff." The competitive injury alleged was that "the discrimination in price and services made plaintiff unable to compete in that it allowed Carriage House to offer customers items and benefits which plaintiff could not afford. As a result, [Haug] has been injured by such discrimination in the amount of approximately $ 13,844,911." The District Court determined that these allegations do not adequately assert that the alleged price discrimination had an effect on competition.

HN8[] The language in *Section 2(a)* relating to injury to competition is the key to the legality of most differential pricing practices and has engendered significant legal uncertainty as courts have struggled to determine what degree and type of market consequences will constitute the proscribed statutory effect on competition in various commercial situations. We note initially that as a prerequisite to establishing competitive injury in a secondary line price discrimination case, a **[**14]** plaintiff must prove that "it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential." *Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir. 1987)*. The District Court did not specifically address whether Haug's amended complaint sufficiently alleges that it was in competition with Carriage House for the purposes of *Section 2(a)*. However, the District Court, in its discussion of Haug's claims under *sections 2(d)* and *(e)*, found that Haug was not "functionally equivalent" to Carriage House because Carriage House was an authorized Rolls Royce dealership in addition to being an authorized parts and service provider.

Based on the pleadings, we believe that the amended complaint sufficiently alleges that Haug and Carriage House competed in the relevant market_parts used for repairing and servicing Rolls Royce automobiles. ***HN9***[] Determining the presence or absence of functional competition between purchasers **[*142]** of a commodity is simply a factual process which focuses on whether these purchasers were directly competing for resales among the same group of customers. See *FTC v. Fred Meyer, Inc., 390 U.S. 341, **[**15]** 349, 19 L. Ed. 2d 1222, 88 S. Ct. 904 (1968)* (*Section 2(d)* "reaches only discrimination between customers competing for resales at the same functional level. . . .").

Moreover, even if we were to assume that the parties were not in actual competition in the relevant market, ***HN10***[] *Section 2(a)* does not categorically exempt price discrimination between parties competing at different functional levels. Previously, we have held that to satisfy this "competitive nexus" requirement, "it must. . .be shown that, as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." *Best Brands Beverage, Inc., 842 F.2d at 585*. The hypothetical predicate for allowing functional discounts is that price differential "merely accords due recognition and reimbursement for actual marketing functions." *Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 562, 110 L. Ed. 2d 492, 110 S. Ct. 2535* (quoting Report of the Attorney General's National Committee to Study the Antitrust Laws 208 (1955)).

However, in Hasbrouck, the Supreme Court rejected the proposition that ***HN11***[] *section **[**16]** 2(a)* provides a safe harbor for any and all functional discounts. *496 U.S. at 563*. While the Court acknowledged that it "generally agreed" with the notion that functional discounts are permissible under the Robinson-Patman Act, the Court found that defendant was liable under *section 2(a)* because the trial record demonstrated that the functional discounts were "untethered to supplier's savings or the wholesaler's costs." *496 U.S. at 562-63*. Thus, even if Haug and Carriage House did compete on different functional levels, there exists a factual question whether "functional discounts" offered to the latter were in fact legitimate functional discounts or subterfuges to avoid *section 2(a)*'s restrictions.

HN12[] Once the existence of a competitive relationship has been established, the plaintiff must demonstrate a reasonable possibility that competition has been harmed as a result of the price differential. *Falls City Industries v. Vanco Beverage, Inc., 460 U.S. 428, 434-435, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1988)* (citing *Corn Products Refining Co. v. FTC, 324 U.S. 726, 742, 89 L. Ed. 1320, 65 S. Ct. 961 (1945))*. In *FTC v. Morton Salt Co., 334 U.S. 37, 49, 92 L. Ed. 1196, 68 S. Ct.* **[**17]** *822 (1948)*, a secondary-line price discrimination case, the Supreme Court determined that the Robinson-Patman Act was "especially concerned with protecting small businesses" and that therefore *section 2(a)* "was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'"(quoting S. Rep. No. 1502, 74th Cong., 2d Sess 4). Accordingly, the Court held that competitive injury may be inferred from evidence demonstrating injury to an individual competitor. *334 U.S. at 46-47*. More specifically, Morton Salt permits an inference of injury to competition from evidence of a substantial price difference over time, because such a price difference may harm the competitive opportunities of purchasers, and thus create a "reasonable possibility" that competition itself may be harmed.

That competitive injury may be satisfied in this manner appears at odds with other statements made by the Supreme Court whereby the Court has indicated that interpretations of *HN13*[] the Robinson-Patman Act should be reconciled with other antitrust laws. See, e.g., *Great Atlantic & Pacific Tea Co., Inc. v. Federal Trade Commission, 440 U.S.* **[**18]** *69, 80 n.13, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979)* (Interpretations of the Robinson-Patman Act "should be construed consistently with broader policies of the antitrust laws."). Nevertheless, the Supreme Court has repeatedly upheld the Morton Salt inference. See *Hasbrouck, 496 U.S. at 559*; *Falls City Industries, 460 U.S. at 435-36*.

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*, a primary-line price discrimination case, the Supreme Court reviewed its prior case law and addressed anew the elements of a claim under **[*143]** *Section 2(a)*. In so doing, the Court acknowledged that its jurisprudence indicated that *HN14*[] price discrimination within the meaning of *section 2(a)* is "merely a price difference." *509 U.S. at 220*. The Court, however, emphasized that in primary-line cases the language of the provision as well as the underlying Congressional intent led to the conclusion that "by its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition."

The District Court, in dismissing Haug's complaint under *Section 2(a)* for failure to assert "antitrust injury", **[**19]** did not advert to an important legal issue which has not been squarely addressed by this Circuit; namely, in secondary-line cases, whether after Brooke Group the same sort of antitrust injury which is a prerequisite under the Sherman Act must be shown under *section 2(a)* of the Robinson-Patman Act. Three Circuits addressing this issue have already determined that the answer is "no." In *Stelwagon Mfg. Co. v. Tarmac Roofing, 63 F.3d 1267, 1272 (3rd Cir. 1995)*, the Third Circuit, citing Morton Salt, found that a claim in a secondary-line price discrimination case under the Robinson-Patman Act is supportable upon proof of a substantial price discrimination between competitors over time; no reference was made to Brooke Group.

In another secondary-line case, *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Co., 79 F.3d 182 (1st Cir. 1996)*, the First Circuit directly took on the question of whether Brooke Group overruled Morton Salt. The First Circuit concluded that Morton Salt remained good law for three reasons:

> First, *HN15*[] the statutory structure that prohibits primary-line price discrimination "stands on an entirely different footing" than the **[**20]** statutory scheme that proscribes secondary-line discrimination. Congress first forbade primary-line price discrimination with the Clayton Act of 1914, which originally condemned discrimination that might "substantially . . . lessen competition or tend to create a monopoly in any line of commerce." The statute was intended to prevent large corporations from invading markets of small firms and charging predatory prices for the purpose of destroying market wide competition, and thus specifically applied only to primary-line injury.
>
> By contrast, *HN16*[] secondary-line discrimination is forbidden by the Robinson-Patman Act, 49 Stat. 1526 (1936), *15 U.S.C. §§ 13-13b*, *21a (1988)*, which amended the original Clayton Act's price discrimination proscriptions. Congress clearly intended the Robinson-Patman Act's provision to apply only

> to secondary-line cases, not to primary-line cases. In contrast to the Sherman Act and the Clayton Act, which were intended to proscribe only conduct that threatens consumer welfare, the Robinson-Patman Act's framers "intended to punish perceived economic evils not necessarily threatening to consumer welfare per se." In particular, the Robinson-Patman Act's amendments to **[**21]** the Clayton Act stemmed from dissatisfaction with the original Clayton Act's inability to prevent large retail chains from obtaining volume discounts from big suppliers, at the disadvantage of small retailers who competed with the chains.
>
> Second, we are persuaded by the reasoning of the Ninth Circuit's opinion in [*Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995)]* that the amendment to the Clayton Act effected by the Robinson-Patman Act supports the continued vitality of the Morton Salt rule, even in the face of Brooke Group's alteration of standards for primary-line price discrimination. ***HN17***[] While the Clayton Act only proscribed conduct that may "substantially lessen competition or tend to create a monopoly[,]" the new law added the following passage: "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The purpose of this passage was to relieve secondary-line plaintiffs -- small retailers who are disfavored by discriminating suppliers -- from having to prove harm to competition market wide, allowing them instead to impose liability **[**22]** simply by proving effects on individual competitors. Such legislative intent directly supports **[*144]** maintaining the Morton Salt rule, which puts into practice Congress' concern with placing the same burden on secondary- line plaintiffs that other antitrust plaintiffs face. Thus, the comparison that the Supreme Court drew between primary-line price discrimination and predatory pricing in Brooke Group stands on a different, and stronger, footing than any comparison that could be made between secondary-line price discrimination and other area of ***antitrust law***, including, but not only, predatory pricing.
>
> Third, and finally, the holding of the Brooke Group opinion on its face applies only to primary-line cases, not secondary-line cases. As a result, given the legislative history and statutory language distinctions, we will not presume, without more guidance, that the Supreme Court intended in Brooke Group to alter the well-established rule that it adopted in Morton Salt.

79 F.3d at 192-193 (citations omitted).

Most recently, in *Chroma Lighting v. GTE Products Corp., 111 F.3d 653, 658 (9th Cir. 1997)*, the Ninth Circuit expressly adopted the First Circuit's conclusion **[**23]** that the Morton Salt inference is applicable in secondary-line price discrimination cases even after Brooke Group. We now adopt the First Circuit's view in Coastal Fuels of Puerto Rico, Inc., thereon.

The appropriate question before this Court, therefore, is whether Haug's amended complaint can be read to allege a substantial and sustained price differential in the distribution of parts from Rolls Royce in order permit discovery in this matter. We find that the allegations in Haug's amended complaint sufficiently state claims under *section 2(a)* of the Robinson-Patman Act. Although Haug does not detail the amount and degree of the price discrimination, it does allege that it was injured "during the 4 years prior to its termination," which is adequate to withstand *Fed. R. Civ. P. 12(b)(6)* dismissal. See, e.g., *J.F. Feeser, Inc. v. Serv-a-Portion, Inc., 909 F.2d 1524, 1539 (3d Cir. 1990)* ("The four-year period analyzed. . . establishes the requisite duration of price discrimination to support an inference of competitive injury.").

2. Sections (d) and (e)

HN18[] *Sections 2(d)* and *(e)* of the Robinson-Patman Act provide as follows:

> (d) It shall be unlawful **[**24]** 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 other customers competing in the distribution of such products or commodities.

(e) 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(d) and *(e)*.

HN19[↑] These provisions were designed to prohibit indirect price discrimination in the form of advertising **[**25]** and other promotional allowances made available to purchasers on disproportionate terms. See *FTC v. Fred Meyer, Inc., 390 U.S. 341, 350-51, 19 L. Ed. 2d 1222, 88 S. Ct. 904 (1968)*. *Section 2(d)* and *Section 2(e)* differ in that in the former, the purchaser supplies the services or facilities and the supplier repays the purchaser; in the latter, the seller supplies the services and facilities for use of the customer in facilitating resales. See *Exquisite Form Brassiere, Inc. v. FTC, 112 U.S. App. D.C. 175, 301 F.2d 499, 500 (D.C. Cir. 1961)*.

HN20[↑] Some of the substantive elements of *sections 2(d)* and *(e)* mirror those of *section 2(a)*. Courts have read in the "in commerce" requirement into both *sections 2(d)* and *(e)*. **[*145]** See *Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 881-882 (9th Cir. 1982)*. The plaintiff must demonstrate that the goods or commodity apply only to offers to customers competing in the same geographic area, see, e.g., *Eastern Auto Distributors, Inc. v. Peugeot Motors of America, Inc., 795 F.2d 329, 335-336 (4th Cir. 1986)*, and reselling at the same functional level. *Fred Meyer, Inc., 390 U.S. at 348-49*. In addition, the plaintiff must demonstrate "actual **[**26]** injury." *Interstate Cigar Co., Inc. v. Sterling Drug Inc., 655 F.2d 29, 31 (2d Cir. 1981)*.

Section 2(d) and *(e)* differ from 2(a) in that no injury to competition need be demonstrated. See *FTC v. Simplicity Pattern Co., 360 U.S. 55, 65, 3 L. Ed. 2d 1079, 79 S. Ct. 1005 (1959)*. In addition, neither 2(d) or (e) "has any built-in defensive matter, as does *§ 2(a)*. . . . The only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the *§ 2(b)* proviso." *360 U.S. at 65-67*.

Haug's amended complaint alleged that Rolls Royce "paid or caused to be paid through affiliates of [Rolls Royce] the rent for Carriage House of approximately. . .$ 60,000 to $ 90,000 per month, but did not pay such costs to plaintiffs;" and "allowed Carriage House to offer customers free work paid for by Rolls Royce while requiring plaintiff to charge similarly situated customers." These payments are best construed as allegations of *Section 2(d)*. Cf. *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 178 F.2d 150, 152-53 (2d Cir. 1949)* (finding that subsidizing demonstrators' salaries was covered by *§ 2(d)*, and providing demonstrators **[**27]** was covered by *§ 2[e]*).

The District Court dismissed these allegations on the grounds that Haug is not "functionally equivalent" to Carriage House. However, we believe that the amended complaint does sufficiently allege that Haug competed at the same functional level with Carriage House in the relevant market.

CONCLUSION

The dismissal of Haug's claims under *Sections 1* and *2* of the Sherman Act is affirmed. The dismissal of Haug's claims under the Robinson-Patman Act is reversed and remanded for further proceedings and Haug's supplemental state law claims are reinstated.

LexisNexis®

Metro Ford Truck Sales v. Ford Motor Co.

United States Court of Appeals for the Fifth Circuit

June 26, 1998, Decided

No. 97-11218

Reporter

145 F.3d 320 *; 1998 U.S. App. LEXIS 14509 **; 1998-1 Trade Cas. (CCH) P72,194; 41 Fed. R. Serv. 3d (Callaghan) 741

METRO FORD TRUCK SALES, INC., Plaintiff-Appellant-Appellee, versus FORD MOTOR COMPANY, Defendant Counter-Defendant/Third-Party Plaintiff-Appellee/Appellant, DUANE KUPPER, ERIC MAGNUS, MIKE STECKLER, Defendants-Appellants, versus DANIEL H. FOLEY, Counter Claimant/Third-Party Defendant-Appellee.

Subsequent History: [1]** Court Revision Received after F.3d Cite Availability. Suggestion for Rehearing En Banc and Rehearing Denied July 28, 1998, Reported at: *1998 U.S. App. LEXIS 21345*.

Certiorari Denied January 11, 1999, Reported at: *1999 U.S. LEXIS 129*.

Prior History: Appeal from the United States District Court For the Northern District of Texas. 3:95-CV-1010. A. Joe Fish, US District Judge.

Disposition: AFFIRMED.

Core Terms

district court, third-party, dealers, removal, customer, truck, contends, price discrimination, summary judgment, antitrust claim, federal court, state law, Robinson-Patman Act, federal question, cause of action, state court, predominates, designation, purchasers, deadline, Sales, pendent state law claims, antitrust

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Civil Procedure > Pretrial Matters > General Overview

Civil Procedure > Pretrial Matters > Conferences > General Overview

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN1[] **Standards of Review, Abuse of Discretion**

The court reviews a trial court's decision to exclude expert witnesses as a means of enforcing a pretrial order under the abuse of discretion standard. In so doing, the court considers: (1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Discovery, Methods of Discovery**

The court reviews a grant of summary judgment de novo. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN3[] **Conspiracy to Monopolize, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, expressly requires that there be a "contract, combination or conspiracy" between the manufacturer and other distributors in order to establish a violation. Independent action is not proscribed. Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under *§ 1* in the absence of a combination or agreement. *15 U.S.C.S. § 1*. Thus, the distinction between independent action and joint action is fundamental in antitrust jurisprudence, and a claim will not exist in the absence of the latter.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN4[] **Price Discrimination, Buyer Liability**

Section 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, provides that it is unlawful for a seller either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality. The "functional availability theory "is a judicial graft on § 2(a) and is not explicitly embodied in the text of the statute. The theory is that a price discount equally available to all purchasers for the same customer and product is not price discrimination.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN5[] **Standards of Review, De Novo Review**

The court reviews de novo whether the legal authority to remand existed and, further, reviews the decision to remand for an abuse of discretion.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Removal > Procedural Matters > Notice of Removal

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN6[] **Specific Cases Removed, Federal Questions**

When an action is brought to federal court through the *28 U.S.C.S. § 1441* mechanism for both removal and original jurisdiction, the federal question must be presented by plaintiff's complaint as it stands at the time the petition for removal is filed and the case seeks entry into the federal system. It is insufficient that a federal question has been raised as a matter of defense or as a counterclaim. Similarly, a defendant's third-party claim alleging a federal question does not come within the purview of *§ 1441* removability. A third-party claim, like a defense or counterclaim, is a pleading by the defendant. The third-party claim does not change the character of the plaintiff's complaint any more than does the defendant's other pleadings. Thus, a federal question alleged in the defendant's third-party claim will not, in and of itself, confer jurisdiction upon the federal court.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN7[] Subject Matter Jurisdiction, Jurisdiction Over Actions

A district court may inquire into the basis of its subject matter jurisdiction at any stage of the proceedings.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN8[] Subject Matter Jurisdiction, Supplemental Jurisdiction

See *28 U.S.C.S. § 1441*.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Removal > Elements for Removal > General Overview

Civil Procedure > ... > Removal > Elements for Removal > Removability

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

HN9[] Jurisdiction Over Actions, Concurrent Jurisdiction

For remand to be proper, the claim remanded must be (1) a separate and independent claim or cause of action; (2) joined with a federal question; (3) otherwise non-removable; and (4) a matter in which state law predominates. The new *28 U.S.C.S. § 1441(c)* permits courts to remand an entire action, or distinct claims, both state and federal, if state law predominates.

Counsel: For METRO FORD TRUCK SALES INC., Plaintiff - Appellant: James A. Pikl, Dallas, TX.

For FORD MOTOR COMPANY, Defendant - Appellee: Kenneth Raymond Valka, Houston, TX. Billy M. Donley, Baker & Hostetler, Houston, TX. John Mark Thomas, Ford Motor Company, Dearborn, MI.

Judges: Before POLITZ, Chief Judge, REYNALDO G. GARZA and DENNIS, Circuit Judges.

Opinion by: POLITZ

Opinion

[*322] POLITZ, Chief Judge:

Metro Ford Truck Sales, Inc. appeals an adverse summary judgment on its federal antitrust claims. [1] Ford Motor Company, Eric Magnus, Mike Steckler, and Duane Kupper appeal the remand of their third-party claim against Daniel H. Foley, Jr. under the Racketeer Influenced and Corrupt Organizations Act. [2] For the reasons assigned, we affirm.

[2] BACKGROUND**

Ford is engaged in the manufacture of various types of vehicles, including heavy, medium, and light duty trucks. At all pertinent times, Metro was a motor vehicle dealership licensed to sell and service Ford trucks, and Foley was the dealer-principal. The relationship between Ford and Metro **[*323]** was governed by Ford Truck and Ford Heavy Duty Truck Sales and Service Agreements.

The focus of this action is a pricing program implemented by Ford, known as Competitive Price Assistance. This program was used to reduce the wholesale price of a truck to authorized Ford medium and heavy duty truck dealers. During the 1990-94 period at issue, all Ford medium and heavy truck dealerships were eligible to receive, on every truck, a base level of CPA called "Sales Advantage." Sales Advantage CPA was obtained by calling Ford's CPA Hotline, and giving the operator basic information about the sale, including the customer's name, the vehicle specifications, and the vehicle options.

In situations where the sales advantage CPA was insufficient, further procedures permitted a dealer to request additional price reductions, known as "Appeal CPA." The appeal process was initiated when a dealer **[**3]** submitted a CPA appeal form by facsimile to Ford's CPA Central. To justify the need for an Appeal CPA, a dealer had to provide information about the competitive situation surrounding the particular transaction at stake. Ford then evaluated the appeal, along with any additional information it had about the customer, to ensure that all Ford dealers bidding the same customer received an equal CPA, and that all Ford dealers could meet the competition from other original equipment manufacturers. Ford thereafter advised the dealer about the amount of additional CPA, if any, that would be allowed.

Specialized CPA also existed for large volume purchasers. This CPA usually was at a predetermined amount and could be obtained simply by calling the CPA Hotline and providing the customer's name and commitment number. Because these customers attracted so much competition, and ordered such a large volume of trucks, the amount of CPA was made readily available, alleviating the need for the dealer to demonstrate individually a competitive situation or to initiate a CPA appeal.

In response to complaints by another dealer that Metro was obtaining more CPA on bids to the same customer, Ford conducted **[**4]** an audit of certain sales Metro made using the CPA program. Ford concluded that Metro had been applying for CPA in the name of one customer, while actually selling the trucks to someone else; thus receiving more CPA than that to which it was entitled. Metro conceded that it sometimes misrepresented customers when claiming CPA, but alleged that Ford representatives instructed it to claim CPA in the name of its large volume purchasers when the situation warranted CPA beyond Sales Advantage CPA. Ford employees, not surprisingly, denied that Metro was so instructed or that they had knowledge of Metro's practice prior to the audit. Accordingly,

[1] Sherman Act, *15 U.S.C. § 1*, and Robinson-Patman Act, *15 U.S.C. § 13(a)*.

[2] *18 U.S.C. §§ 1961-1968*.

Ford determined to charge back the amount of CPA obtained by Metro on the misrepresented transactions, and to pursue termination of Metro's franchise agreements.

To prevent the threatened charge back or terminations, Metro filed the instant action in state court, seeking injunctive relief and asserting various state law claims against Ford and Ford employees Kupper, Magnus, and Steckler (hereinafter collectively referred to as "Ford"). Ford filed counterclaims against Metro and a third-party petition against Foley, alleging several causes of action **[**5]** under state law. Thereafter Metro filed an amended petition, which included a claim against Ford for price discrimination under the Texas Antitrust Act, and Foley filed a counterclaim against Ford for intentional infliction of emotional distress.

Ford removed the action to federal court on the basis that the Texas Antitrust Act does not prohibit price discrimination and, therefore, Metro's antitrust claim for price discrimination could arise, if at all, only under the federal Robinson-Patman Act, conferring federal question jurisdiction. The district court agreed with the basis for removal and denied Metro's motion to remand. Metro thereafter amended its complaint to assert specific claims for price discrimination under § 2(a) of the Robinson-Patman Act and for vertical price fixing under *§ 1* of the Sherman Act, and Ford amended its third-party complaint against Foley to include a RICO claim.

[*324] All parties subsequently moved for summary judgment. The district court granted Ford's motion for summary judgment on Metro's federal antitrust claims. Finding that state law predominated and a substantial overlap existed, the district court remanded the remaining state law claims, as well **[**6]** as the third-party RICO claim, to state court. Both Metro and Ford timely appealed.

ANALYSIS

Metro contends that the district court erred in (1) denying leave to designate experts and file expert reports beyond the scheduling order deadline; and (2) granting summary judgment in favor of Ford on its Sherman Act and Robinson-Patman Act claims. In its cross-appeal, Ford contends that the district court erred in remanding its third-party RICO claim, as well as the pendent state law claims.

Metro's first argument on appeal is that the district court erred in denying its motion for leave to designate experts and file expert reports out-of-time, or to recognize its supplemental disclosures. ***HN1***[] We review a trial court's decision to exclude expert witnesses as a means of enforcing a pretrial order under the abuse of discretion standard. [3] **[**7]** In so doing, we consider: "(1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice." [4]

As a preliminary matter, we note that it is only the ruling on one expert, Dr. Keith Leffler, that is at issue. Absent from Metro's trial motion and its argument on appeal, is sufficient justification for the late designation of this expert witness. Metro essentially complains that Ford failed to provide supplemental discovery. Although this case had been pending for well over two years, and the scheduling order deadlines had been extended previously, Metro did not timely raise this issue in the trial court.

Nonetheless, Metro contends that the mere one week delay in designating this expert was nominal and resulted in no prejudice, mandating the grant of its motion. Metro fails, however, to note the lack of an accompanying written report, as required by the scheduling order and Rule 26(a)(2)(B), which results, necessarily, in the conclusion that the expert designation deadline was not merely one week late as it contends. Instead, Metro urges this court to recognize the filing of Dr. Leffler's report as timely under the supplemental disclosure deadline some three months later. **[**8]** We decline to do so. The purpose of supplementary disclosures is just that -- to supplement. Such

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[3] *Geiserman v. MacDonald, 893 F.2d 787 (5th Cir. 1990)*.

[4] ***Id.*** *at 791*.

disclosures are not intended to provide an extension of the expert designation and report production deadline. [5] We therefore hold that the district court did not abuse its discretion in refusing to modify the scheduling order and in enforcing the time deadlines. [6]

In its remaining **[**9]** arguments on appeal, Metro contends that the district court erred in granting summary judgment in favor of Ford on its federal antitrust claims. ***HN2***[] We review a grant of summary judgment *de novo*. [7] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment **[*325]** as a matter of law." [8]

Metro contends that Ford's CPA program constitutes vertical price fixing in violation of the Sherman Act. The district court found the lack of evidence of an agreement fatal to Metro's Sherman Act claim. Metro contends that the district court erred in this regard because the existence of a contract or agreement is not required for a vertical price fixing claim. Metro maintains that Ford's independent and unilateral actions **[**10]** are sufficient to support its claim. We do not find these contentions persuasive.

HN3[] *Section 1* of the Sherman Act expressly requires that there be a "contract, combination … or conspiracy" between the manufacturer and other distributors in order to establish a violation. [9] **[**11]** "Independent action is not proscribed." [10] Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under *§ 1* in the absence of a combination or agreement. [11] Thus, the distinction between independent action and joint action is fundamental in antitrust jurisprudence, and a claim will not exist in the absence of the latter. [12] Accordingly, we find and conclude that the district court was

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[5] ***Sierra Club v. Cedar Point Oil Co.****, 73 F.3d 546 (5th Cir. 1996)*.

[6] We note that Metro appears to be urging this issue only in anticipation of reversal of the grant of summary judgment. Metro argued below that the need for experts could not be determined until after the district court ruled on the pending summary judgment motions. Because Metro is not claiming that this issue impacted its summary judgment positions, and in light of our decision affirming the grant of same, *infra*, we perceive no prejudice to Metro as to this claim. **See** ***Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.****, 48 F.3d 927 (5th Cir. 1995)*.

[7] ***Martin v. Memorial Hosp. at Gulfport****, 130 F.3d 1143 (5th Cir. 1997)*.

[8] ***Fed. R. Civ. P.*** *56(c)*.

[9] *15 U.S.C. § 1*. Purely unilateral behavior is illegal under § 2 of the Sherman Act, but only when it threatens actual monopolization. Metro does not allege or offer evidence of monopolization; instead claiming restraint of trade, which is governed by *section 1*.

[10] ***Monsanto Co. v. Spray-Rite Service Corp.****, 465 U.S. 752, 760, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*.

[11] **Id.**

[12] **See id.**; ***United States v. Colgate & Co.****, 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*; ***Business Electronics Corp. v. Sharp Electronics Corp.****, 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*.

Metro contends nevertheless that Ford's unilateral actions are *per se* illegal without evidence of a contract under ***Dr. Miles Medical Company v. John D. Park & Sons Company****, 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*. The flaw in Metro's reasoning is its failure to recognize the existence, and corresponding significance, of the systems of contracts involved in that case. The plaintiff, Dr. Miles Medical Company, had devised a system of contracts with its customers to maintain minimum resale prices at which its proprietary medicine products would be sold. The defendant, John D. Park & Sons, was a wholesale drug company which refused to enter into such a contract. The plaintiff charged that the defendant, "in combination and conspiracy with a number of wholesale and retail dealers in drugs and proprietary medicines," procured its medicines by inducing the violation of the contracts. *31 S. Ct. at 381-82*.

correct in determining that the lack of a "contract, combination … or conspiracy" precludes Metro's Sherman Act claim.

[12]** Metro also contends that Ford's implementation of the CPA program resulted in price discrimination in violation of the Robinson-Patman Act. The district court found that Metro failed to demonstrate that the same level of CPA was not functionally available to all dealers and, thus, no evidence of price discrimination exists. Metro insists that summary judgment on this basis was erroneous because whether or not the discounts were equal, no such defense exists unless the discounts were cost justified or offered in good faith to meet competition. Again, Metro's contentions are not persuasive.

HN4[] Section 2(a) of the Robinson-Patman Act provides that it is unlawful for a seller "either directly or indirectly, to discriminate in price between different purchasers of commodities **[*326]** of like grade and quality." [13] For its claim under § 2(a) of the Robinson-Patman Act to succeed, Metro must adduce evidence of an actual instance of price discrimination, i.e. a difference in price charged to different purchasers or customers of the discriminating seller for products of like grade or quality. [14] If the challenged lower price was in fact -- and not merely theoretically -- made available to the allegedly **[**13]** disfavored purchasers, the seller cannot be held liable under section 2(a). [15]

This "functional availability" theory "is a judicial graft on § 2(a) and is not explicitly embodied in the text of the statute." [16] Nevertheless, the theory is clear and coincides with the purpose of the Act in that a price discount equally available to all purchasers for the same customer and product is not price discrimination. [17] As found by the district court, the record reflects that Metro was treated the same as all other Ford dealers with respect to CPA for the same customer, and products of like grade and quality. The record further establishes that the CPA program functioned to ensure that all Ford dealers issuing **[**14]** bids to the same customer received equal CPA, and that all Ford dealers could meet the competition from other original equipment manufacturers. Metro concedes that the discounts were available to it on an equal basis with other Ford dealers. We therefore must find and conclude that price discrimination did not exist, and that no violation of the Robinson-Patman Act occurred.

The plaintiff's right to relief depended on the validity of the restrictive contracts, making it the central issue before the Court. The Court found, however, that the contracts constituted unlawful resale price maintenance by restricting "the freedom of trade on the part of dealers who own what they sell." This finding that resale price maintenance is *per se* illegal under *§ 1* has been reaffirmed by the Court. **See** ***United States v. Parke, Davis & Co.****, 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*; ***California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.****, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*; ***Monsanto Co.****, 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464*. In **Business Electronics Corporation**, however, the Court made it clear that vertical price restraints require an agreement or concerted action, and not just an effect on resale prices, to be *per se* unlawful. *485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. We thus focus on whether the restraint is unilateral or concerted for all aspects of a *section 1* claim.

[13] *15 U.S.C. § 13(a)*.

[14] ***FTC v. Anheuser-Busch, Inc.****, 363 U.S. 536, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*.

[15] **See, e.g.,** ***FTC v. Morton Salt****, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)*; ***Capital Ford Truck Sales, Inc. v. Ford Motor Co.****, 819 F. Supp. 1555 (N.D. Ga. 1992)*.

[16] ***Precision Printing Co. v. Unisource Worldwide, Inc.****, 993 F. Supp. 338, 350 (W.D. Pa. 1998)*.

[17] **See** ***Morton Salt****, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822*. While some functional discounts may be covered by the cost justification defense or the meeting competition defense, these defenses present no bar to the use of the functional availability theory to demonstrate the lack of an essential element of the case (price discrimination), as alleged by Metro. **See** Kintner & Bauer, 3 Federal ***Antitrust Law***, § 25.7, (1983) ("availability" is technically not an affirmative defense, but the negation of an element of the plaintiff's case).

[15]** Having found the grant of summary judgment in favor of Ford on Metro's federal antitrust claims to be appropriate, we turn to Ford's cross-appeal wherein it challenges the remand of its third-party RICO claim and the pendent state law claims. [17] **[**16]** Ford contends that the district court had no legal authority to remand its RICO claim to state court because the claim arose under federal law and was filed in federal court. Ford further contends that because the RICO and state law claims are interrelated, the factors of judicial economy, convenience, fairness, and comity require that all the claims be tried in the same court, making the remand of the pendent state law claims improper. ***HN5***[] We review *de novo* whether the legal authority to remand existed and, further, review the decision to remand for an abuse of discretion. [18]

The essential concept governing in this appeal, perhaps overlooked by Ford, is that the district court's jurisdiction was derived from a *§ 1441* removal. [19] ***HN6***[] When an action is brought to federal court through the *§ 1441* mechanism, "for both removal and original jurisdiction, the federal question must be presented by plaintiff's complaint as it stands at the time the petition for removal is filed and the case seeks entry into the federal system. It is insufficient that a federal **[*327]** question has been raised as a matter of defense or as a counterclaim." [20] Similarly, the defendant's third-party claim alleging a federal question does not come within the purview of *§ 1441* removability. [21] The third-party claim, like a defense or counterclaim, is a pleading by the defendant. The third-party claim does not change the character of the plaintiff's complaint any more than does the defendant's **[**17]** other pleadings. Thus, the federal question alleged in the defendant's third-party claim does not, in and of itself, confer jurisdiction upon the federal court.

The initiation of Ford's third-party claim in federal court, as opposed to that in state court prior to removal, does not change its status. Such a result would be contrary to the rule that removal jurisdiction must be disclosed on the face of the plaintiff's complaint, [22] and that the basis to determine removal jurisdiction so continues throughout the litigation. [23] To hold otherwise would unduly **[**18]** grant a defendant the power to manipulate removal jurisdiction once in federal court, despite overwhelming authority proscribing same.

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[17] As an initial matter, we note that Metro contends that this issue was mooted by the state court's dismissal of Ford's RICO claim. Ford challenges this contention, and also submits that the remand of the state law claims remains at issue. Although we earlier were advised that the state law claims were scheduled to be tried in state court beginning in April 1998, we have received no additional information. Nevertheless, given our conclusion herein, *infra*, we need not resolve this dispute.

[18] ***Eastus v. Blue Bell Creameries, L.P.****, 97 F.3d 100 (5th Cir. 1996)*. The remand order was based on the district court's discretionary power under *§ 1441(c)* and, thus, § 1447(d) does not bar review. **Id.**

[19] *28 U.S.C. § 1441*.

[20] 14A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3722, at 255-60. **See** ***Gully v. First Nat'l Bank****, 299 U.S. 109, 81 L. Ed. 70, 57 S. Ct. 96 (1936)*.

[21] While a third-party defendant may remove a case to federal court based on the third-party claim, a defendant/third-party plaintiff may not. **See** ***Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury****, 622 F.2d 133 (5th Cir. 1980)*.

[22] ***Great Northern Ry. Co. v. Alexander****, 246 U.S. 276, 281, 62 L. Ed. 713, 38 S. Ct. 237 (1918)* ("It is also settled that a case, arising under the laws of the United States, nonremovable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant …, but that such conversion can only be accomplished by the voluntary amendment of his pleading by the plaintiff….").

[23] ***Id.*** *at 282* ("the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and [] this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case nonremovable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove …, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.").

[19]** Having determined that Ford's filing of its third-party RICO claim in federal court after removal does not impact the court's removal jurisdiction and its corresponding remand authority, we turn to the remand decision. [24] After dismissing the federal antitrust claims, the court determined that state law predominated over the remaining claims, and that the interests of judicial economy, convenience, fairness, and comity warranted remand under *§ 1441(c)*.

Section 1441(c) provides:

> ***HN8***[] Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more **[**20]** otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Thus, ***HN9***[] for remand to be proper, the claim remanded must be "(1) a separate and independent claim or cause of action; (2) joined with a federal question; (3) otherwise non-removable; and (4) a matter in which state law predominates." [25]

As an initial matter, we consider Ford's contention that district courts have no authority to remand federal claims. Although RICO is a federal cause of action, state courts have concurrent jurisdiction to adjudicate civil claims arising thereunder. [26] Thus, any attempt to equate "original jurisdiction" with "exclusive jurisdiction" in this **[*328]** instance would be error. [27] The cases relied on by Ford are distinguishable because therein the court sought to remand federal claims which would have been otherwise removable. [28] **[**22]** As **[**21]** discussed *supra*, Ford's third-party RICO claim could not, and did not, confer removal jurisdiction in this instance. In addition, we have since noted that the new *§ 1441(c)* permits courts to remand an entire action, or distinct claims, both state and federal, if state law predominates. [29] We thus must find no merit in Ford's contentions.

In the case at bar, the federal antitrust claims constituted the basis of the court's removal jurisdiction, and were joined with Ford's third-party RICO claim. Because the third-party RICO claim could not provide removal jurisdiction, it qualifies as an "otherwise non-removable" claim. Thus, only the first and fourth elements of the *§ 1441(c)* analysis can be disputed. [30]

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[24] Once the claims on which removal jurisdiction was based were dismissed, the district court rightfully reevaluated its jurisdiction and the position of the action. **See** ***Menchaca v. Chrysler Credit Corp.****, 613 F.2d 507, 511 (5th Cir. 1980)* ("It is axiomatic that ***HN7***[] a district court may inquire into the basis of its subject matter jurisdiction at any stage of the proceedings.").

[25] ***Eastus****, 97 F.3d at 104*.

[26] ***Tafflin v. Levitt****, 493 U.S. 455, 107 L. Ed. 2d 887, 110 S. Ct. 792 (1990)*.

[27] If the federal claim in this case fell within the court's exclusive jurisdiction, rather than concurrent, remand of the claim would be improper because the state court would be unable to hear the federal claim. Accordingly, a federal claim within the court's exclusive jurisdiction would not implicate *§ 1441* removal jurisdiction because the state court would have no jurisdiction at the outset. **See** ***Arizona v. Manypenny****, 451 U.S. 232, 68 L. Ed. 2d 58, 101 S. Ct. 1657 (1981)*.

[28] ***Buchner v. FDIC****, 981 F.2d 816 (5th Cir. 1993)* (plaintiff's complaint conferred removal jurisdiction over claim sought to be remanded); ***In re Wilson Industries, Inc.****, 886 F.2d 93 (5th Cir. 1989)* (same); ***Burks v. Amerada Hess Corp.****, 8 F.3d 301 (5th Cir. 1993)* (same); ***Smith v. Texas Children's Hosp.****, 84 F.3d 152 (5th Cir. 1996)* (same).

[29] ***Eastus****, 97 F.3d 100* (and cases cited therein). **See also** 14A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3724 (Supp. 1997) (and cases cited therein).

[30] We note that Ford misapplies the *§ 1441(c)* analysis by assuming that the RICO claim forms the basis of jurisdiction and must be considered in relation to the state law claims. As discussed *supra*, this is error.

The first element requires independence as well as separateness. "Where there is a single wrong to [the] plaintiff, for which relief is sought, **[**23]** arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under *§ 1441(c)*." [31] "If one claim depends on establishing liability under the other, the two cannot be found to be independent." [32]

We find that, in this case, the federal antitrust claims and the RICO claim are separate and independent. Metro sought relief from Ford based on its implementation of the CPA program, alleging price fixing and discrimination under the federal antitrust laws. In its third-party RICO action, Ford sought relief from Foley for alleged fraud and misrepresentation in the operation of the Metro dealership. Although the CPA program was involved in both the antitrust and RICO actions, the claims rely on different supporting facts and clearly seek separate relief for distinct wrongs.

Ford concedes that the RICO claim and the pendent **[**24]** state law claims are substantially related, calling for litigation in one forum. In fact, the RICO claim is so intertwined with the state law claims as to be difficult to treat separately. We perceive no incompatibility between state court jurisdiction and federal interests [33] and, thus, find that state law predominates. Accordingly, we find and conclude that *§ 1441(c)* authorized remand of the third-party RICO claim, and we affirm that portion of the order. In light of this conclusion, and considering the interests of judicial economy, convenience, fairness, and comity, we must conclude that the district court did not abuse its discretion in correspondingly remanding the pendent state law claims. [34]

The judgment appealed is AFFIRMED.

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[31] ***American Fire & Casualty Ins. Co. v. Finn****, 341 U.S. 6, 14, 95 L. Ed. 702, 71 S. Ct. 534 (1951)*.

[32] ***Eastus****, 97 F.3d at 104*.

[33] **See** ***Tafflin****, 493 U.S. 455, 107 L. Ed. 2d 887, 110 S. Ct. 792*.

[34] **See** *28 U.S.C. § 1367(c)*; ***Carnegie-Mellon University v. Cohill****, 484 U.S. 343, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988)*.

Mellon v. Cessna Aircraft Co.

United States District Court for the District of Kansas

July 1, 1998, Decided ; July 2, 1998, Filed

No. 96-1454-JTM

Reporter
7 F. Supp. 2d 1183 *; 1998 U.S. Dist. LEXIS 12494 **; 1998-2 Trade Cas. (CCH) P72,295

TIMOTHY MELLON, Plaintiff, vs. THE CESSNA AIRCRAFT COMPANY, Defendant.

Disposition: [1]** Defendant Cessna's motion for summary judgment denied.

Core Terms

aircraft, argues, plane, modified, modification, summary judgment, relevant market, single-pilot, inspections, market power, jets, service center, monopoly, jet aircraft, installation, manufacturer, effects, phase, sales, damages, antitrust, providers, antitrust claim, issuance, anti-competitive, monopoly power, upgrades, pilot, injunctive relief, purchasers

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Discovery, Methods of Discovery**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The initial burden is on the moving party to show that there is an absence of evidence to support the non-moving party's case.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] Summary Judgment, Entitlement as Matter of Law

Once the initial showing has been made, the burden shifts to the non-moving party to designate specific facts showing there is a genuine issue for trial. A party may not rely on the allegations of its pleadings but must establish the existence of a genuine issue of material fact through admissible evidence. When determining whether there is a material issue of fact, the nonmoving party's evidence is to be believed; all justifiable inferences are to be drawn in its favor; and its nonconclusory version of any disputed issue of fact is assumed to be correct.

Transportation Law > Air & Space Transportation > Aviation Certificates > General Overview

Transportation Law > Air & Space Transportation > Maintenance & Safety

HN3[] Air & Space Transportation, Aviation Certificates

Under Federal Aviation Regulations, for a manufacturer to obtain a Type Certificate from the Federal Administration, it must first submit a type design, which includes the drawings and specifications necessary to define the configuration and design features of the aircraft, and information on the dimensions, materials and processes necessary to define its structural strength.

Transportation Law > ... > US Federal Aviation Administration > Notices & Orders > Judicial Review

Transportation Law > Air & Space Transportation > Maintenance & Safety

HN4[] Notices & Orders, Judicial Review

A Supplemental Type Certificate is issued by the Federal Aviation administration to someone other than an original manufacturer of an airplane to certify that a modification to the original type design complies with the regulations applicable to the modification.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

The offense of monopoly under *§ 2* of the Sherman Act, *15 U.S.C.S. § 1*, has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Tying Arrangements, Clayton Act

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different, or tied, product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement violates *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN7[] **Clayton Act, Claims**

The Clayton Act authorizes private actions to enforce the antitrust laws. *15 U.S.C.S. §§ 15* and *26*. To establish standing to bring an enforcement action seeking injunctive relief under *15 U.S.C.S. § 26*, a plaintiff must show (1) an antitrust injury; and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws.

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] **Antitrust & Trade Law, Clayton Act**

To show an antitrust injury, a plaintiff must show an injury of the type which the antitrust laws are intended to prevent and which flow from the reason that the defendant's conduct is prohibited. To meet the second prong of the test, the plaintiff must show the injury resulted directly from the defendant's violation. There are six factors to be considered when evaluating antitrust standing: (1) the causal connection between the alleged antitrust violation and the harm; (2) improper motive or intent of defendants; (3) whether the claimed injury is one sought to be redressed by antitrust damages; (4) the directness between the injury and the market restraint resulting from the alleged violation; (5) the speculative nature of the damages claimed; and (6) the risk of duplicative recoveries or complex damage apportionment.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9[] **Regulated Practices, Market Definition**

It is not necessary for a plaintiff to establish market power where a plaintiff directly shows anti-competitive effects, such as control over output or price.

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Judges: J. THOMAS MARTEN, JUDGE.

Opinion by: J. THOMAS MARTEN

Opinion

[*1186] *MEMORANDUM ORDER*

Timothy Mellon sued Cessna Aircraft Company, alleging Cessna's policy of refusing to service Cessna manufactured aircraft with modifications unapproved by Cessna violates *Sections 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2*. Mellon also asserts a promissory estoppel claim under state law.

Mellon moved for summary judgment on the promissory estoppel claim. Cessna moved for summary judgment on all claims. On May 18, 1998, the court denied the parties' cross motions for summary judgment on the estoppel **[**2]** claim. Cessna's motion for summary judgment on the antitrust claims was taken under advisement. The court is now prepared to rule.

I. Summary Judgment Standard.

HN1[] Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c)*. The initial burden is on the moving party to show that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*.

HN2[] Once the initial showing has been made, the burden shifts to the non-moving party to designate specific facts showing there is a genuine issue for trial. *Celotex, 477 U.S. at 324*. A party may not rely on the allegations of its pleadings but must establish the existence of a genuine issue of material fact through admissible evidence. *Panis v. Mission Hills Bank, N.A., 60 F.3d 1486, 1490 (10th Cir. 1995)*, *cert. denied*, *516 U.S. 1160, 116 S. Ct. 1045, 134 L. Ed. 2d 192 (1996)*. When determining whether there is **[**3]** a material issue of fact, the nonmoving party's evidence is to be believed; all justifiable inferences are to be drawn in its favor; and **[*1187]** its nonconclusory version of any disputed issue of fact is assumed to be correct. *Multistate Legal Studies, Inc. v. Harcourt Brace Publ., Inc., 63 F.3d 1540, 1545 (10th Cir. 1995)*, *cert. denied*, *516 U.S. 1044, 116 S. Ct. 702, 133 L. Ed. 2d 659 (1996)*.

II. Facts.

The following factual scenario is based on the relevant factual assertions of the parties, where supported by citations to admissible evidence and with all reasonable inferences drawn in Mellon's favor. [1]

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[1] Cessna's statement of facts contains interpretations of governmental regulations. However, Mellon does not dispute Cessna's interpretations, so the court treats these interpretations as accurate for summary judgment purposes.

[4]** A. Mellon's Purchase of the Plane and the Service Letter.

Cessna has manufactured a variety of business jet aircraft, including the Model 501SP "Citation I" owned by Mellon, as well as the model 525 "CitationJet." Mellon purchased his jet in May 1989, for $ 1,333,500.

A major reason Mellon decided to purchase the Cessna was that it was a jet with single-pilot capability. Mellon refused to consider a Falcon 10 as it was not capable of single-pilot flight without a modification and Mellon thought the modification was not feasible. Mellon refused to consider non-jet aircraft.

Another factor in Mellon's decision to purchase the plane was the availability of service and inspections at Cessna-owned Citation service centers. [2] The pre-purchase inspection of the plane was conducted at Cessna's Citation service center in Orlando. From the time he purchased the plane until September 1995, Mellon regularly brought the plane to Cessna's company-owned Citation service center in Newburgh, New York, particularly for major maintenance and "phase inspections" required by the Federal Aviation Administration (FAA).

[5]** Before Mellon purchased the plane, it had been serviced by providers other than Cessna. Prior to September 1995, Mellon also had the plane serviced by other service providers and on one occasion by a Cessna-authorized service center in Germany.

In the Spring of 1992, Mellon began to consider having his citation modified by installing an Eagle 400 modification manufactured by Sierra Industries, Inc. Before deciding whether to purchase the Eagle 400 modification, Mellon asked Charles Knapp, the acting general manager of Cessna's Newburgh service center, if Cessna would continue to perform major maintenance and phase inspections on the aircraft if Mellon had the plane equipped with the Eagle 400 modification. [3]

Knapp told Mellon he would check **[**6]** with Cessna management in Wichita and get back to him. Knapp asked one or more Cessna employees in Wichita or elsewhere whether Cessna would continue to service Mellon's plane if the Eagle 400 modification was installed. Knapp reported back to Mellon that he had consulted with Cessna management in Wichita and Cessna would continue to service the plane if Mellon had the Eagle 400 modification installed. Mellon purchased the modification from Sierra Industries and it was installed by Sierra in Texas.

Cessna issued Service Letter SL500-03-01 on September 22, 1995. The text of the letter provides:

> **[*1188]** This service letter transmits information to owners/operators regarding the Supplemental Type Certificate (STC) process affecting Cessna Citation aircraft. The STC is an FAA approved change to aircraft within FAA jurisdiction. STCs that are developed by Cessna, or that are purchased and installed by Cessna, are covered by Cessna warranty and will be supported by Cessna.
>
> STCs that are developed without Cessna involvement and engineering approval will not be supported by Cessna. The STC holder for the particular installation is expected to accept responsibility for the warranty and

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In its reply brief, Cessna objects to Mellon's practice of stating the fact which he wishes to infer from the evidence, then identifying the evidence which he claims supports the inference. Cessna argues this practice violates D.Kan.R. 56.1 and asks the court to disregard all such inferences. The court does not consider Mellon's practice to be in violation of the local rule. Where the cited facts reasonably support the inference, the court presumes, as it must in the summary judgment stage, that Mellon's inference is true. Mellon's approach actually makes it easier for the court to evaluate the significance of the cited facts and the reasonableness of the inference. The court notes that Cessna followed a similar practice. *See e.g.*, Cessna's Statement of Undisputed Facts PP 48, 49, 104.

[2] Cessna cites other factors Mellon considered, as well as other planes. This does not mean that Mellon did not consider the availability of Cessna service as a factor.

[3] Cessna purports to contradict this assertion, but instead makes other factual assertions which do not contradict Mellon's assertion that he asked Knapp whether Cessna would continue to perform major maintenance and phase inspections on the plane if he had it modified.

> product **[**7]** support for the installation on Citation aircraft. It is recommended that operators who are contemplating an STC installation, address the support issue directly with the STC holder prior to installation.
> Citation aircraft that have installed STCs that permit performance and/or alter limitations outside the Cessna FAA Approved Flight Manual may be refused service at Cessna service centers.
> Cessna-owned service centers will not provide support in the way of installation, spare parts, repair, inspection or warranty for STCs not approved by Cessna.

When Cessna issued the Service Letter, it issued similar letters on all other models of jet aircraft it manufactures.

HN3[] Under Federal Aviation Regulations (FARs), for a manufacturer to obtain a Type Certificate (TC) from the Federal Administration (FAA), it must first submit a type design, which includes the drawings and specifications necessary to define the configuration and design features of the aircraft, and information on the dimensions, materials and processes necessary to define its structural strength.

HN4[] A Supplemental Type Certificate (STC) is issued by the FAA to someone other than an original manufacturer of an airplane to certify **[**8]** that a modification to the original type design complies with the regulations applicable to the modification. Mellon's Citation I is equipped with two STCs: the Eagle and the Eagle 400.

James E. Morgan, Cessna's Vice President for Service Facilities, testified that he believes over 100 Cessna 500/501 series Citations are equipped with Eagle or Eagle 400 modifications. Prior to the issuance of the Service Letter, Cessna serviced between 5 and 10 of these planes.

Mellon's expert testified a plane comparable to Mellon's is worth about $ 50,000 less than it would otherwise be worth if all phase inspections and major maintenance had been performed at a Cessna-owned service center. Mellon and prior owners had the plane serviced at non-Cessna-owned service facilities. However, Cessna does not allege that prior to the issuance of the Service Letter, phase inspections or major maintenance were performed at non-Cessna-owned service facilities.

Upon issuance of the Service Letter, Cessna-owned service centers initially refused to provide any service to modified Citations. [4] When Mellon complained about the Service Letter, Cessna offered to arrange for service at Cessna-authorized service **[**9]** centers.

In June 1997, after Mellon filed this lawsuit, Cessna issued a policy revision indicating that modified Citations were no longer "totally excluded" from Cessna-owned service centers.

Since the Service Letter was issued, Mellon has had his plane serviced as much as possible by Cessna. Sierra has serviced his plane and both Cessna and Sierra have performed phase inspections. Mellon also has obtained service at other non-Cessna service centers.

B. The Market.

The parties agree that the geographical market for new and used business jets is worldwide. Mellon defines the relevant antitrust market for aircraft as business jets, new and used, that can be flown by a single pilot. Cessna admits its Models 500 and 501, including those with STC modifications, are part of the competition in Cessna's efforts to sell the CitationJet. **[**10]** Sales of the CitationJet **[*1189]** increased after the Service Letter was issued.

Cessna disputes Mellon's market definition, and relying on testimony from Cessna officials and retained experts, contends the following planes are competitors of the CitationJet:

(1) Cessna Models 500, 501SP, 525, 550, S-550, 551 and 560, which are jet aircraft which can be flown by a single pilot crew.

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[4] Cessna disputes this fact, but Mellon has cited admissible evidence from which it is reasonable to conclude that Cessna initially refused to provide any service to modified aircraft.

(2) The Lear 31 and the Beech Jet 400-A, which are jets but cannot be flown by a single pilot.

(3) King Air 90s, King Air 200s, King Air 300s and the Beech Starship, which can be flown by a single pilot, but are turbo props.

When attempting to sell CitationJets, Cessna targets owners of turboprops, Citation Models 500, 501, and 525, and Lear Models 23 and 24. Cessna is the only manufacturer of business jets that, as built by the manufacturer, can be certified by the FAA to be flown by a single pilot. Other manufacturers have such planes under development. Raytheon is taking orders aggressively for the single-pilot business jet it is developing, the Premier I.

Cessna's market surveys indicate that most of the competition for the sale of the Citation Jet comes from used Citations. The surveys also indicate that **[**11]** single-pilot capability was listed as an important factor for purchasers of the CitationJet, ranging from a low of 12% in 1991 to a high of 48% in 1996. Cessna also conducted a survey which showed less than 10% of the Cessna fleet was flown single pilot.

Mellon's expert witness testified that there is a discrete market for single-pilot jet aircraft. He testified that he had 33 years experience in the aircraft industry and had been involved in more than 1000 aircraft sales transactions. Cessna objects to the report's conclusions because it contains no analysis of reasonable substitution or interchangeability. Cessna's damages expert testified that, in his experience, 5 to 7 percent of aircraft purchasers are only interested in single-pilot jet aircraft.

Cessna sells approximately 60 CitationJets each year. About 10 used CitationJets are sold each year. About three Citations with Eagle modifications are sold each year. About nine Citations are equipped with Sierra modifications each year. In the absence of the Service Letter, the president of Sierra Industries believes his sales would have been greater. He testified that prior to the issuance of the Service Letter, he had a healthy **[**12]** backlog of orders. At the time of his deposition, he had only two long-wing modifications pending, and no Eagle or Eagle 400 orders.

Cessna service for major maintenance and phase inspections costs substantially more than such service from other providers.

The original developer of the Sierra Modification STC went bankrupt. A subsequent owner of the rights to the STC went out of business. Sierra Industries is the present owner of the rights to the STC.

The FAA has not issued any Air Worthiness Directives (AWDs) or taken any other action indicating that Citations equipped with Sierra Modifications are unsafe or have long-term safety problems. Cessna's expert witness testified that he saw no safety-related issues involved in servicing modified aircraft and that his own service center continues to service such aircraft. Sierra Industries offered to provide Cessna with the technical specifications of the modified aircraft and, prior to the issuance of the Service Letter, worked closely with Cessna when technical questions arose.

Prior to the issuance of the Service Letter, some Cessna employees felt comfortable servicing modified Citations and were willing to continue servicing the **[**13]** modified aircraft. Also prior to the issuance of the Service Letter, the manager of Cessna's Newburg facility asked the sales and marketing manager to determine how much income the center would lose if it stopped servicing modified Citations. After the Service Letter was issued, Cessna employees provided different justifications for the Service Letter. Cessna refuses to certify the airworthiness of modified aircraft and will not accept modified aircraft as a trade-in when purchasing a new CitationJet.

III. Analysis.

Mellon claims that Cessna violated *Section 2* of the Sherman Act by monopolizing or **[*1190]** attempting to monopolize the market for single-pilot business jets. He argues Cessna violated *Section 1* of the Sherman Act by tying Cessna service to the purchase of non-modified Cessna aircraft.

HN5[] The offense of monopoly under *Section 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

*Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451, 481, [**14] 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*.

HN6[] A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different, or tied, product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement violates *Section 1* of the Sherman Act if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Kodak, 504 U.S. at 461-62*.

Cessna first argues both of Mellon's antitrust claims fail because he lacks standing to assert them. Cessna then argues Mellon's *Section 2* monopoly claim fails because he cannot show the existence of a legally cognizable and relevant market for jet aircraft in which Cessna possesses monopoly power. Next, Cessna argues Mellon cannot establish that its conduct was intended to preserve or create monopoly power in a relevant market, thus Mellon's *Section 2* claim fails. Cessna argues Mellon's *Section 1* tying claim fails because he cannot show Cessna possesses market power in the tying market, service for Cessna Citations, sufficient to impact the tied market. Finally, **[**15]** Cessna argues injunctive relief is inappropriate under the facts of this case, and since Mellon does not seek monetary damages in his antitrust claims, Cessna is entitled to summary judgment. Each argument will be addressed in turn.

A. Standing.

Cessna first argues that Mellon lacks standing to bring his antitrust claims. **HN7**[] The Clayton Act authorizes private actions to enforce the antitrust laws. *15 U.S.C. §§ 15* and *26*. To establish standing to bring an enforcement action seeking injunctive relief under *Section 26*, a plaintiff must show (1) an antitrust injury; and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws. *Reibert v. Atlantic Richfield Co., 471 F.2d 727, 730-31* (10th Cir.) (applying test to claims brought under *Sections 15* and *26*), *cert. denied*, *411 U.S. 938, 36 L. Ed. 2d 399, 93 S. Ct. 1900 (1973)*. *See also* *Sports Racing Services, Inc. v. Sports Car Club of America, Inc., 131 F.3d 874, 882 (10th Cir. 1997)* (applying test to claim for treble damages under *Section 15*).

Sports Racing explained how the two factors are evaluated. **HN8**[] To show an antitrust injury, a plaintiff must show an injury of the type which **[**16]** the antitrust laws were intended to prevent and which flow from the reason that the defendant's conduct is prohibited. *131 F.3d at 882*. To meet the second prong of the test, the plaintiff must show the injury resulted directly from the defendant's violation. *Id. Sports Racing* identified six factors to be considered when evaluating antitrust standing:

> (1) the causal connection between the alleged antitrust violation and the harm; (2) improper motive or intent of defendants; (3) whether the claimed injury is one sought to be redressed by antitrust damages; (4) the directness between the injury and the market restraint resulting from the alleged violation; (5) the speculative nature of the damages claimed; and (6) the risk of duplicative recoveries or complex damage apportionment.

Sports Racing, 131 F.3d at 882 (quoting *City of Chanute, Kan. v. Williams Natural Gas Co., 955 F.2d 641, 652 n.14* (10th Cir.), *cert. denied*, *506 U.S. 831, 121 L. Ed. 2d 57, 113 S. Ct. 96 (1992)*, *overruled in part on other grounds,* *Systemcare, Inc. v. Wang Lab. Corp., 117 F.3d 1137 (10th Cir. 1997)*(en banc)). *Sports Racing* recognized that standing analysis must take into **[**17]** account the type of antitrust claim being asserted. *131 F.3d at 882*.

[*1191] Cessna sets forth all of the factors listed by the Tenth Circuit and cites a number of cases where a plaintiff was found not to have standing to assert an antitrust claim. However, Cessna presents only two arguments, both of which address the fourth factor listed by the Tenth Circuit: whether Mellon can establish damages related to Cessna's allegedly illegal conduct.

Cessna first argues Mellon cannot show an injury as a result of Cessna's conduct because his plane was serviced by providers other than Cessna prior to the issuance of the Service Letter. Cessna cites Mellon's expert's testimony that an owner voluntarily having major maintenance or phase inspections performed by another provider would suffer the same damages. Cessna ignores the fact that Mellon's expert clearly emphasized the importance of major maintenance and phase inspections, as opposed to routine maintenance. Cessna cites no evidence, and does not even argue, that Mellon's plane received either major maintenance or phase inspections from other providers prior to the issuance of the Service Letter. Cessna's arguments therefore go to the amount of **[**18]** damages Mellon suffered as a result of Cessna's conduct, rather than the existence of such damages. For summary judgment purposes, Mellon can establish that he suffered damages related to Cessna's conduct.

Cessna next argues Mellon is an inappropriate plaintiff because he regularly flies his plane internationally. Cessna has no company-owned service centers outside the United States. Cessna argues this would regularly place Mellon in a position where he would have to use non-Cessna service. While Cessna cites some instances where Mellon's plane received service outside the United States, Cessna does not cite any instances where Mellon's plane received major maintenance or phase inspections outside the United States. Cessna does not argue that Mellon would have to schedule major maintenance or phase inspections outside the United States. At the summary judgment stage all reasonable inferences must be drawn in Mellon's favor. In the absence of evidence to the contrary, it is reasonable to assume Mellon could schedule all major maintenance and phase inspections to occur while his plane was in the United States. Thus, the fact that Mellon flies his plane internationally does not mean **[**19]** that he would be unable to show damages.

The court finds it unnecessary to address the other five factors of *Sports Racing*, where Cessna does not even argue that any of the other factors weigh against conferring standing under the facts of this case. Cessna has the burden of establishing that it is entitled to summary judgment and the court will not construct arguments on its behalf. This would be unfair to Mellon, who would have no opportunity to respond to such arguments. Accordingly, Mellon has standing to assert his antitrust claims.

B. Relevant Market for Jet Aircraft.

Mellon argues the relevant market for his *Section 2* claim is business jets that can be flown by a single pilot and that Cessna possesses monopoly power in that market. Cessna argues (1) Mellon has defined the market too narrowly, and (2) Mellon cannot show Cessna has monopoly power in the relevant market, regardless of which definition is used. Cessna argues that Mellon has the burden of establishing the relevant market and that Cessna has market power in that market.

The purpose in ***antitrust law*** of market definition is to illuminate a practice's effect on competition, rather than as an end unto itself. **[**20]** *Law v. National Collegiate Athletic Assoc., 134 F.3d 1010, 1020 (10th Cir. 1998)*. *Accord, Allen-Myland, Inc. v. International Business Machines Corp., 33 F.3d 194, 209* (3rd Cir.)("Market share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them.") (citations omitted), *cert. denied*, *513 U.S. 1066 (1994)*. What Mellon must actually do is present a reasonable economic theory with citations to evidence indicating the theory accurately reflects the market. *Kodak, 504 U.S. at 468-69*. If Mellon cites evidence of anti-competitive effects, to obtain summary judgment Cessna has the burden of showing that an inference **[*1192]** of market power is unreasonable. *Id., 504 U.S. at 468-69, 471*.

Law held that ***HN9***[] it is not necessary for a plaintiff to establish market power where a plaintiff directly shows anti-competitive effects, such as control over output or price. *Law, 134 F.3d at 1019-21*. In *Law*, the Tenth Circuit found evidence that the NCAA imposed a cap on salaries for certain assistant coaches at member schools was sufficient to show anti-competitive effects. It was **[**21]** not necessary for the plaintiffs to present an elaborate demonstration of the relevant market. *Id.* As discussed below, for summary judgment purposes Mellon has established a relevant product market and produced direct evidence of anti-competitive effects. While Mellon's evidence of anti-competitive effects is not as direct as that presented in *Law, Law* is important because it illustrates the perspective from which the definition of relevant market must be established.

In *Kodak*, the defendant was a manufacturer of complex business machines and also serviced the machines. Other manufacturers of similar machines existed. However, parts for the machines were not interchangeable. The plaintiff cited evidence that the defendant restricted access to parts for other service providers, that customers switched to the defendant's service, and that some service providers went out of business as a result. The Supreme Court held this was sufficient evidence to raise a material question of fact for the jury. *Kodak, 504 U.S. at 469*.

Here, Mellon cited evidence that Cessna recognizes sales of used Citations, particularly those with performance modifications, as the major competition **[**22]** for sales of new CitationJets. He cited evidence of increased sales of CitationJets after the Service Letter was issued. He cited evidence of decreased sales of modifications to existing Citations. Finally, he cited evidence that the market value for modified used Citations decreased as a result of Cessna's refusal to provide service and support for modified aircraft. Mellon has cited evidence of anti-competitive effects. Accordingly, to obtain summary judgment Cessna must show that an inference of market power is unreasonable.

Cessna argues that Mellon has failed to take into account reasonable interchangeability of use and the cross elasticity of demand between CitationJets and alternative aircraft, citing *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022* (10th Cir.), *cert. denied*, *506 U.S. 999, 121 L. Ed. 2d 537, 113 S. Ct. 601 (1992)*; *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3rd Cir. 1997)*, *cert. denied*, *118 S. Ct. 1385 (1998)*; *Allen-Myland, supra*; *Tower Air, Inc. v. Federal Exp. Corp., 956 F. Supp. 270 (E.D.N.Y.* ***[**23]*** *1996)*; and *B.V. Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp. 162 (S.D.N.Y. 1995)*. Cessna claims that the market, as defined by Mellon, is tailored to his own personal preferences.

Cessna argues a number of single-pilot aircraft, as well as non-single pilot aircraft, compete with the Cessna Citation and should be included in the market definition, including turbo-prop aircraft, modified multi-pilot business jets, multi-pilot business jets, and single-pilot jet aircraft in design by other manufacturers. Cessna cites evidence supporting this argument. Cessna claims that when these other aircraft are considered, Cessna has less than 48% of the market. However, Cessna merely raises a question of material fact. Mellon's personal preferences happen to coincide with what Cessna's own marketing materials indicate are the characteristics of the CitationJet's major competition. Cessna has not established that Mellon's suggested market definition is unreasonable as a matter of law. Under Mellon's definition of the relevant market, Cessna controls approximately 73% of the market. This is sufficient to show market power for summary judgment purposes. *See* *Kodak, 504 U.S.* ***[**24]*** *at 481* (citing cases). The cases Cessna cites are distinguishable and do not support Cessna's position.

In *Brown Shoe*, the government sought to block a merger between two shoe companies under *15 U.S.C. § 18*. The Supreme Court reasoned that the proper way to define the relevant markets was with regard to the **[*1193]** facts of the actual market. The district court made factual findings and divided the market into three lines of shoes: men's, women's, and children's shoes. The Supreme Court rejected attempts by the shoe companies to further subdivide the market before considering whether the proposed merger would substantially impact competition. *Brown Shoe, 370 U.S. at 323-28*. The Court held that because there was no difference in the competitive effects of the merger when so subdivided, further subdivision was impractical and unwarranted. *Id., 370 U.S. at 327-28*.

Here, Mellon's action is brought pursuant to *15 U.S.C. § 2* and the motion is one for summary judgment rather than a review of rulings based on findings of fact. Furthermore, here there is evidence the competitive effects are different if the market is subdivided.

In *TV Communications*, a cable TV operator sued a **[**25]** cable television source provider. The operator alleged the provider had a monopoly over a single cable television station. The district court granted a motion to dismiss. The Tenth Circuit held an antitrust claim could not be based on a natural monopoly a company holds over its own product. *964 F.2d at 1022*. To the extent that Cessna argues *TV Communications* stands for the proposition that a single brand of a product or service can never define a relevant market, *Kodak* explicitly rejected this position. *Kodak, 504 U.S. at 481-82*. Furthermore, the *TV Communications*' court noted that it could not consider whether the defendant had a monopoly in broader markets, such as subscription television programming or sports programming, but was limited to considering the allegations of the complaint. Here, Mellon does not allege that Cessna monopolized or was trying to monopolize the market in CitationJets. He alleges Cessna was trying to monopolize the market in single-pilot jet aircraft.

In *Queen City*, Domino's Pizza and its franchisees entered into a contract agreement. The franchisees alleged that Domino's Pizza was using contract provisions to force the franchisees to **[**26]** purchase supplies from it at supracompetitive prices. The franchisees sought to limit the market to supplies for Domino's franchisees. The Third Circuit rejected this approach, holding that the relevant market must include supplies for all pizza shops because such supplies were interchangeable. The court emphasized that a supplier's exercise of contractual restraints is not necessarily equivalent to the exercise of monopoly power. *Queen City, 124 F.3d at 436-39*. The court distinguished *Kodak* because the franchisees failed to allege that the supplies at issue were unique. *Id. 124 F.3d at 439*. Here, as discussed above, Cessna has merely raised a material question of fact as to whether a single-pilot jet aircraft forms a unique market.

In *Allen-Myland*, the plaintiff, AMI, reconfigured IBM mainframe computers by installing module upgrades which increased the processing power of the computers. The modules were purchased directly from IBM or from customers who had purchased upgrades from AMI. IBM instituted a policy bundling installation with the price of the modules and requiring that replaced modules be returned to IBM.

AMI sought to define the relevant market as large-scale **[**27]** mainframe computers. Alternatively, AMI sought to limit the market to parts and services for upgrading IBM mainframes or all manufacturer's mainframes. Instead, the district court expanded the relevant market to include various substitutes that it believed shared cross-elasticity of demand with large-scale mainframe computers.

The Third Circuit rejected a number of the additions because they amounted to double counting. It rejected the addition of used IBM equipment because IBM had too much control over that market. It rejected the addition of memory and other internal upgrades because they were not reasonably interchangeable with processor upgrades. The Third Circuit then vacated factual findings that small computers, peripheral devices and software upgrades competed with processor upgrades. On remand, the district court was referred to *Kodak* and directed to consider evidence that high switch-over costs might effectively prevent small computers from competing with mainframe upgrades. With regard to peripheral devices and software, the Third Circuit found the evidence on which the district court relied was insufficient **[*1194]** to support its findings, but noted that the district court **[**28]** was free to consider additional evidence on remand. Finally, the Third Circuit found there was sufficient evidence to support the district court's rejection of AMI's proposed submarkets. *Allen-Myland, 33 F.3d at 201-209*.

Allen-Myland does not support Cessna's position. The thrust of the decision is that a detailed factual inquiry must be conducted. Similarly, *Tower Air* found that summary judgment was inappropriate where a definition of the relevant market could not be made based solely upon the undisputed facts. *Tower Air, 956 F. Supp. at 281-282*.

In *B.V. Optische*, the plaintiff failed to plead that the market for certain chest X-ray equipment was not interchangeable with the general market for X-ray equipment. *B.V. Optische, 909 F. Supp. at 171-172*. Here, Mellon has plead and cited evidence in support of his argument that the single-pilot jet aircraft market is the relevant market.

A material question of fact exists as to the relevant product market and Cessna's power in that market. Accordingly, Cessna is not entitled to summary judgment on Mellon's *Section 2* antitrust claim.

C. Intent to Preserve Monopoly Power.

Cessna argues that Mellon's *Section **[**29]** 2* claim fails because he cannot show that Cessna issued the Service Letter with the intent to preserve monopoly power in the market for single-pilot jet aircraft.

Cessna first argues that Mellon cannot point to any "smoking-gun" statements from Cessna executives, thus he cannot establish intent to monopolize. However, intent may be established by circumstantial evidence, including evidence of a negative impact on competition. *See* *Kodak, 504 U.S. at 483* (where plaintiff presented evidence that Kodak took actions to preserve its monopoly, liability will turn on whether legitimate business reasons can explain Kodak's actions). Cessna also points to the self-serving statements of its officials that they were not concerned with sales of modified aircraft and had a neutral position on modifications. It is reasonable to infer from Cessna's marketing reports that Cessna did consider used Citations, including modified Citations, as competition. It also is reasonable to infer from the decision not to service modified aircraft that Cessna was not neutral on the issue of whether the aircraft should be modified.

Mellon has presented circumstantial evidence from which it is reasonable to infer **[**30]** that Cessna was motivated by an intent to eliminate modified aircraft as competition to the CitationJet. He cited evidence that various Cessna officials offered different justifications for the Service Letter. Cessna explains this away by arguing that all of the stated reasons were factors in issuing the Service Letter. This may well be true, but a reasonable fact finder could conclude otherwise. Mellon cited evidence from which it is reasonable to infer that no legitimate safety concerns exist, thus negating the main reason proffered for the issuance of the Service Letter.

Cessna then argues that Mellon's theory is economically unfeasible because Cessna would forego sales opportunities by turning away service customers. Cessna cites no evidence indicating the impact of its decision on sales, or on the amount of sales that occur as a result of maintenance service. Mellon cites evidence that Cessna's sales of the CitationJet increased and that the value of used-modified Citations decreased after the Service Letter was issued. This suggests that Mellon's theory is economically reasonable.

Cessna next argues that legitimate business concerns -- customer safety and product integrity **[**31]** -- prompted the Service Letter. As previously noted, Mellon has cited evidence that there are no legitimate safety concerns, including evidence that Sierra Industries cooperated with Cessna by providing technical data and assistance. With regard to product integrity, Mellon cited evidence that before the Service Letter was issued, Cessna had serviced modified aircraft for more than a decade.

Cessna next argues that its lack of market power in the service market means that it cannot have intended to restrict competition in the sales market. This argument fails because Mellon's monopoly claim is not based solely on the tying arrangement. Mellon also argues, and cites evidence in support, **[*1195]** that Cessna's decision not to service modified Citations sends a significant message to purchasers of single-pilot jet aircraft, i.e. that Cessna considers modified Citations unsafe.

Cessna next cites evidence of problems with modified Citations, including fuel leaks in Mellon's plane and difficulty obtaining technical information. Cessna also cites evidence that it issued similar service letters on other modified aircraft. This is evidence that Cessna may have been motivated by safety concerns. However, **[**32]** it merely indicates that a material question of fact exists.

Cessna next asserts that the court should consider the pro-competitive effects the Service Letter had on the service market. While pro-competitive effects may exist, Cessna cites no evidence from which the court can find, as a matter of law, that the pro-competitive effects outweigh the anti-competitive effects of the Service Letter. [5]

Finally, Cessna argues that Mellon's theory is irrational because the difference in price for a new CitationJet over a used Citation with modifications is so large that the lack of Cessna service is insufficient by itself to induce any rational buyer to spend the extra money on the CitationJet. This argument **[**33]** fails because Cessna's own marketing documents indicate that Cessna considers used Citations as the primary competition for the CitationJet. If the planes are in competition, then differences in service policies could indeed induce a potential buyer to purchase a CitationJet, rather than purchasing a used Citation with modifications or purchasing a modification for an existing Citation. This is especially true when Cessna's policy of refusing to accept modified aircraft for trade-in on a new CitationJet is considered.

Mellon has raised a material question of fact as to whether Cessna issued the Service Letter with an intent to preserve a monopoly on single-pilot jet business aircraft.

D. Market Power in the Tying Market.

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[5] Presumably, Cessna is arguing that the pro-competitive effects in the service area mean that Cessna cannot have intended to monopolize the sales area. Cessna does not even argue that the lost profit in the service area exceeds the profit gained from the alleged increase in sales attributable to the Service Letter.

As previously noted, to establish a claim for tying in violation of *Section 1* of the Sherman Act, Mellon must show Cessna has appreciable economic power in the tying product market, in this case the service market, and the arrangement affects a substantial volume of commerce in the tied market, in this case the market for single-pilot jet business aircraft. *Kodak, 504 U.S. at 461-62*. Cessna argues that Mellon cannot show it has appreciable power in the service **[**34]** market.

As previously discussed, Mellon need only present a reasonable economic theory with citations to evidence indicating the theory accurately reflects the market. *Kodak, 504 U.S. at 468-69*. If Mellon cites evidence of anti-competitive effects, to obtain summary judgment Cessna has the burden of showing that an inference of market power is unreasonable. *Id., 504 U.S. at 468-69, 471*. This applies to the tying market as well as the tied market. *See Kodak, 504 U.S. at 481* (noting that the burden of showing market power is lower in a *Section 1* claim).

Cessna first argues that because Mellon claims Cessna has a monopoly in the tied market, he cannot show that any tying by Cessna had a substantial impact in the tied market. Cessna cites *Boddicker v. Arizona State Dental Association, 680 F.2d 66, 67* (9th Cir.), *cert. denied*, *459 U.S. 837, 74 L. Ed. 2d 79, 103 S. Ct. 83 (1992)*, as well as a number of other cases in support of this proposition. There are two problems with this argument. First, Cessna misstates the holding of *Boddicker* and the other published cases, which actually held that where there was no competition at all in the tied market, a tying claim **[**35]** was not viable. The court declines to consider the unpublished cases, where Cessna failed to provide copies. Furthermore, there are cases which have allowed both monopoly and tying claims to go to the fact finder. *See e.g.* *Kodak, supra.* Cessna's argument is not well taken.

Second, Mellon presents his tying claim in the alternative to his monopoly claim. Cessna vigorously argues that it does not have a monopoly in the tied market. If Cessna **[*1196]** prevails on this issue at trial, Mellon's tying claim would not be barred by a monopoly in the tied market, even if the court were to accept Cessna's argument as valid.

Cessna next argues that because other companies service modified Cessnas, Cessna cannot be said to possess sufficient market power in the service market to impact the sales market. As discussed above, Mellon has cited evidence of anti-competitive effects in the tied market. Accordingly, Cessna must show Mellon's theory is unreasonable as a matter of law.

Cessna argues that because it controls less than 7% of the market for servicing Citations, it does not possess market power in the tying market. Mellon does not dispute that Cessna controls less than 7% of the general service **[**36]** market. He argues that Cessna factory service must be considered a separate sub-market -- a market where Cessna has a complete monopoly. Mellon cites evidence that Cessna charges substantially more for phase inspections and other maintenance than other service providers and that owners are willing to pay this difference. Cessna's own economic expert testified that Cessna service is not the same as service obtained elsewhere. Mellon also cited evidence of the impact Cessna's refusal to service modified aircraft had on the value of such aircraft. The court cannot conclude as a matter of law that Cessna lacked market power in the tying market.

E. Appropriateness of Injunctive Relief.

Cessna argues injunctive relief is inappropriate because Mellon has not alleged any damages that can be avoided through injunctive relief and because Cessna has legitimate safety concerns. The court has previously held that material questions of fact exist as to the amount of Mellon's damages and the safety justifications for Cessna's actions.

Mellon argues, and the court agrees, that it is reasonable to assume that a plane partially serviced by Cessna would suffer less loss in value than one receiving **[**37]** all its service elsewhere. Thus, it is possible that Mellon could obtain some actual relief through an injunction.

In addition, the court may find that Cessna has no legitimate safety concerns. If that turns out to be the case, the court may find injunctive relief appropriate. Accordingly, Cessna is not entitled to summary judgment because Mellon seeks only injunctive relief on his antitrust claims.

IT IS ACCORDINGLY ORDERED this *1st* day of July, 1998, that defendant Cessna's motion for summary judgment is denied.

J. THOMAS MARTEN, JUDGE

Rockholt Furniture, Inc. v. Kincaid Furniture Co.

United States District Court for the Eastern District of Tennessee

July 6, 1998, Filed

No. 1:96-CV-588

Reporter
1998 U.S. Dist. LEXIS 24255 *

ROCKHOLT FURNITURE, INC., Plaintiff, v. KINCAID FURNITURE COMPANY, INC. and RHODES FURNITURE COMPANY, Defendants.

Subsequent History: Affirmed by *Rockholt Furniture, Inc. v. Kincaid Furniture Co., 1999 U.S. App. LEXIS 22436 (6th Cir. Tenn., Sept. 10, 1999)*

Core Terms

Furniture, summary judgment, manufacturer, terminate, distributors, gallery, Sherman Act, customer, concerted action, prices, sufficient evidence, set price, complaints, products, display, breach of contract, antitrust, nonmoving party, Deposition, Memorandum, dealer, margin, accomplish, conspiracy, inducement, concerted, reasons

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For Rhodes Furniture Company, (TN-Rhodes, Inc.) doing business as, Defendant: Dwight J Davis, Michael L Brown, LEAD ATTORNEYS, King & Spalding, Atlanta, GA USA; T Harold Pinkley, Jr, LEAD ATTORNEY, Butler Snow, LLP (Nash), Nashville, TN USA.

Judges: CURTIS L. COLLIER, UNITED STATES DISTRICT JUDGE.

Opinion by: CURTIS L. COLLIER

Opinion

MEMORANDUM

Before the Court are Defendants Kincaid Furniture Company, Inc.'s ("Kincaid") and Rhodes Furniture Company's ("Rhodes") Motions for Summary Judgment (Court File Nos. 28 and 31). Plaintiff Rockholt Furniture, Inc. ("Rockholt") responded (Court File No. 37) and Kincaid and Rhodes replied (Court File Nos. 40 and 41). For the following reasons, the Court will **GRANT** Kincaid's and Rhodes's motions. There being no other issues, the Court will **[*2]** **ORDER** the case **DISMISSED**.

I. RELEVANT FACTS

Kincaid manufactures solid wood furniture. Kincaid sells this furniture to retail establishments throughout the county. Some of the retailers Kincaid sells to maintain a special independent dealer arrangement known as a Kincaid gallery. In a Kincaid gallery, the retailer divides the store's showroom into room-like sections to display the furniture as if it were arranged in a home. It was Kincaid's experience that a gallery type display yielded two and a half to three times the volume yielded by an independent dealer not maintained as a gallery (Dennis Kincaid Deposition, p. 30, Supplemental File to Court File No. 29).

From 1985 until May 1996, Rockholt purchased furniture from Kincaid and sold that furniture at its Decatur, Tennessee store. Rockholt did not maintain a Kincaid gallery. Rockholt contends there was a verbal contract between it and Kincaid for Rockholt to remain a dealer of Kincaid products as long as Rockholt paid for the furniture it ordered (Rockholt's Response to the Motions for Summary Judgment, p. 2, Court File No. 37). Calvin Rockholt, owner of the Rockholt store, testified as follows regarding the contract:

> Q: Well, taking **[*3]** that it may or may not be in their best interest, if they felt it was in their best interest to have Rockholt Furniture and you didn't want to carry their line, you don't have any kind of written agreement or any kind of understand that you're going to continue handling it; is that correct?
> A: That's correct.
> Q: And is it your understanding that that's the typical arrangement between -- you're talking about the typical arrangement between a dealer and furniture supplier in the industry, that is, generally, if the dealer, for whatever reason that is acceptable to him, decides it's not in his best interest to carry a line, he can just not order any more furniture from that manufacturer; is that correct?
> A: Yes.

. . . .

> Q: Is the understanding that you consider that you had with Kincaid that you described the same with all of the manufacturers that you carry in your store, that is, you have a partnership arrangement?
> A: Yes.
> Q: And as long as you are doing your end of the bargain, then they should continue selling to you indefinitely?
> A: Yes.
> Q: Have you ever had anyone ask you to sign a contract or request that you sign a contract?
> A: No.

(Calvin Rockholt Deposition, pp. 29-30, Supplemental File **[*4]** to Court File No. 29, Exh. D ("Depo Excerpts I")).

In a later portion of his deposition, Calvin Rockholt again testified about the contract between Kincaid and Rockholt:

> Q: Can you tell me if you have any comment in this letter[1] regarding your contract with Kincaid or your agreement with Kincaid?
> A: The only tiling would be where Dennis -- where I say in the second paragraph ten years ago Dennis called on me to put Kincaid into our store. At that time Dennis was trying to sell us the Kincaid product and I bought it at that time. A verbal agreement to buy the product. Dennis approached me about putting it in the most prominent part of the store, and we did that. It had the best area of our store with the best lighting and the best display area that we had at that time. And I fulfilled that agreement with Dennis.
> Q: But you didn't feel the need to call to Mr. Steve Kincaid's attention anything about a contract or agreement in that letter; is that correct?
> A: Well, there was not a written contract. That was what I was referring to in the second paragraph when I said ten years ago when Dennis called on me. And I go on to refer to things that I did.

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[1] The parties are referring to a letter Calvin Rockholt sent to Steve Kincaid, president of Kincaid, after Mr. Rockholt learned Kincaid was not going to continue to sell furniture to Rockholt.

(Calvin Rockholt Deposition, pp. 74-75, Court **[*5]** File No. 37, Exh. A ("Depo. Excerpts II")). Mr. Rockholt's best description of the contract was, "It was always just terminology, even within the industry, if you pay your bills and do a decent job of representing the product, people would continue to sell to you" (Calvin Rockholt Depo. Excerpts I, p. 56; *See also id.* at p. 57).

In November 1993, Rhodes opened a retail furniture store in Chattanooga, Tennessee. Rhodes's store was located approximately 40 to 50 miles from the Rockholt store and also sold Kincaid furniture. Rhodes was Kincaid's largest customer and the Chattanooga store maintained a Kincaid gallery.

In March of 1994, Stan Lowenstein, manager of Rhodes's Chattanooga store, complained to Robert Lemons, National Accounts Representative for Kincaid, about a customer who had visited the Rhodes store. The customer asked Rhodes to beat a price offered by Rockholt on a certain piece of Kincaid furniture. Rhodes offered to beat the price by $100, but the customer did not purchase the item. Instead, she returned to the Rockholt store seeking an even better deal. Rhodes refused to make another offer to the customer *(See* D. Kincaid Depo., pp. 34-35, Supplemental File to Court File No. 29, Exh. **[*6]** C; Exhibit 4 to Robert A. Lemons Deposition, Court File No. 37, Exh. E ("Lemons Depo. Excerpts I")).

The essence of Lowenstein's complaint was he believed Rockholt maintained only a limited inventory of Kincaid furniture. Lowenstein believed when a Rockholt customer wanted to view items not earned by Rockholt, Rockholt sent those customers to Rhodes. Once the customer located the items they wanted at Rhodes, Rockholt then special ordered the furniture for the customers. Rhodes felt this practice, if true, permitted Rockholt to receive the benefit of Rhodes's large inventory and gallery display without the costs associated with maintaining such a large display *(See* Stan Lowenstein Affidavit, ¶ 4, Supplemental File to Court File No. 29, Exh. E).

Lemons instructed Dennis Kincaid, Kincaid's marketing representative for the area, to investigate Lowenstein's complaint (D. Kincaid Depo., p. 35). Dennis Kincaid spoke with both Calvin Rockholt and Stan Lowenstein about the customer shopping incident. After Dennis Kincaid's conversation with Lowenstein, he faxed the following synopsis of the conversation to Lemons:

> I called Stan to express support and concern about competitive discounting, etc. **[*7]** He was respectable but harsh and not receptive to my review of the shopping incident. He told me his version and indicated that Rockholt had lied to me, says Rockholt habitually sends customers to shop his store on all shared lines, indicating he will special order and beat prices.
> Rhodes made the sale in question at 28% margin. Stan feels that competitors should not have access to anything he carries unless they are an AUTH. "K" gallery [authorized Kincaid gallery].
> He did not believe my report on Rockholt display, stocking of Kincaid. He agreed to send shoppers to Rockholt to verify pricing, display, etc.
> He confirmed that Rockholt advertising was institutional-no product identity.
> He has no problem with Rockholt's access to line as long as they don't drastically cut prices. I will try to influence Rockholt not to do so.

(Exhibit 5 to Lemons Depo. Excerpts I)

With respect to the relationship between Rockholt, Kincaid, and Rhodes, Calvin Rockholt also testified, "After Rhodes entered the Chattanooga market, Dennis Kincaid pressured Rockholt to establish a 42% profit margin. According to Dennis Kincaid, this was the margin Rhodes and Kincaid desired that we establish. This pressure to establish **[*8]** a specific profit margin came from Dennis Kincaid and it continued from the time that Rhodes entered the Chattanooga market until Rockholt was terminated as a distributor of Kincaid products" (Calvin Rockholt Affidavit, ¶¶ 6-7, Court File No. 39).[2]

[2] Calvin Rockholt's deposition testimony did not indicate Rhodes also desired Rockholt to set it prices at a 42% profit margin (Calvin Rockholt Depo. Excerpts II, pp. 34-35). Furthermore, while Mr. Rockholt's testimony regarding his conversation with Dennis Kincaid *could possibly* be admissible against Kincaid as an admission by a party opponent, this evidence is likely

Kincaid also sold its furniture to another area store, Morgan Furniture. Prior to 1992, Morgan Furniture maintained stores in Morristown and Dayton, Tennessee. Since the Dayton, Tennessee store was only eleven miles from Rockholt's store, Kincaid initially protected Rockholt's distribution area by permitting Morgan Furniture to only sell Kincaid products at its Morristown store (D. Kincaid Depo., pp. 99-100). However, in 1992 or 1993, Morgan Furniture closed it Morristown store and asked to sell Kincaid furniture in its Dayton store.

Kincaid discussed Morgan Furniture's request with Rockholt who had no objection. The Tennessee River separated Morgan Furniture from Rockholt and the only mode of transportation between the stores was by ferry. This was thought to be an effective competition deterrent and Kincaid permitted Morgan Furniture to sell Kincaid products in its Dayton store (*Id.* at 100).

In February of 1996, Morgan Furniture became **[*9]** a Kincaid gallery and began to display Kincaid products in a home like arrangement (Robert A. Lemons Deposition, p. 17, Supplemental File to Court File No. 29, Exh. F ("Lemons Depo. Excerpts II")). That same year, the State of Tennessee also began to build a bridge across the Tennessee River. This meant customers would have easier access to both the Rockholt and Morgan Furniture stores (*Id.* at 59-60).

On May 14, 1996, Kincaid sent Rockholt a letter terminating Kincaid's relationship with Rockholt. The letter stated:

> We have determined that we can best increase the sale of Kincaid products in your area through fewer dealers, therefore, this is notification from this date forward, we will not accept any new orders for stock merchandise....
>
> Thank you for the orders which you have sent us in the past. If our market plans or philosophy changes in the future, we hope that we may be able to renew our relationship.

(Exhibit 2 to Calvin Rockholt Depo. Excerpts II).

Calvin Rockholt also had a discussion with Dennis Kincaid about the termination of the relationship between Rockholt and Kincaid. In his affidavit, Calvin Rockholt described this conversation as follows:

> At the time Dennis Kincaid informed me of Kincaid's **[*10]** decision to terminate Rockholt as a distributor of Kincaid products, he did not mention either the construction of a new bridge between Dayton and Decatur or the establishment of Morgan Furniture as a Kincaid gallery as a factor in Kincaid's decision.
>
> During this conversation, Dennis Kincaid told me that our termination was as a result of Kincaid's agreement with Rhodes to terminate me. He told me that the decision "ain't right," that Kincaid was showing "great disloyalty" to Rockholt, and that Rhodes finally got me because I would not raise my prices to the level requested by Rhodes and Kincaid.
>
> Dennis Kincaid also told me that his superiors could not give him much information on why Rockholt was being terminated, but that he thought that it was a "shitty decision," and "it was a shame to take a line work your ass off and build it up for ten years just to have it taken away from you."

(Calvin Rockholt aff., ¶¶ 8-10).

On December 6, 1996, Rockholt filed suit against Kincaid and Rhodes alleging violations of the Sherman Act, *15 U.S.C. § 1*; and Tennessee State ***Antitrust law***, *Tenn. Code Ann. §§ 47-25-101* and *-102*; and for claims for breach of contract; unlawful inducement of breach of contract, *Tenn. Code Ann. 47-50-109*; tortious interference with a prospective **[*11]** business advantage; and conspiracy.[3] Kincaid's and Rhodes's Motions for Summary Judgment challenge Rockholt's proof on all of these claims. The motions are now ripe for the Court's adjudication.

II. STANDARD OF REVIEW

Under *Fed R. Civ. P. 56(c)*, the Court will render summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to

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inadmissible hearsay with respect to Rhodes. However, as discussed in Section III(A) of this Memorandum, even if the Court accepts this evidence, there is insufficient proof of a violation of *Section 1* of the Sherman Act.

[3] Rockholt did not assert some of these claims until its amended complaint filed on May 8, 1997 (Court File No. 16).

conclusively show no genuine issue of material fact exists, Lansing Dairy, Inc. v. Espy, 39 F.3d 1339, 1347 (6th Cir. 1994); Kentucky Div., Horsemen's Benev. & Prot. Assoc, Inc. v. Turfway Park Racing Assoc, Inc., 20 F.3d 1406, 1411 (6th Cir. 1994), and the Court must view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Oakland Gin Co., Inc. v. Marlow, 44 F.3d 426, 429 (6th Cir. 1995); City Management Corp. v. U.S. Chemical Co., Inc., 43 F.3d 244, 250 (6th Cir. 1994).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Lansing Dairy, 39 F.3d at 1347; Horsemen's Benev., 20 F.3d at 1411; .see *also* Guarino v. Brookfield Township Trustees, 980 F.2d 399, 404-06 (6th Cir. 1992) (holding courts do not have the responsibility to search *sua sponte* the record for genuine issues of material fact). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party **[*12]** is entitled to summary judgment. Celotex, 477 U.S. at 323.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); 60 Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435-36 (6th Cir. 1987). The standard for summary judgment mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes a fair-minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Id.;* Lansing Dairy, 39 F.3d at 1347; Horsemen's Benev., 20 F.3d at 1411.

III. DISCUSSION

The Court will address in turn each of Rockholt's claims.

A. Sherman Act, 15 U.S.C. § 1

"Section 1 of the Sherman Act requires that there be a 'contract, combination ... or conspiracy' between the manufacturer and other distributors in order to establish a violation." Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 760, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). All parties agree the Supreme Court's analysis in Monsanto controls this Court's decision regarding whether there is sufficient **[*13]** evidence of a Sherman Act violation.

In *Monsanto*, the Supreme Court explained there are two important distinctions at the center of every distributor-termination case under Section 1 of the Sherman Act. Id. at 760-761. "First, there is the basic distinction between concerted and independent action .... Independent action is not proscribed." Id. at 761. "The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former hav[ing] been *per se* illegal since the early years of national antitrust enforcement. The latter [being] judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition." *Id.* (citations omitted).

Rockholt alleges Kincaid's and Rhode's activities were a *per se* violation of Section 1 of the Sherman Act. In light of the two basic distinctions in a distributor-termination case, this means the Court must find evidence of a concerted action to set prices.

In evaluating whether there is sufficient evidence of a concerted action to set prices, the Supreme Court has said "the fact that a manufacturer **[*14]** and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions." *Id. at 762*. The Court explained, "A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market." The Court also cautioned against inferring the parties have entered into a concerted agreement to set prices "merely from the existence of complaints, or even from the fact that termination came about '*in response to*' complaints." *Id. at 763* (emphasis added). As the Court explained, to infer an agreement based merely on evidence of this type "could deter or penalize perfectly legitimate conduct." *Id.* The Court stated,

> . . . complaints about price cutters "are natural-and from the manufacturer's perspective, unavoidable--reactions by distributors to the activities of their rivals." Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, "arise in the normal course of business and do not indicate illegal concerted action." Moreover, distributors are an important source of information for manufacturers. **[*15]** In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.

Id. at 763-764 (internal citations omitted).

The Supreme Court concluded, for there to be sufficient evidence of a concerted agreement to set prices, "something more than evidence of complaints is needed." *Id. at 764*. That something more "must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* (citation omitted).

Rockholt contends there is sufficient evidence to meet the "something more" standard delineated by the Supreme Court. Rockholt contends the following provide sufficient evidence of a concerted action to set prices: **[*16]**

- Rhodes's complaints to Kincaid about Rockholt's prices;
- Kincaid relayed these complaints to Rockholt to encourage Rockholt to raise its prices to a 42% margin--the specific profit margin Rhodes desired;[4]
- Dennis Kincaid never told Calvin Rockholt that the reason he was terminated as a Kincaid distributor was because of the construction of the bridge between Decatur and Dayton and the establishment of a Kincaid gallery at Morgan Furniture;
- Sam Morgan, owner of Morgan Furniture, testifies Kincaid never informed him the establishment of a Kincaid gallery at his store would impact upon Rockholt; and
- Kincaid cannot agree upon who made the decision to terminate Rockholt as a distributor.[5]

(Rockliolt's Response to the Motions for Summary Judgment, p. 10).

Even if the Court assumes, *arguendo*, there is sufficient evidence to support Rockholt's contentions,[6] this evidence does not lead to the inference there has been a violation of *Section 1* of the Sherman Act. Rockholt has not cited,

[4] *See* footnote number 2.

[5] Rockholt alleges Robert Lemons testified Dennis Kincaid made the decision to terminate Rockholt. Rockholt contends this testimony is inconsistent with Dennis Kincaid's testimony that "[He] could not veto the decision" (Rockholt's Response to the Motions for Summary Judgment, pp. 10-11). However, a review of the deposition excerpts reveals Roberts Lemons actually testified that Mr. Kincaid initiated the decision to terminate Rockholt and Lemons approved the decision (Lemons Depo. Excerpts I, p. 57). This testimony is consistent with Mr. Kincaid's description of the termination decision (D. Kincaid Depo., pp. 110-111). Thus, Rockholt's contention is not supported by die evidence.

[6] *See* footnote numbers 2 and 5.

nor is the Court aware of, any authority which requires Kincaid to inform Rockholt or even a different distributor, such as Morgan Furniture, of its specific reasons for a termination. Furthermore, this failure, if true, **[*17]** is not circumstantial evidence "that reasonably tends to prove that the manufacturer *and others* 'had a conscious commitment to a unlawful objective'" as is required by the Supreme Court's decision in *Monsanto*. The Supreme Court was clear in stating, *Section 1* of the Sherman Act does not proscribe independent action. *Monsanto, 465 U.S. at 761*. To prove a violation, the Court must be presented with evidence of some *concerted* action by Rhodes and Kincaid and Rockholt has not met this burden. The Court reaches the same conclusion with respect to Rockholt's contention that Kincaid cannot agree on who made the decision to terminate Rockholt.[7]

This means the only evidence Rockholt has to support concerted action by Kincaid and Rhodes to set prices is Rockholt's contention Rhodes complained about Rockholt's prices and, in response to those complaints, Kincaid attempted to encourage Rockholt to raise its prices to the 42% profit margin desired by Rhodes. However, the *Monsanto* decision makes clear "something more" than evidence of this type is necessary to establish a *Section 1* violation of the Sherman Act. Accordingly, the Court will **GRANT** Kincaid's and Rhodes's Motions for Summary Judgment on this issue.

B. Tennessee State *Antitrust* [*18] *Law*, *Tenn. Code Ann. §§ 47-25-101* and -102

"The State [of Tennessee] anti-trust statute passed in 1891 is quite similar to the Sherman Anti-Trust Act passed by Congress in 1890. Authorities which define the character of private damage suits under the federal anti-trust statutes, particularly the Sherman Act, are most persuasive." *Slate of Tennessee v. Levi Strauss & Co.*, 1980 WL 4696 at n.2 (Tenn. Ch. Ct. Sept. 25, 1980) (internal citation omitted). In Section III(A) of this Memorandum, the Court concluded Rockholt has not presented sufficient evidence to support its claim of a Sherman Act violation. For the same reasons, the Court concludes Rockholt's evidence fails with respect to any claim under the state ***antitrust law***.[8] *See also Bailey's Inc. v. Windsor America, Inc., 948 F.2d 1018,1032 (6th Cir. 1991)*.[9] Accordingly, the Court will GRANT Kincaid's and Rhodes's Motions for Summary Judgment with respect to this issue.

C. Breach of Contract

For the Court to find there has been a breach of contract, the Court must first find there was a contract between Rockholt and Kincaid.[10] As detailed in Section II of this Memorandum, Calvin Rockholt testified the contract was oral and the terms were essentially "if you pay your bills and do a decent job of representing the product, people would continue to sell to you" (Calvin Rockholt Depo. Exceipts I, p. 56). With respect to **[*19]** any assent to the contract by Kincaid, Calvin Rockholt testified as follows:

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[7] *See* footnote number 5.

[8] "Rockholt relies on the same evidence to support both its federal and state antitrust claims (Rockholt's Response to the Motions for Summary Judgment, p. 9).

[9] In *Bailey's*, the plaintiff opposed summary judgment as to its contract, federal antitrust, and state antitrust claims. The plaintiff's brief in opposition to the motion for summary judgment, however, "was devoted almost exclusively to [the] contract and federal antitrust issues." *Bailey's, 948 F.2d at 1032*. With respect to the Tennessee state antitrust claim, the plaintiff merely quoted the statute and stated, "The comments made above concerning the federal antitrust laws are also applicable to the Tennessee antitrust laws." *Id.*

The district court found the plaintiff had failed to present sufficient evidence of a Sherman Act violation. The district court then also granted summary judgment on plaintiff's state antitrust claims "indicating that the plaintiff has no case under the state statutes for reasons similar to those given for the conclusion that the plaintiff has no case under federal ***antitrust law***." *Id.* The Sixth Circuit affirmed both these rulings.

[10] Rockholt does not allege Rhodes was a party to any contract. Thus, Rhodes would be entitled to summary judgment on this issue.

> Q: Okay. Well, tell me as near as you can exactly what it was that Dennis Kincaid said to you that you base this allegation that you have an agreement with Kincaid on.
> A: When Dennis and I would work together, obviously he wanted me to buy more product and expand it within my store. And we were adding more product line, continually. And Dennis had even made the comment about, you know, that we paid our bills good and everything. And that was --
> Q: He made what comment, now?
> A: Well, that we paid our bills good and we were never late. And so we took that to the agreement [sic].
> Q: I mean what did Dennis say? Did he say we will agree that we will not -- that we'll continue to sell you Kincaid for an indefinitie period of time if you pay your bill on time?
> A: No, Dennis didn't say that. That's a mutual understanding within the industry.

Id. at p. 57.

"In order to enforce a contract in Tennessee, the contract must result from a meeting of the minds, must be based upon sufficient consideration, and must be sufficiently definite to be enforced." *Peoples Bank of Elk Valley v. ConAgra Poultry, 832 S.W.2d 550, 553 (Term. Ct. App. 1991)*. Calvin Rockholt's testimony establishes there was not a meeting of the minds with respect **[*20]** to this alleged contract.

Rockholt's claim of a contract with Kincaid also fails because the contract, as described by Calvin Rockholt, permitted Mr. Rockholt to terminate performance at any time and for any reason yet Kincaid's would have had to perform for a potentially indefinite period. Finally, any alleged contract would likely run afoul of the statute of frauds.[11] Since the contract appears to involve the sale of goods over $500, the Uniform Commercial Code states the contract is not enforceable "unless there is some writing or record sufficient to indicate that a contract for sale has been made between the parties . . . ." *Tenn. Code Ann. § 47-2-201*.[12] The parties did not sign a written contract and there has not been sufficient evidence of a "record" of a contract between Rockholt and Kincaid. Accordingly, the Court will GRANT Kincaid's and Rhodes's Motions for Summary Judgment on this issue.[13]

D. Unlawful Inducement of Breach of Contract, *Tenn. Code Ann. § 47-50-109*

In order to establish a cause of action for unlawful inducement of breach of contract under *Tenn. Code. Ann. § 47-50-109*, "a plaintiff must prove that there was a legal contract, of which the wrongdoer was aware, that the wrongdoer maliciously intended to induce a breach, and **[*21]** that as a proximate result of the wrongdoer's actions, a breach occurred that resulted in damages to the plaintiff." *Quality Auto Parts v. Bluff City Buick, 876 S.W.2d 818, 822 (Tenn. 1994)*. In Section III(C) of this Memorandum, the Court concluded there was insufficient evidence to establish a contract between Rockholt and Kincaid and consequently, there was insufficient evidence of any breach of contract. Furthermore, even if the Court assumes, *arguendo*, there was a contract and a breach, Rockholt has failed to present any evidence Rhodes was even aware of any such contract (*See* Calvin Rockholt Depo. Excerpts I, p. 140 (Mr. Rockholt testified he did not have any indication Rhodes was aware of any contract between Rockholt and Kincaid); Stan Lowenstein Affidavit, ¶ 6, Supplemental File to Court File No. 29, Exh. E (Lowenstein was the manager of Rhodes from November, 1993 to October, 1994 and was not aware of any such contract); David Wallace Affidavit, ¶ 5, Supplemental File to Court File No. 29, Exh. G (Wallace was the manager of Rhodes from October, 1994 to February, 1996 and was not aware of any such contract)). Accordingly, the Court will **GRANT** Kincaid's and Rhodes's Motions for Summary Judgment on this issue.[14]

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[11] Rockholt did not address Defendants' arguments regarding the statute of frauds.

[12] In 1997, the Tennessee legislature modified *§ 47-2-201* to state there must be either a writing or *record* of a contract for the contract to be enforceable.

[13] *See* footnote number 10.

[14] Under *§ 47-50-109*, "[a] party to a contract cannot be held liable for procuring the breach of that contract." *Purisch v. Tennessee Technological University, 76 F.3d 1414, 1420 (6th Cir. 1996)* (*citing* *Ladd v. Roane Hosiery, Inc., 556 S.W.2d 758,*

E. Tortious Interference with Prospective [*22] Business Advantage

Tennessee does not recognize a cause of action for interference with a prospective business advantage. *Nelson v. Martin, 958 S.W.2d 643, 646 (Tenn. 1997)*.[15] Accordingly, the Court will **GRANT** Kincaid's and Rhodes's Motions for Summary Judgment with respect to this issue.

F. Conspiracy

"A civil conspiracy is a combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means. The requisite elements of the cause of action are common design, concert of action, and an overt act. Injury to person or property, resulting in attendant damage, must also exist." *Menuskin v. Williams, 145 F.3d 755, 770, 1998 WL 238625, at *13-14 (6th Cir. 1998)* (*citing* *Braswell v. Carothers, 863 S.W.2d 722, 727 (Tenn. Ct. App. 1993)*. Rockholt's entire argument with respect to this claim is as follows:

> It is unlawful for the Defendants to agree to accomplish unlawful purposes. As demonstrated above, the termination of Rockholt under these circumstances is an unlawful purpose, which has been accomplished by the concerted action of Rhodes and Kincaid.

(Rockholt's Response to the Motions for Summary Judgment, p. 12).

In Section III(A) of this Memorandum, the Court found insufficient evidence of a concerted action by Rhodes and Kincaid to set prices. In Sections III(B)-(E), the Court found insufficient evidence **[*23]** to establish any of Rockholt's other claims. Thus, there is no evidence of concerted action to accomplish *any* unlawful purpose. Accordingly, the Court will **GRANT** Kincaid's and Rhodes's Motions for Summary Judgment with respect to this issue.

IV. CONCLUSION

The Court concludes Rockholt has failed to present sufficient evidence to support its claims under *Section 1* of the Sherman Act and the Tennessee State ***Antitrust Law***. The Court also finds Rockholt has failed to present sufficient evidence to supports it claims for breach of contract, unlawful inducement of breach of contract, tortious interference with prospective business advantage, and conspiracy. For these reasons, the Court will **GRANT** Kincaid's and Rhodes's Motions for Summary Judgment. There being no other issues, the Court will also **ORDER** the case **DISMISSED**.

An Order shall enter.

/s/ Curtis L. Collier

CURTIS L. COLLIER

UNITED STATES DISTRICT JUDGE

ORDER

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760 (Tenn. 1977). Since Rockholt's claim under *§ 47-50-109* is based on an alleged contract between Rockholt and Kincaid, Kincaid could not be liable for a violation of *§ 47-50-109* and would also be entitled to summary judgment.

[15] Rockholt did not address this issue in its Response to the Motions for Summary Judgment.

In accordance with the accompanying memorandum, Kincaid's and Rhodes's Motions for Summary Judgment (Court File Nos. 28 and 31) are **GRANTED.** There being no other issues, the Court **ORDERS** the case **DISMISSED**.

SO ORDERED.

ENTER:

/s/ Curtis L. Collier

CURTIS L. COLLIER

UNITED STATES DISTRICT JUDGE

Marshall v. Planz

United States District Court for the Middle District of Alabama, Southern Division

July 8, 1998, Decided ; July 8, 1998, Filed

CIVIL ACTION NO. 97-T-793-S

Reporter

13 F. Supp. 2d 1231 *; 1998 U.S. Dist. LEXIS 10739 **

WILLIAM G. MARSHALL, JR., Plaintiff, v. EDWARD PLANZ, et al., Defendants.

Subsequent History: [1]** As Corrected November 18, 1998.

Summary judgment granted by, in part, Summary judgment denied by, in part *Marshall v. Planz, 13 F. Supp. 2d 1246, 1998 U.S. Dist. LEXIS 12080 (M.D. Ala., July 9, 1998)*

Motion denied by *Marshall v. Planz, 2006 U.S. Dist. LEXIS 105214 (M.D. Ala., Feb. 9, 2006)*

Disposition: Motion for summary judgment, filed by defendants Edward Planz, M.D., and Southeastern Cardiovascular Associates, P.C. on March 18, 1998, granted as to all federal and state antitrust claims asserted by plaintiff William G. Marshall, Jr.

Core Terms

privileges, antitrust, surgical, patients, antitrust claim, revocation, injuries, surgery, staff, anti trust law, causation, peer review process, Sherman Act, cardiovascular, defendants', alleges, revoke, partnership, suspended, terminate, monopolization, summary judgment motion, cardiac, damages, conspiracy, conspired, lawsuit, courts, Authorities, recommended

LexisNexis® Headnotes

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN1[] **Antitrust Actions, Facilities**

It is well-settled that states enjoy immunity from federal antitrust lawsuits that stem from their actions as sovereign. As currently applied, the doctrine may be invoked not only by states themselves, but also by states' political subdivisions, including municipal corporations. Moreover, state action immunity has also been extended to hospital authorities established under state statutes, and to physicians at such hospitals who participate as official members of peer-review committees.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Entitlement as Matter of Law, Appropriateness**

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Once the party seeking summary judgment has informed the court of the basis for its motion, the burden shifts to the non-moving party to demonstrate why summary judgment would be inappropriate. In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the nonmoving party.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Torts > ... > Elements > Causation > General Overview

HN3[] **Federal Regulations, Antitrust Regulations**

In applying the antitrust laws, courts have come to recognize two distinct types of causation questions, the first of which is essentially identical to that typically posed in the tort context, and the second of which is unique to antitrust cases.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN4[] **Private Actions, Remedies**

Courts have long recognized that antitrust claims are tortious in nature, and that common-law principles governing tort claims are equally applicable to antitrust claims.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Industries > General Overview

Torts > ... > Elements > Causation > General Overview

HN5[] **Private Actions, Remedies**

Among the common-law principles governing tort claims that are applicable in the antitrust context is the requirement that the plaintiff demonstrate that the defendant actually caused the alleged injury.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN6[] **Private Actions, Standing**

The second causation question that courts have come to recognize, which is unique to antitrust cases, is often examined in connection with the determination of whether a plaintiff enjoys antitrust standing. In essence, this question involves an assessment of whether the defendants caused a plaintiff what has come to be known as an "antitrust injury"--that is, an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN7[] **Antitrust & Trade Law, Sherman Act**

The court recognizes that under certain circumstances a plaintiff may succeed in making out a claim under *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, by demonstrating that a hospital and members of its medical staff conspired to restrain trade.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Types of Evidence > Circumstantial Evidence

HN8[] **Antitrust & Trade Law, Sherman Act**

Where a plaintiff cannot point to an explicit agreement among the alleged conspirators, he or she may resort to circumstantial evidence. Under such circumstances, the plaintiff, to survive a motion for summary judgment, must present evidence that reasonably tends to exclude the possibility that the alleged conspirators acted independently.

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN9[] **Healthcare Litigation, Antitrust Actions**

Many courts have recognized that by imposing sanctions on physicians who do not satisfy their patient-care requirements hospitals do indeed take steps to enhance, rather than restrict, competition.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Sherman Act, Claims**

There are three essential elements of an attempted monopolization claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*: (1) the defendant must have the specific intent to achieve monopoly power by predatory or exclusionary conduct; (2) the defendant must in fact commit such anticompetitive conduct; and (3) there must have existed a dangerous probability that the defendant might have succeeded in its attempt to achieve monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Torts > Business Torts > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Remedies > Damages > Monetary Damages

HN11[] **Attempts to Monopolize, Elements**

Section 4 of the Clayton Act, *15 U.S.C.A. § 15*, provides: Any person who shall be injured in his business of property by anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. To sustain such a cause of action, a plaintiff must show: (1) that the defendants' attempted monopolization constitutes a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*; (2) an injury to his business or property; and (3) a causal relationship between the antitrust violation and the injury. Moreover, the last two elements require the valuation of the plaintiff's injury in terms of money damages with some degree of certainty.

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For EDWARD PLANZ, M.D., defendant: Paul G. Smith, Matthew C. Williams, Smith, Spires & Peddy, Birmingham, AL.

Judges: Myron H. Thompson, UNITED STATES DISTRICT JUDGE.

Opinion by: [2]** Myron H. Thompson

Opinion

[*1233] *ORDER*

Plaintiff William G. Marshall, Jr., M.D., brings this lawsuit against defendants Edward Planz, M.D. (his former business partner) and Southeastern Cardiovascular Associates, P.C. ("SCA") (a corporation of which Planz is currently, and Marshall was formerly, a shareholder and employee) alleging claims grounded on *§§ 1* and *2* of the Sherman Antitrust Act, *15 U.S.C.A. §§ 1* and *2*, and *§ 4* of the Clayton Act, *15 U.S.C.A. § 15*, as well as numerous state-law claims, namely tortious interference with business and contractual relations, defamation, breach of contract, monopolization, and civil conspiracy. All of Marshall's claims stem from Planz's termination of their business relationship, and events surrounding Marshall's loss of surgical privileges at two hospitals in Dothan, Alabama, where the two physicians conducted their surgical practices. This court has federal-question jurisdiction over this lawsuit pursuant to *28 U.S.C.A. §§ 1331* and *1337*, and supplemental jurisdiction over Marshall's state-law claims pursuant to *28 U.S.C.A. § 1367(a)*.

Pending before the court is the motion for summary judgment filed by the defendants as to Marshall's federal **[**3]** and state antitrust claims. [1] The defendants' motion raises a difficult question concerning the so-called state-action immunity doctrine that is applicable in antitrust actions. Specifically, ***HN1***[] it is well-settled that states enjoy immunity from federal antitrust lawsuits that stem from their actions as sovereign. *See Parker v. Brown, 317 U.S. 341, 351-53, 63 S. Ct. 307, 314, 87 L. Ed. 315 (1943)*; *Crosby v. Hospital Auth. of Valdosta and Lowndes County, 93 F.3d 1515, 1521 (11th Cir. 1996)*, *cert. denied*, *520 U.S. 1116, 137 L. Ed. 2d 328, 117 S. Ct. 1246 (1997)*. As currently applied, the doctrine may be invoked not only by states themselves, but also by states' political subdivisions, including municipal corporations. *See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412, 98 S. Ct. 1123, 1137, 55 L. Ed. 2d 364 (1978)* (Brennan, J., plurality opinion); *See also Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39, 105 S. Ct. 1713, 1716, 85 L. Ed. 2d 24 (1985)*. Moreover, state action immunity

[1] In their motion for summary judgment, the defendants also seek summary judgment on the remainder of Marshall's state-law claims, with the exception of the breach-of-contract claim. This order, however, addresses only the federal and state antitrust claims.

has also been extended to hospital authorities established under state statutes, *see* Crosby, 93 F.3d at 1522-26 (holding that a Georgia hospital is a political subdivision **[**4]** of the state, because the nexus between the hospital and the state is sufficiently close); Askew v. DCH Reg. Health Care Auth., 995 F.2d 1033, 1037-38 (11th Cir. 1993) (holding that hospital authorities created under the Alabama Health Care Authorities Act are political subdivisions of the State of Alabama), and to physicians at such hospitals who participate as official members of peer-review committees. *See* Crosby, 93 F.3d at 1530. The difficult question presented here is whether state-action immunity should be further extended to individual physicians who do not serve as official members of a hospital's peer-review committees, but who initiate proceedings against fellow physicians before the committees or furnish information to them. As explained below, however, the court does not need to address this question in view of its conclusion that the defendants' **[*1234]** motion is due to be granted as to all of Marshall's antitrust claims because he has failed to establish that the defendants' actions actually caused his alleged antitrust injuries.

[5]** I. BACKGROUND

The pertinent facts of this lawsuit, viewed in the light most favorable to Marshall, who is the non-movant with respect to the defendants' motion for summary judgment concerning the federal and state antitrust claims, are as follows.

. In 1992, Marshall joined SCA, a professional corporation in which he and Planz were the sole shareholders and employees. The focus of both physicians' practices was cardiovascular surgery, although they also performed other surgical techniques. Both physicians maintained surgical privileges at Southeast Alabama Medical Center ("SAMC"), a hospital owned and operated by the Houston County Health Care Authority, and Flowers Hospital, the two primary care hospitals located in Dothan, Alabama. In 1988, SAMC had been reincorporated under the Alabama Health Care Authorities Act of 1982, 1975 Ala. Code §§ 22-21-310 through 22-21-344 (Michie 1997).

. In 1994, Marshall and Planz executed a shareholders and deferred compensation agreement, pursuant to which they became equal financial partners in SCA, dividing all revenues from their practices equally after expenses. Under the agreement, Planz retained authority to sever the partnership **[**6]** without cause. The agreement was silent, however, as to whether Marshall could continue to practice medicine independently in Dothan should the partnership be dissolved.

. In July 1996, Dr. Steven Johnson, a third cardiovascular surgeon, joined SCA.

. On July 23, 1996, Marshall and Planz were informed by letter that the Quality Risk Management Committee ("Quality Committee") had established an ad hoc committee to investigate the circumstances surrounding the unexpected deaths of five of Marshall's cardiovascular patients in the preceding two months.

. The Quality Committee's investigation into Marshall's performance at SAMC was not the first instance in which a hospital committee had responded to concerns and complaints regarding Marshall. Starting in 1993, both SAMC's Executive and Credentials Committee ("E&C Committee") and its Peer Review Committee met on numerous occasions to take up complaints about Marshall's "unacceptable" and "inappropriate" behavior toward hospital personnel, as well as concerns about Marshall's mortality statistics. On at least three occasions, in April and December 1994, and July 1995, the E&C Committee had voted to defer elevating Marshall's **[**7]** privileges from associate staff status to active staff status, citing Marshall's unacceptable conduct toward others at the hospital.

. In the summer of 1996, Planz attended a conference where he learned about expected changes in Medicare reimbursement for cardiac services, and he subsequently expressed concern to both Marshall and Johnson that the proposed decreases in reimbursement would adversely affect SCA's revenues and their individual incomes.

. Shortly after attending the summer conference, in August 1996, Planz informed James Blackmon, then Chief Executive Officer of SAMC, that he planned to terminate his partnership with Marshall. [2] **[**17]** Planz had not yet informed Marshall of his intentions. In his conversation with Blackmon, Planz sought assurances that SAMC would support Planz in his efforts to sever his relationship with Marshall. **[*1235]** Planz and Blackmon also discussed the fact that the dissolution of the partnership would have repercussions for Marshall's privileges at SAMC. This aspect of the discussion appears to have focused on an exclusive contract that Planz purportedly signed with the hospital. [3]

. At some point during the Quality Committee's deliberations, **[**8]** Dr. George Veale, who headed the committee, informed Fred Pelle, who was then SAMC's Chief Operating Officer, that it would not be in the latter's "best interest to work against what the committee was trying to do and against what Dr. Planz wanted."

. On August 13, 1996, the E&C Committee, based upon the report prepared by the Quality Committee concerning the unexpected deaths of five of Marshall's cardiovascular patients, voted to request an independent clinical review of the hospital's provision of cardiovascular care. The American Medico-Legal Foundation was enlisted to conduct the review, which, though nominally directed to "Cardiac Surgery and Anesthesia Services" at SAMC, in fact focused primarily on Marshall's performance at the hospital.

. After completing its review, which included interviews with hospital staff, the foundation prepared a report, which stated that Marshall's practice demonstrated "an unacceptably high mortality rate and complication rate," perhaps due to his surgical techniques. The report also recommended that Marshall be subjected to a number of additional evaluations, including a medical evaluation of a cervical disc problem that he had suffered, **[**9]** drug testing, and a "preceptorship" at a major cardiac center for at least a month. The report advised that Marshall be suspended pending completion of these processes. Marshall raises numerous objections to the methodology employed in the preparation of this report, and contests its conclusions and recommendations.

. In mid-November 1996, Planz informed Marshall that he had decided to terminate their partnership pursuant to the terms of their shareholder agreement.

. On a Friday in late November, 1996, Planz expressed his concern to Dr. James York, an anesthesiologist at SAMC who was scheduled to operate with Marshall on the following Monday, that because of his cervical disk problem Marshall was suffering from back pain and numbness that could impair his ability to perform surgery. At some point in the course of the ensuing conversations among Drs. Planz, York, Veale, Dr. Wayne Hannah (SAMC's Medical Director), and Dr. Ross Clifton (Marshall's treating physician), Planz stated to Clifton that Marshall had been suspended by the hospital's E&C Committee, a statement which Marshall alleges to have been untrue. Because of the concern over his ability to operate, Marshall voluntarily **[**10]** removed himself from the surgical roster.

. In December 1996, Planz informed Pelle, who had by then succeeded Blackmon as Chief Executive Officer of SAMC, that he would sue the hospital, based upon the purported exclusive contract between the hospital and Planz, if it continued to work with, or financially support, Marshall despite the dissolution of the Planz-Marshall partnership. Pelle perceived Planz's statements to him as indicating that he would be unhappy with Pelle and the hospital if the assurances that Blackmon had initially provided to Planz would not be honored.

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[2] It should be noted that the defendants challenge on hearsay grounds the admissibility of Marshall's evidence regarding this, and various other, conversations that Marshall alleges to have taken place. However, as explained more fully below, the court concludes that Marshall's antitrust claims cannot withstand summary judgment even if all of the alleged conversations did in fact occur and the participants actually said what Marshall alleges them to have said. Consequently, the court will proceed on the assumption that the statements are admissible without addressing the merits of the defendants' challenge.

[3] The uncontradicted record shows that no such exclusive contract ever existed. However, Marshall has proffered evidence suggesting that Blackmon and Planz contemplated executing such a contract in the wake of the dissolution of the Marshall-Planz partnership, or, alternatively, that an already existing, but unsigned, exclusive contract between Planz and SAMC would be executed.

. Also in December 1996, Marshall discussed with Pelle the possibility of Marshall's establishing an independent practice at SAMC, and Pelle assured Marshall that as long as Marshall remained at the hospital Pelle wanted to ensure that Marshall would be treated fairly.

. **[*1236]** On January 3, 1997, Planz and Clifton met with Hannah, SAMC's Medical Director, to express their concerns regarding Marshall's treatment of patients, patient safety issues, and his relationship with the nursing staff. During this meeting, Planz told Hannah that "something had to be done" about Marshall, because patients were being **[**11]** harmed. Planz's concern stemmed from two of Marshall's patients who had suffered postoperative strokes, and a patient in the intensive care unit for whom Marshall had ordered what Planz and others deemed to have been an ill-advised procedure, which required immediate reversal upon its completion to save the patient's life. In the course of the discussion, Clifton agreed to ask Marshall to discontinue voluntarily his surgical practice. Subsequently, Hannah contacted all available members of the E&C Committee, and each stated that he or she would cast a vote to summarily suspend Marshall should he refuse to voluntarily stop operating on patients. Later that day, because Clifton had been unable to reach Marshall, the E&C Committee unanimously suspended Marshall's surgical privileges until concerns about the quality of care his patients received could be further reviewed at a meeting scheduled for January 14, 1998. At that meeting, the E&C Committee reviewed the report of the American Medico-Legal Foundation and decided to leave in place the suspension of Marshall's surgical privileges.

. The E&C Committee subsequently held a series of hearings concerning the status of Marshall's **[**12]** surgical privileges at SAMC, pursuant to the hospital's peer review process. Numerous witnesses presented testimony regarding Marshall's performance at the hospital, and the evidence heard by the committee included Marshall's operative mortality rate and his relations with the nursing staff and fellow physicians.

. At an informal hearing convened by the E&C Committee on January 30, 1997, Marshall, represented by his attorney, challenged the statistical data regarding his operative outcomes that the committee had relied upon in maintaining its suspension against him. Marshall also proposed a number of solutions to the problem that would permit him to regain his privileges, and his attorney warned the committee that the hospital could be exposing itself to legal liability, especially if the call for Marshall's suspension was originated by Planz. The committee decided to maintain the suspension and continue to proceed with the correction plan outlined in SAMC's bylaws.

. The following day, January 31, 1997, a surgical ad hoc committee charged with investigating the allegations against Marshall held an informal hearing at which Marshall and his attorney were afforded an opportunity **[**13]** to respond to the allegations. After hearing Marshall's rebuttal testimony regarding the allegations of inadequate care and disruptive behavior, including his assertion that the mortality data developed by the outside reviewers distorted his record because he operated on higher risk patients than did Planz and other surgeons, the committee held deliberations and concluded that the external review indicated a quality-of-care problem and that Marshall's admittedly disruptive actions could not be justified. The committee prepared a report summarizing these conclusions and forwarded it to the E&C Committee.

. After receiving the surgical ad hoc committee's report, the E&C Committee voted unanimously to terminate Marshall's privileges at SAMC.

. In February and March 1997, an SAMC hearing committee consisting of three physicians held a formal hearing regarding Marshall's status at the hospital. Testimony was taken regarding the quality of patient care rendered by Marshall, as well as his relations with hospital staff. On April 9, 1997, the hearing committee unanimously recommended that the E&C Committee's decision be upheld "on the basis of disruptive and abusive behavior associated **[**14]** with personnel involved in patient care with implications **[*1237]** of adverse effect on the quality of patient care." The hearing committee rejected the possibility of rehabilitation in Marshall's case.

. Next, the Houston County Health Care Authority Board, which served as SAMC's board of directors, empaneled an appellate review committee, comprising four Board members, to review the prior proceedings related to the proposed revocation of Marshall's privileges. The appellate review committee conducted a hearing on the matter, at which Marshall and his counsel were present, and subsequently recommended that the Board uphold the E&C Committee's decision to revoke Marshall's privileges.

. After considering the appellate review committee's recommendation, the Board voted unanimously to approve the termination of Marshall's surgical privileges at SAMC. Shortly thereafter, Flowers Hospital followed suit and summarily suspended Marshall's privileges based upon the action taken by SAMC.

. During the course of his business relationship with Marshall, Planz had expressed his opinion to Marshall that the presence of a competing cardiovascular surgery group in Dothan would be unwelcome **[**15]** because it could generate competitive bidding for contracts with managed care organizations, and thus decrease SCA's revenues. Planz illustrated his concerns by pointing to the experiences of two medical specialties in which competing groups had merged to prevent managed care organizations or health maintenance organizations from decreasing compensation rates.

. Marshall alleges, and the court assumes as true for purposes of deciding the defendants' motion for summary judgment, that Planz engaged in a systematic campaign to impugn Marshall's personal and professional integrity, as part of Planz's effort to persuade SAMC to strip Marshall of his surgical privileges, and to make it impossible for Marshall to practice cardiovascular surgery in Dothan. Among the defamatory statements that Planz is alleged to have made are: (1) statements to various physicians that Marshall's severe back problems prevented him from operating safely; (2) statements that Marshall was suicidal and mentally unstable; (3) statements associated with the quality-of-care complaint Planz made to SAMC's E&C Committee; (4) statements to various individuals at SAMC that Marshall had abandoned patients; (5) statements **[**16]** to SAMC staff that Marshall "killed" patients; (6) statements to individuals in SAMC's cardiovascular surgery intensive care unit that Marshall's surgical privileges had been terminated and that his orders were to be disregarded; (7) statements to patients and others in Dothan that Marshall had left town and no longer practiced medicine in Dothan; and (8) statements to an outside physician reviewer that Marshall had been suspended from his residency for six months.

. At the time Marshall's ties to SCA were severed, and at all times thereafter, SCA was the sole provider of cardiovascular surgery services in Dothan, Alabama, and a surrounding eleven county region. Since Marshall and SCA parted ways, he has not established an independent cardiovascular surgery practice in this region, although he intended to before he lost his surgical privileges at SAMC and Flowers Hospital.

. After Marshall's departure from SCA, Planz replaced him with a lower-paid physician-associate, resulting in an increase in Planz's income despite a decrease in his caseload.

II. MOTION FOR SUMMARY JUDGMENT STANDARD

HN2[] *Rule 56(c) of the Federal Rules of Civil Procedure* provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Once the party seeking summary judgment has informed the court of the basis for its motion, the burden shifts to the non-moving party to demonstrate why summary judgment would be inappropriate. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)*; *see also* *Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115-17* ***[*1238]*** *(11th Cir. 1993)* (discussing how the responsibilities of the movant and the nonmovant vary depending on **[**18]** whether the legal issues, as to which the facts in question pertain, are ones on which the movant or nonmovant bears the burden of proof at trial). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*.

III. FEDERAL ANTITRUST CLAIMS

In their motion for summary judgment, the defendants contend that the court should dismiss Marshall's antitrust claims without reaching their merits, on two alternative grounds: (1) because Marshall lacks standing to bring antitrust claims against them, and (2) because the defendants enjoy immunity against Marshall's antitrust claims. In addition, the defendants assert that the claims should be dismissed on their merits even if Marshall clears the standing and immunity hurdles, for a multitude of reasons.

As is true of virtually every issue that arises in the antitrust context, the standing and immunity challenges raised by the defendants present myriad thorny analytical questions for the court. However, the court does not need to decide either issue **[**19]** here because, as explained below, Marshall is unable to satisfy a basic prerequisite for establishing liability under the antitrust laws, namely that the actions of the defendants actually caused his alleged antitrust injuries. [4]

A. Causation in Antitrust Cases

Causation in the antitrust context, especially where a physician challenges a hospital's credentialing decision, is a somewhat elusive concept. ***HN3***[] In applying the antitrust laws, courts have come to recognize two distinct types of causation questions, the first of which is essentially identical to that typically posed in the tort context, and the second of which is unique to antitrust **[**20]** cases. As explained below, it is the first, tort-based causation requirement that presents an insurmountable barrier to Marshall's antitrust claims in this lawsuit.

HN4[] Courts have long recognized that antitrust claims are tortious in nature, and that common-law principles governing tort claims are equally applicable to antitrust claims. *See Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 532-33, 103 S. Ct. 897, 905-06, 74 L. Ed. 2d 723 (1983)* (proximate causation and other common-law limitations on damages are applicable in antitrust context); *DeLong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 848 (11th Cir. 1988)* (citing *Myers v. American Dental Ass'n, 695 F.2d 716, 723 (3rd Cir. 1982)* (antitrust claims are, in essence, "forms of torts alleging business injury")); *Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 392 n.4 (5th Cir. 1976)*.

HN5[] Among the common-law principles governing tort claims that are applicable in the antitrust context is the requirement that the plaintiff demonstrate that the defendant actually caused the alleged injury. *See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1459, 1462 (11th **[**21]** Cir. 1991)* (noting that "A private party seeking to invoke the antitrust laws must show that the defendants caused the alleged injury…. As with other causes of action that are tortious in nature, failing to show causation is fatal to a *section 1* [of the Sherman Act] claim"; also applying this requirement to the plaintiff's *§ 2* claims) (internal citations omitted); *Cable Holdings of Ga., Inc. v. Home Video, Inc., 825 F.2d 1559, 1561-62 (11th Cir. 1987)* ("To recover under the antitrust laws, a plaintiff must prove that a defendant's illegal conduct materially contributed to his injury. Proof of a violation of the Sherman Act standing alone does not establish civil liability"). Thus, to survive the defendants' motion for summary judgment Marshall must proffer sufficient evidence to permit a fact-finder reasonably to infer that Planz's actions actually caused the injuries that Marshall alleges in support of his antitrust claims.

[*1239] ***HN6***[] The second causation question that courts have come to recognize, which is unique to antitrust cases, is often examined in connection with the determination of whether a plaintiff enjoys antitrust standing. In essence, this question involves an assessment **[**22]** of whether the defendants caused a plaintiff what has come to be known as an 'antitrust injury'--that is, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*. As the Eleventh Circuit has explained, this second causation question

> "asks for something other than an inquiry into whether an antitrust violation has put a plaintiff in a worse position than it otherwise would have been in. Often an antitrust violation has effects beneficial as well as banned. The causation question asks not whether the antitrust violation caused the plaintiff's injury, but whether the banned effects flowing from that violation--as opposed to the beneficial ones--led to the plaintiff's harm. In many cases this distinction makes a difference. This is so because in many cases the 'injury to competition' an ***antitrust law*** was established to prevent is different from an 'injury to competitors' that a breach (or nonbreach) of that law may effect. In those cases a competitor cannot complain if injured unless the injury **[**23]** flows from anti-competitive, not anti-competitor, effects."

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[4] In deciding this case on the merits without reaching the standing question, the court adheres to the standard set by the Eleventh Circuit in *Levine v. Central Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1545 (11th Cir. 1996)* (decision on the merits without addressing standing is appropriate where a court concludes that the plaintiff has not made out an antitrust violation).

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1427 (11th Cir. 1990) (citations omitted).

Typically, in antitrust actions brought by physicians based upon the credentialing decisions of hospitals, courts are confronted with the difficult question of whether the plaintiff, who plainly suffered some sort of injury as a result of the alleged monopolists' conduct, suffered the type of injury that is compensable under the antitrust laws. Thus, in these cases the first question discussed above, whether the defendants actually caused the plaintiffs' injuries, is rarely at issue; instead, causation is firmly established, but the courts must examine the record for evidence that the plaintiff suffered the ever-elusive 'antitrust injury' described above. For instance, in *Todorov* the Eleventh Circuit denied antitrust standing to a physician who challenged a hospital's rejection of his application for privileges because it found that the physician had only shown that he had been deprived of "the profits he would have garnered had he been able to share a part of the [other physicians'] supercompetitive, or monopoly, **[**24]** profits." *921 F.2d at 1453-54*. The court observed that such an injury clearly is not an antitrust injury, as defined above, because "the antitrust laws were not enacted to permit one person to profit from the anticompetitive behavior of another person." *Id. at 1454*; *see also* *Oksanen v. Page Memorial Hosp., 945 F.2d 696, 709 (4th Cir. 1991)* (noting that "the aphorism that 'the antitrust laws were enacted for the "protection of *competition*, not *competitors*,"' rings true" where the physician-plaintiff had not demonstrated harms to competition in the relevant market); *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 998-99 (N.D. Ga. 1992)* (finding no antitrust injury because complaint alleged only "harm to the individual doctor and not to competition within the marketplace").

Here, by contrast, the injuries that Marshall alleges to have suffered--namely, the loss of his practice in Dothan and his inability to reestablish it due to the revocation of his surgical privileges at the only two hospitals in Dothan at which cardiac surgery is performed--appear to fit snugly within the parameters of 'antitrust injury,' for he complains that Planz's challenged actions were **[**25]** calculated to create and/or maintain his monopoly over cardiac-surgery services in the relevant market by ensuring that Marshall, a potential provider of these services who would increase competition and lower prices, could not practice medicine in the market. [5] **[*1240]** *See* *Boczar v. Manatee Hosps. & Health Systems, Inc., 993 F.2d 1514, 1519 (11th Cir. 1993)* (holding that sufficient evidence existed to support a finding that a physician suffered antitrust injury where her loss of privileges ended her ability to compete in the relevant market and burdened her ability to compete generally). However, Marshall's antitrust claims founder on the first, tortbased, causation requirement discussed above because he has not mustered the evidence necessary to establish that the *defendants*' actions actually caused his alleged antitrust injuries. Instead, as explained more fully below, it is beyond legitimate dispute that any antitrust injuries suffered by Marshall were solely caused by the unilateral decision of SAMC's board of directors to revoke Marshall's surgical privileges after the completion of the peer review proceedings regarding his performance at the hospital, and by the subsequent **[**26]** decision by Flowers Hospital to follow suit based upon SAMC's decision.

B. The Actions Marshall Alleges to Have Caused Him Antitrust Injury

To explain the basis for its finding that Marshall has failed to establish causation, the court will first examine more closely the conduct of Planz that Marshall challenges as unlawful under *§§ 1* and *2* of the Sherman Act. For reasons that will become clear when it discusses the relative roles of Planz and SAMC's board of directors in the decision to revoke Marshall's **[**27]** surgical privileges, the court will classify Planz's challenged conduct as falling within one or both of two distinct categories: conduct associated with the peer review proceedings at the hospital, and conduct that was wholly separate from that process.

Drawing upon the pretrial order entered in this case, in which Marshall provides a concise summary of Planz's allegedly anticompetitive conduct, the court observes that Marshall challenges three broad classes of Planz's activities. First, Marshall alleges that "Before and during the peer review [process at SAMC], Dr. Planz maliciously

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[5] The court emphasizes that it has not fully considered the question of whether Marshall has established the requisite antitrust injury, which requires a complicated analysis of whether the harms he complains of truly flow from any harms to competition worked by the revocation of his surgical privileges in Dothan. However, because Marshall has not satisfied the tort-based causation requirement for the reasons explained in the text of this order, the court is not called upon to decide the antitrust-injury question.

spread false and defamatory statements to SAMC officials, physicians, and others." [6] **[**28]** Second, Marshall contends that Planz threatened SAMC and individuals with lawsuits or other adverse consequences if they sided with Marshall and supported him in establishing an independent practice in Dothan. [7] Third, Marshall alleges that Planz exerted "pressure on SAMC officials to do something' about Dr. Marshall" and instigated the peer review process that led to the revocation of Marshall's privileges by demanding that the hospital suspend his privileges "for a confused litany of reasons." [8]

Most of these allegedly unlawful activities and statements fall within the first category described above, that is, conduct associated with SAMC's peer review process. Some of these are essentially inseparable from that process, including his alleged exhortations that the hospital "do something" about Marshall, his instigation of the peer review process by lodging a complaint about Marshall's performance, his alleged statements to hospital personnel that Marshall was suicidal and that his back problems impeded his ability to perform surgery, and, finally, Planz's alleged statement to the outside reviewers from the American Medico-Legal Foundation that Marshall had been suspended from his residency for six months. Other challenged statements allegedly made by Planz, while less closely tied to the peer review process, were nonetheless obviously calculated to, as Marshall puts it in his allegations in the pretrial order, "poison[] the medical staff's perceptions of Dr. Marshall's personal and professional character," **[**29]** so that it became "a **[*1241]** virtual certainty that Marshall would be terminated based upon any excuse." [9] Thus, these alleged remarks, which include the statement that Marshall killed his patients, that he abandoned his patients, and that his privileges had been terminated rather than suspended, also fall within the category of statements that are associated with the peer review proceedings.

This leaves only three challenged actions that arguably occurred outside the peer review process: (1) Planz's alleged threat to sue SAMC if it chose to support Marshall's independent practice after the partnership between the two physicians was severed; (2) Planz's alleged threat to prevent the hospital's perfusionists from providing Marshall with necessary services after dissolution of the partnership; and (3) Planz's alleged remarks to individuals in Dothan that Marshall had left town and no longer intended to practice medicine in Dothan.

C. Did the Challenged Actions **[**30]** of Planz Cause Marshall's Alleged Antitrust Injuries?

The next step for the court is to determine whether any of the foregoing actions or statements ascribed to Planz, either individually or collectively, actually caused the antitrust injuries that Marshall alleges. For the following reasons, the court finds that Marshall has failed to demonstrate the requisite causation.

The court readily concludes that the actions and statements falling within the first category described above, conduct associated with the peer review process, did not actually cause Marshall's alleged antitrust injuries. The court arrives at this conclusion chiefly because the ultimate, allegedly trade-restraining, outcome of this challenged conduct was the revocation of Marshall's surgical privileges by SAMC's board. In other words, the individual actions themselves, on their own or collectively, did not, and indeed could not, amount to an unlawful restraint on Marshall's ability to compete against the defendants. Instead, the revocation of Marshall's privileges, first by SAMC and immediately thereafter by Flowers Hospital, was the sole action that could have--by barring him from establishing a viable medical **[**31]** practice in Dothan--caused the alleged antitrust injuries. In fact, Marshall himself concedes as

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[6] Order on pretrial hearing, entered on June 18, 1998, at 4. Within this broad category Marshall points to six specific statements he attributes to Planz: (1) that Marshall routinely killed patients; (2) that he had a personality disorder and was suicidal; (3) that he abandoned his patients; (4) that he was suspended from his residency for six months; (5) that his privileges had been revoked, when in fact they had only been suspended at the time; and (6) that he was a danger to patients because he had cervical disc disease and other medical problems. *See id*. at 4-5. In his complaint. Marshall also alleges that Planz told "patients and others" in Dothan that Marshall had left town and would not resume practicing medicine in Dothan, which was untrue at the time. *See* Plaintiff's second amended compl., filed on Oct. 23, 1997, at P 33.

[7] Order on pretrial hearing, entered on June 18, 1998, at 2, 3.

[8] *Id*. at 5.

[9] Order on pretrial hearing, entered on June 18, 1998, at 5.

much in his contentions in the pretrial order entered in this lawsuit, where he states that "Dr. Planz could not prevent Dr. Marshall from establishing a competing cardiac surgery practice unless Dr. Marshall's privileges were suspended and/or revoked at SAMC and Flowers. Therefore, he undertook a campaign to destroy any chance for Dr. Marshall to conduct an independent practice of cardiac surgery in Dothan." [10]

Moreover, the court reaches the same conclusion regarding the alleged acts that occurred *outside* the peer review context. The court agrees with Marshall that these statements and threats arguably were not calculated to, and in fact did not, influence the peer review process. However, nothing in the record persuades the court that this alleged conduct, even if it did indeed occur, resulted in Marshall's alleged antitrust injuries. While Marshall points **[**32]** to a significant body of evidence indicating that he suffered damages as a result of the revocation of his privileges at the two Dothan hospitals, he has not proffered any evidence to establish that Planz's conduct outside the peer review process could have--absent the hospitals' decisions to revoke privileges--caused him antitrust injury. [11]

[33]** **[*1242]** In summary, then, it is evident that any antitrust injury that Marshall could conceivably prove would have stemmed from the revocation of his surgical privileges at the two hospitals, and Planz's allegedly unlawful activity that lead up to or was associated with that decision, standing alone, was merely ancillary to the true source of Marshall's alleged injuries and the action that actually animates this lawsuit--in Marshall's own words, the "unwarranted revocation of Dr. Marshall's privileges at the Medical Center." [12]

Furthermore, it is beyond legitimate dispute that Planz's challenged conduct did not actually cause the revocation of Marshall's privileges. Instead, that action was taken exclusively and independently by SAMC's board of directors itself. The record establishes incontrovertibly that the board retained the ultimate and exclusive decisionmaking power over the revocation decision, and that it did not merely rubberstamp the **[**34]** recommendations of its peer review committees or any individual physicians, including Planz. In so doing, the hospital acted in accordance with *§ 22-21-318* of the Alabama Health Care Authorities Act of 1982, under which it had been reincorporated in 1988, *see* 1975 *Ala. Code § 22-21-318(a)(12)* (authorizing hospital authorities organized under the Act "To select and appoint medical and dental staff members and others licensed to practice the healing arts and to delineate and define the privileges granted to each such individual"); *Todorov, 921 F.2d at 1461* (observing that the Act specifically authorizes hospitals "to make decisions concerning the granting of privileges"), as well as the by-laws governing the medical staff at SAMC. [13] Marshall does not dispute these facts, nor does he offer any evidence that the board reached its decision without conducting its own, independent review. Moreover, the court's own examination of the record reveals no suggestion that board ceded control over the ultimate decision to any hospital committee or individual staff members. Thus, there is no question that the ultimate decision to terminate Marshall's surgical privileges was not the final **[**35]** result of a scheme to restrain trade hatched by Planz alone or with the participation of others at SAMC. Under these circumstances, the court concludes that Marshall has failed to establish, as he must to maintain his antitrust claims, that the defendants actually caused his alleged antitrust injuries.

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[10] Pretrial order, entered on June 18, 1998, at 3.

[11] Of course, once the decision to revoke Marshall's privileges was made, Planz's actions outside of the peer-review context were rendered wholly superfluous, and could not have further hindered Marshall's ability to compete in Dothan. For instance, the two alleged threats made by Planz to SAMC officials appear to have been calculated to persuade the hospital to impede Marshall's ability to compete against Planz by withdrawing necessary support for Marshall's practice, while the alleged remark to individuals in Dothan appears to have been aimed at interfering with his practice by discouraging patients from seeking his services. However, once SAMC and Flowers Hospital revoked Marshall's surgical privileges, he was no longer in a position to pursue a competing practice in Dothan because he could not perform surgery at either hospital. Thus, in reality it was the revocation of Marshall's privileges, if anything, that caused his alleged antitrust injuries.

[12] Plaintiff's second amended compl., filed on Oct. 23, 1997, at P 83.

[13] *See* defendants' exhibit no. 97, SAMC medical staff bylaws, at 22-23 (providing that the board makes the final decision regarding staff privileges).

In *Todorov*, the Eleventh Circuit reached the same conclusion on closely analogous facts, ruling that a physician's failure to establish that the defendant physicians caused his alleged antitrust injuries was fatal to his claims under §§ 1 and 2 of the Sherman Act. As previously stated, the *Todorov* court had found that the plaintiff lacked standing because he did not allege the requisite antitrust injury. *See* 921 F.2d at 1453-54. The court went on, however, to explain that the plaintiff's claims against three radiologists at the hospital--who had **[**36]** allegedly conspired among themselves to monopolize the relevant market and had enlisted the hospital board's aid by convincing it to deny the plaintiff's request for privileges--would not survive even if the plaintiff enjoyed antitrust standing because the hospital had acted *unilaterally* in denying the application for privileges. *See* id. at 1459. The court concluded that "the radiologists, regardless of their desires, were not causally responsible for" the decision to deny privileges, and therefore that the plaintiff could not maintain an action under either § 1 or § 2 of the Sherman act, because he was unable to prove that the defendant radiologists caused his injury. Id. at 1459, 1462.

To be sure, **HN7**[] the court recognizes that under certain circumstances a plaintiff may succeed in making out a claim under § 1 of the Sherman Act by demonstrating that a hospital and members of its medical staff conspired to restrain trade. *See* Todorov, 921 F.2d at 1455; Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 819 (11th Cir. 1990); *see also* Crosby v. Hospital Auth. of Valdosta and Lowndes County, 93 F.3d 1515, 1521 (11th Cir. 1996) (noting that while other aspects **[*1243]** of the **[**37]** *Bolt* decision had been implicitly overruled by the Supreme Court, this holding remained the law of the circuit), *cert. denied*, *520 U.S. 1116, 117 S. Ct. 1246, 137 L. Ed. 2d 328 (1997)*. Thus, Marshall may survive summary judgment on his § 1 claim if he can establish that the revocation of privileges stemmed from a concerted action by Planz and the hospital.

However, to prevail on such a claim, Marshall must "demonstrate 'a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.'" Todorov, 921 F.2d at 1455-56 (quoting American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1946)). **HN8**[] Where a plaintiff cannot point to an explicit agreement among the alleged conspirators, as is the case here, he or she may resort to circumstantial evidence. Under such circumstances, "the plaintiff, to survive a motion for summary judgment, must present evidence that reasonably 'tends to exclude the possibility' that the alleged conspirators acted independently." Todorov, 921 F.2d at 1456 (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775 (1984)). **[**38]** As the Eleventh Circuit has explained:

> "This means that 'conduct as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, permit the inference of conspiracy. Thus, when the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred; the plaintiff must produce more probative evidence that the law has been violated."

Todorov, 921 F.2d at 1456 (internal citations omitted).

Here, the defendants have proffered as procompetitive reasons for the termination of Marshall's privileges the hospital's concerns about patient safety and staff morale, in view of the lengthy record of complaints against Marshall, as well as the evidence of inadequate care and disruptive behavior uncovered during the peer-review process. **HN9**[] Many courts have recognized that by imposing sanctions on physicians who do not satisfy their patient-care requirements hospitals do indeed take steps to enhance, rather than restrict, competition. *See* Mathews v. Lancaster General Hosp., 87 F.3d 624, 640 (3rd Cir. 1996) (noting that "peer **[**39]** review actions, when properly conducted, generally enhance competition and improve the quality of medical care"); Weiss v. York Hosp., 745 F.2d 786, 821 n.60 (3d Cir. 1984) ("It seems obvious that by restricting staff privileges to doctors who have achieved a predetermined level of medical competence, a hospital will enhance its reputation and the quality of medical care it delivers. Thus such action is pro-competitive."); Oksanen v. Page Memorial Hosp., 945 F.2d 696, 709 (4th Cir. 1991) (noting that "the peer review process, by policing competence and conduct of doctors, can enhance competition"). That is not to say, though, that Marshall cannot overcome this asserted procompetitive explanation by demonstrating that it is merely a pretext masking a conspiracy between Planz and the SAMC board to restrain trade unlawfully by stripping Marshall of his surgical privileges.

However, the record establishes that Marshall has failed to make a factual showing sufficient to overcome the defendants' asserted procompetitive explanation. Considered in the light most favorable to Marshall, his circumstantial evidence amounts to the following. First, Planz had an economic, anticompetitive **[**40]** incentive to exclude Marshall from the cardiac surgery market in Dothan and its environs. Second, the most effective, and perhaps exclusive, means of ensuring that Marshall could not compete would be to secure the revocation of his surgical privileges at the only two hospitals in the area that supported cardiac surgery, and to do so Planz would need to enlist the aid of officials at SAMC, with whom he had a close association and over whom he could perhaps wield some influence. Third, Planz in fact communicated his desire to exclude Marshall from the market to several individuals associated with SAMC, by seeking assurances from the hospital's then-current chief executive officer that it would support Planz rather than Marshall, and by threatening other hospital officials with adverse consequences should they chose to support Marshall in an independent practice. Fourth, the peer review process contained several deficiencies, including errors in data collection and analysis. Fifth, **[*1244]** and finally, the hospital itself had several economic incentives to side with Planz and strip Marshall of his privileges. [14]

[41]** The court finds that this evidence, while it may contain the whisper of a suggestion that SAMC's board conspired with Planz to restrain trade unlawfully by revoking Marshall's privileges, does not even remotely exclude the possibility that the board acted unilaterally and procompetitively in reaching its decision. Most importantly, there is no indication in the record that Planz conspired *with SAMC's board of directors* to secure the revocation of Marshall's privileges. While Planz's meetings with former SAMC chief executive officer James Blackmon may provide, when all inferences are drawn in Marshall's favor, a hint of a conspiracy between Planz and an SAMC official, the record shows that Blackmon was no longer the hospital's CEO when the board decided to revoke Marshall's privileges, and there is no indication that he could have influenced the board's deliberations. Nor does the record reveal any instances in which Planz communicated to hospital board members his desire that Marshall's privileges be revoked or that Marshall be disciplined in any way. [15]

[42]** Additionally, even if a conspiracy could be established by showing that Planz conspired with other physicians at SAMC, including those on the peer-review committees, and those physicians in turn conspired with the board to revoke Marshall's privileges, there is no factual support for such a finding. Once again, Marshall can point to no evidence that suggests that the board merely rubberstamped the peer-review committees' recommendation that Marshall lose his privileges, and thus ceded its authority under state law and the hospital's by-laws to decide independently questions of staff privileges.

Thus, the court finds that Marshall has failed to muster sufficient evidence to demonstrate a genuine issue of material fact regarding the existence of a conspiracy between Planz and the hospital board. He has presented no evidence that reasonably tends to exclude the possibility that the board acted independently when it revoked Marshall's surgical privileges. Consequently, Marshall cannot maintain his conspiracy claim under *§ 1* of the Sherman Act. [16]

[43]** Moreover, the court notes that a different outcome could very well be warranted if Planz's alleged misdeeds had so infected the peer-review process and the board of directors' final decision that it was in reality Planz who,

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[14] These economic incentives include, according to Marshall's antitrust expert, a desire to (1) avoid unwanted price competition imposed by managed health care plans should Marshall establish a competing practice at Flowers hospital, and (2) avert the flight of Planz's practice to Flowers should SAMC side with Marshall and thus alienate Planz. *See* Plaintiff's exhibit no. 1 in opposition to defendants' motion for summary judgment, expert report of David M. Eisenstadt, Ph.D., at 29-30.

[15] Moreover, 13 of the 14 members of the board that revoked Marshall's privileges have testified during depositions or have stated in affidavits that Planz did not influence their decision to revoke Marshall's privileges. *See* defendants' memorandum in support of motion for summary judgment, filed on March 18, 1998, at 39-41.

[16] The court reaches this same conclusion regarding Marshall's *§ 2* monopolization claim, to the extent he alleges that Planz and the SAMC board conspired to create or maintain a monopoly over cardiac-surgery services. *See* *Todorov, 921 F.2d at 1460 n.35* (observing that *§ 1* and *§ 2* conspiracy claims require the same threshold showing of the existence of an agreement to restrain trade, and noting that the court need not address the specific intent element of the *§ 2* claim where the plaintiff fails to demonstrate a genuine issue of material fact as to the existence of a conspiracy between the defendant physicians and hospital authority).

wielding undue power over the board, revoked Marshall's surgical privileges. At a hearing held by the court concerning the defendants' summary judgment motion on June 17, 1998, counsel for Marshall colorfully, but aptly, portrayed such a scenario as "Planz putting a gun to the head of the board of the medical center" and forcing the revocation of Marshall's privileges. While the court of course recognizes that the private actor need not actually threaten physical violence to call into question whether the hospital board indeed acted unilaterally, but that raising the specter of severe economic consequences may constitute a sufficient threat, Marshall has not proffered any evidence that would support a reasonable inference that Planz's threats actually subverted the board's independent decision-making process and **[*1245]** that it, in effect, shirked its responsibility and acquiesced to Planz's demands for fear of economic retribution or other undesirable consequences.

[44]** D. Attempted Monopolization Under *§ 2* of the Sherman Act

Marshall maintains that even if the revocation of his surgical privileges was the sole cause of his antitrust injuries, the defendants may nonetheless be liable under *§ 2* of the Sherman Act for attempted monopolization, because he would have suffered a diminution in his practice due to the defendants' anticompetitive conduct even absent the revocation of his privileges. Specifically, Marshall contends that even if he had not been stripped of his privileges there would have been a period of time after the dissolution of his partnership with Planz during which the defendants would have enjoyed a 'short-term monopoly' because Planz had so maligned Marshall at the hospital that it would have taken him some time, perhaps a year or two, to reestablish his goodwill among referring physicians and to rebuild his practice. Marshall asserts that the defendants should be held responsible for the damages he would have sustained during that interim period, because it was Planz's anticompetitive conduct and his attempt to monopolize the provision of cardiac-surgery services that would have caused those damages.

This effort to salvage Marshall's **[**45]** antitrust lawsuit by resort to the theory of attempted monopoly falters, however, because regardless of whether or not Planz's actions amount to an attempt to monopolize the market in the absence of the revocation of Marshall's privileges, Marshall cannot demonstrate that he suffered any actual injury or damages as a consequence of those actions. As the Eleventh Circuit has explained, ***HN10***[] there are three essential elements of an attempted monopolization claim under *§ 2* of the Sherman Act: (1) the defendant must have the specific intent to achieve monopoly power by predatory or exclusionary conduct; (2) the defendant must in fact commit such anticompetitive conduct; and (3) there must have existed a dangerous probability that the defendant might have succeeded in its attempt to achieve monopoly power. *See* *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 993 (11th Cir. 1993)*. However, in seeking damages for attempted monopolization, Marshall relies upon ***HN11***[] *§ 4* of the Clayton Act, *15 U.S.C.A. § 15*, which provides: "Any person who shall be injured in his business of property by anything forbidden in the antitrust laws may sue therefore in any district court of the United States **[**46]** in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." To sustain such a cause of action, Marshall must show: (1) that the defendants' attempted monopolization constitutes a violation of *§ 2* of the Sherman Act; (2) an injury to his business or property; and (3) a causal relationship between the antitrust violation and the injury. *See* *National Ind. Theatre v. Buena Vista Distribution, 748 F.2d 602, 607 (11th Cir. 1984)*. Moreover, "the last two elements require the valuation of the plaintiff's injury in terms of money damages with some degree of certainty." *Id*.

Thus, to prevail on his attempted-monopolization claim, Marshall must demonstrate that Planz's allegedly anticompetitive conduct resulted in an actual injury to his business, and, further, he must proffer evidence that permits the valuation of his injury with some degree of certainty. He fails on both counts. Marshall can point to no concrete injury that he suffered as a consequence of Planz's alleged misconduct, because even if Planz **[**47]** took steps to sabotage any attempt by Marshall to establish an independent practice after dissolution of the partnership between the two physicians, these actions were swiftly rendered superfluous, in view of the fact that Marshall's privileges at SAMC were suspended, and eventually revoked, almost immediately after the partnership ended. Thus, Marshall never had any real opportunity to strike out on his own after he and Planz parted ways, because SAMC's revocation of his privileges, which prompted Flowers Hospital to follow suit, spelled the end of his hopes of practicing cardiac surgery in Dothan.

Therefore, Marshall is unable to demonstrate that he suffered any injury to his business at the hands of the defendants for **[*1246]** the hypothetical interim period that would have existed, absent the loss of his surgical privileges, between the termination of his relationship with SCA and the reestablishment of his medical practice in Dothan. As a consequence, Marshall cannot satisfy the second and third elements of a claim for damages under *§ 4* of the Clayton Act, and his claim grounded on the defendants' attempted monopolization is due to be dismissed along with his other antitrust claims. **[**48]** [17]

IV. STATE ANTITRUST CLAIM

Marshall also brings a claim against the defendants grounded on state ***antitrust law***. Specifically, he charges them with having violated 1975 *Ala. Code § 6-5-60*. [18] Alabama courts interpret this provision in accordance with federal ***antitrust law***. *See* *Ex parte Rice, 259 Ala. 570, 67 So. 2d 825, 829 (1953)* (per curiam) ("The federal statutes … prescribe the terms of unlawful monopolies and restraints of trade as they should also be administered in Alabama"); *see also* *Avery Freight Lines, Inc. v. Alabama Pub. Serv. Comm'n, 267 Ala. 646, 104 So. 2d 705, **[**49]** 709 (1958)* ("In construing the terms and provisions of Alabama statutes derived from federal statutes, such terms and provisions will usually be considered as having the meaning given by the federal courts"). For the reasons given above regarding the claims for relief under *§§ 1* and *2* of the Sherman Act, the court concludes that summary judgment should also be granted as to Marshall's claim under 1975 *Ala. Code § 6-5-60*.

V. CONCLUSION

Because the court finds that Marshall has failed to establish that the allegedly unlawful acts he ascribes to Planz actually caused him any antitrust injury, the court will grant summary judgment as to all of his federal and state antitrust claims, which are brought pursuant to *§§ 1* and *2* of the Sherman Act, and 1975 *Ala. Code § 6-5-60*.

Accordingly, it is ORDERED that the motion for summary judgment, filed by defendants Edward Planz, M.D., and Southeastern Cardiovascular Associates, P.C. on March **[**50]** 18, 1998, is granted as to all federal and state antitrust claims asserted by plaintiff William G. Marshall, Jr.

DONE, this the *8th* day of July, 1998.

Myron H. Thompson

UNITED STATES DISTRICT JUDGE

End of Document

[17] If Marshall were seeking injunctive relief due to the existence of an ongoing or recurring threat of monopoly posed by the defendants' actions, a different analysis would apply. However, because Marshall is now precluded from resuming his practice in Dothan because he does not possess the requisite staff privileges, the defendants no longer pose any threat to his economic interests, and injunctive relief is unavailable.

[18] *See* plaintiff's second amended compl., filed on Oct. 23, 1997, at PP 74-78.

Seafarers Welfare Plan v. Philip Morris

United States District Court for the District of Maryland

July 13, 1998, Decided

CIVIL ACTION NO. MJG-97-2127

Reporter

27 F. Supp. 2d 623 *; 1998 U.S. Dist. LEXIS 11875 **; 1999-1 Trade Cas. (CCH) P72,460

SEAFARERS WELFARE PLAN, et al., Plaintiffs vs. PHILIP MORRIS, et al., Defendants

Subsequent History: [1]** Released for Publication December 16, 1998.

Disposition: Certain Defendants' Motion to Dismiss the First Amended Complaint GRANTED. Certain Defendants' Alternative Motion to Dismiss for Failure to Join Necessary Parties DENIED AS MOOT.

Core Terms

Plaintiffs', Funds, Defendants', damages, smoking, cigarettes, smokers, medical expenses, antitrust, proximate cause, circuit court, remote, tobacco, unjust enrichment, instant case, smoking-related, contributions, illnesses, injuries, antitrust claim, medical costs, common law, addictiveness, tortfeasor, costs, common law tort claim, motion to dismiss, tobacco company, tobacco product, third party

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

The court must deny a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The question 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. The court, when deciding a motion to dismiss, must consider well-pled allegations in a complaint as true and must construe those allegations in favor of the plaintiff.

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

Torts > Negligence

HN2[] **Health Insurance, Reimbursement**

The longstanding common law rule is that one who pays medical expenses on behalf of an injured third party does not have a direct action against the tortfeasor who caused the injury.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN3[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Under the Racketeer Influenced and Corrupt Organizations Act, any person injured in his business or property by reason of a violation of *§ 1962* of this chapter may sue therefor. *18 U.S.C.S. § 1964(c)*.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN4[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Under *18 U.S.C.S. § 1964(c)* of the Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff must prove that the defendant's acts were a proximate cause, in addition to being a "but for" cause, of the plaintiff's injury. In order to satisfy RICO's proximate cause requirement, there must be some direct relation between the injury asserted the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN5[] **Private Actions, Remedies**

Antitrust injury has been defined as injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The damages sought must flow from that conduct which is proscribed by the antitrust laws. Because the antitrust laws are intended to protect competition only injury caused by damage to the competitive process may form the basis of an antitrust claim.

Antitrust & Trade Law > Consumer Protection > General Overview

HN6[] **Antitrust & Trade Law, Consumer Protection**

Under the Maryland Consumer Protection Act (Act), any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by the Act. *Md. Code Ann., Com. Law II § 13-408*.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN7[] **Types of Contracts, Quasi Contracts**

The elements of a claim for unjust enrichment are first, a benefit conferred on the defendant by the plaintiff; two, an an appreciation or knowledge by the defendant of the benefit; and three, the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

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For CONSTRUCTION WORKERS' TRUST FUND, CABINETMAKERS' LOCAL NO. 974 AND CARPENTERS' LOCAL NO. 1110 HEALTH AND WELFARE FUND, plaintiffs: **[**2]** John McNeill Broaddus, Connerton, Ray and Simon, Washington, DC. David J. Bershad, Milberg, Weiss, Bershad, Hynes & Lerach, LLP, N/A, New York, NY. Michael C. Spencer, Milberg Weiss Bershad Hynes & Lerach, LLP, PH, New York, NY. Kenneth J. Vianale, Milberg Weiss Bershad Hynes & Lerach, LLP, PH New York, NY. Steven E. Fineman, Law Office, PH, New York, NY. Perry Weitz, Law Office, PH, New York, NY. Karen J. Sabine, Weitz & Luxenberg, PH, New York, NY. Jerry Kristal, Weitz & Luxenberg, PH, Cherry Hill, NY.

Judges: Marvin J. Garbis, United States District Judge.

Opinion by: Marvin J. Garbis

Opinion

[*625] *MEMORANDUM AND ORDER*

The Court has before it the motions entitled "Certain Defendants' Motion to Dismiss the First Amended Complaint" and "Certain Defendants' Alternative Motion to Dismiss for Failure to Join Necessary Parties." These motions have been adopted by all Defendants. [1] The Court also has before it the materials submitted by the parties relating to the motions. The Court finds that a hearing is unnecessary.

[3]** As discussed herein, the Court concludes that the motions to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* should be granted. Accordingly, it is unnecessary to consider the alternative motion to dismiss under *Federal Rule of Civil Procedure 12(b)(7)*.

[*626] I. *BACKGROUND*

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[1] The Moving Defendants are: Philip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., Lorillard Tobacco Company, The American Tobacco Company, The Council for Tobacco Research -- USA, Inc., The Tobacco Institute, Inc., Hill & Knowlton, Inc., and United States Tobacco Company. B.A.T. Industries, P.L.C. and Smokeless Tobacco Council have indicated that they join in the instant motion, without prejudice to and without waiving their defenses of lack of personal jurisdiction, as per stipulations entered into by the parties and approved by the Court. Liggett Group, Inc. has also indicated to the Court by letter that it joins in the instant motion.

The Plaintiffs in this case are five non-profit labor-management trust funds operating in the State of Maryland (collectively referred to as "Plaintiffs" or "the Funds"). [2] The Funds are established through collective bargaining and pursuant to the Labor-Management ("Taft-Hartley") Act. They are also employee benefit plans and multi-employer plans within the meaning of the Employee Retirement Income Security Act of 1974, *29 U.S.C. § 1001 et seq.* ("ERISA").

The Funds provide health care benefits to union workers, their **[**4]** families, and retirees (referred to as "participants" and "beneficiaries"). The Funds are financed through contributions from the employers of covered workers, the amounts of which are negotiated in collective bargaining between the workers' unions and the employers. The Funds are governed by boards of trustees and are legal entities under ERISA. *29 U.S.C. § 1132(d)*. As such, the Funds hold the Funds' assets in trust for the purpose of providing benefits to participants and their beneficiaries.

The Defendants are this country's leading tobacco companies [3] and their lobbying and public relations agents. [4]

The Funds bring this suit on their **[**5]** own behalf and on behalf of a proposed class of similarly situated funds. As described by the Plaintiffs, "this is an action to recover funds expended by the Plaintiff Funds to provide medical treatment and other benefits and services to their participants and beneficiaries suffering from smoking-related illnesses and to seek appropriate injunctive relief against the Defendants' continuing illegal and outrageous conduct." Complaint P 5. In essence, Plaintiffs allege that, for many years, the Defendants have misrepresented the dangers of smoking cigarettes and the addictiveness of nicotine. They further allege that the Defendants have purposefully inhibited the development of safer tobacco products. As a result, a great many smokers have suffered a variety of serious health problems allegedly stemming from tobacco use.

In their highly detailed and lengthy seventeen [5] count Complaint, which purports to catalogue, among other things, virtually the entire history of the marketing of cigarettes in this country, Plaintiffs assert claims under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1962* ("RICO"), federal and Maryland antitrust statutes, the Maryland Consumer **[**6]** Protection Act [6], and under Maryland common law for unjust enrichment, breach of voluntarily undertaken duty, fraud, negligent misrepresentation, and conspiracy. [7]

Plaintiffs do not seek to bring subrogation claims for the medical expenses of individual smokers which the Funds paid. Rather, they assert "independent" or "direct" claims to recover such expenses. Defendants now move to dismiss Plaintiffs' entire Complaint for failure to state a claim upon which relief may be granted.

II. *LEGAL STANDARD*

HN1[] The Court must deny a motion to dismiss **[**7]** under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* unless it "appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would **[*627]** entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. "The question is whether in the light most favorable to the Plaintiff, and with every doubt resolved in his behalf, the

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[2] The Plaintiffs are: Seafarers Welfare Plan, United Industrial Workers Welfare Plan, Construction Workers' Trust Fund, Cabinetmakers' Local No. 974 and Carpenters' Local No. 1110 Health and Welfare Fund.

[3] Philip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., B.A.T. Industries, P.L.C., Lorillard Tobacco Company, Liggett Group, Inc., The American Tobacco Company, and United States Tobacco Company.

[4] The Council for Tobacco Research -- U.S.A., Inc., Smokeless Tobacco Council, Inc., The Tobacco Institute, and Hill & Knowlton, Inc.

[5] The Court notes that the Complaint skips Count XIII when reciting Counts numbered I through XVII.

[6] This claim was previously dismissed without prejudice. However, the Plaintiffs have reinstated it with the consent of the Defendants.

[7] Plaintiffs originally also asserted claims for breach of express warranty, breach of implied warranty, negligence, and strict liability. These claims have been dismissed without prejudice by the Plaintiffs.

Complaint states any valid claim for relief." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure 2d* § 1357 (1990). The Court, when deciding a motion to dismiss, must consider well-pled allegations in a complaint as true and must construe those allegations in favor of the plaintiff. *See* *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*; *Jenkins v. McKeithen, 395 U.S. 411, 421-22, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969)*. Further, the Court must disregard the contrary allegations of the opposing party. *See* *A.S. Abell Co. v. Chell, 412 F.2d 712, 715 (4th Cir. 1969)*.

III. *DISCUSSION*

In this Court's view, Plaintiffs' entire Complaint suffers from the fundamental flaw that the Funds themselves, as opposed to their participants **[**8]** or the pertinent employers, have not suffered any cognizable damages.

As the Plaintiffs point out, the Funds are established and maintained as nonprofit, tax-exempt trusts. The Funds' assets are held in trust "for the exclusive purpose of providing benefits to participants in the [trust] and their beneficiaries." *29 U.S.C. § 1101(c)(1)*. The Funds are financed by contributions from the Funds' members' employers which are negotiated through the collective bargaining process.

Plaintiffs contend that although the payments to the Funds are deemed employer contributions for tax purposes, the reality is that these monies are substitute wages for the covered workers. As stated by Plaintiffs, "Instead of receiving these monies in their paychecks, the workers, through their unions, negotiate to have their employers contribute to the Funds to finance health coverage for themselves and their families." Plaintiffs' Opposition at 9. It is from these monies that the medical bills of Fund participants are paid. In addition, to the extent a fund chooses to provide benefits through the purchase of insurance, the premiums on the insurance which covers the workers are also paid from these contributions.

[9]** This Court agrees with the view expressed by Judge Fullam of the United States District Court for the Eastern District of Pennsylvania in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 5951*, No. 97-5344, 1998 WL 212846 (E.D. Pa. Apr. 22, 1998) that the Plaintiff Funds themselves have not suffered any cognizable damages. As Judge Fullam held,

> Whether the contributions are properly attributed to the employer or the participating workers, it is clear that plaintiffs' [the Funds'] own economic interests were not affected by the payments. The fact that the medical costs paid out of these funds increased because of defendants' wrongdoing caused no harm to plaintiffs [the Funds]; it merely meant that the unions negotiated a greater level of contributions from the employers.

Steamfitters, 1998 WL 212846 at *2. Furthermore, "if the Fund[s] recover[] in this lawsuit, [they] would not reimburse contributing employers for their overpayments because [they are] statutorily prohibited from doing so." *Southeast Florida Laborers Dist. Heath and Welfare Trust Fund v. Philip Morris, 1998 U.S. Dist. LEXIS 5440*, *6, No. 97-8715- CIV, 1998 WL 186878 at *1 (S.D. Fla. Apr. 13, 1998) **[**10]** (citing *29 U.S.C. § 1103(c)(1)*). As Judge Fullam noted, unlike the various suits now pending brought by state attorneys general or other governmental entities, the Plaintiffs in the instant case are not the entities which actually paid the increased medical costs from their own assets. Rather, in the instant case, "plaintiffs are merely handling the payments with money provided by others, and have no genuine stake in the matter." *Steamfitters,* 1998 WL 212846 at *2. Finally, Judge Fullam "noted that a reduction of the medical costs payable by plaintiffs [the Funds] would not inure to plaintiffs' [the Funds'] benefit. The money in their hands can only be used to pay benefits on behalf of others, and, since all are non-profit entities, plaintiffs [the Funds] cannot claim to have suffered any economic loss **[*628]** in the form of lost profits." [8] *Id.* at *3.

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[8] Furthermore, even if they were to prevail in the instant suit, the Funds "could not unilaterally reduce the employers' contributions because these contributions are determined in a collective bargaining agreement to which the Fund[s are] not a party." *Southeast Florida Laborers Dist. Heath and Welfare Trust Fund v. Philip Morris, 1998 U.S. Dist. LEXIS 5440*, at *6, No. 97-8715- CIV, 1998 WL 186878 at *1 (S.D. Fla. Apr. 13, 1998).

[11]** In addition to money damages, Plaintiffs in the instant case also seek injunctive and declaratory relief requiring Defendants to, *inter alia,* publish all of their research pertaining to issues of smoking and health, fund a corrective education campaign designed to reduce smoking among Plaintiffs' participants, cease advertising to minors, and fund smoking cessation programs. As Judge Fullam held, "While plaintiffs' apparent desire to be helpful to its members and to society in general is commendable, plaintiffs [for the reasons heretofore discussed] simply do not have legal standing to advance such claims, which really belong to the individuals affected." *Id.* at *3.

This Court agrees with the foregoing reasoning of Judge Fullam, and, for the reasons stated, concludes that Plaintiffs' entire Complaint must be dismissed.

Alternatively, even if the Funds have suffered injury, each of the Plaintiffs' claims is subject to dismissal for other reasons. As discussed herein, the Court concludes that Plaintiffs' injuries are too remotely caused by the Defendants to satisfy the requirements of proximate cause, Plaintiffs lack "antitrust standing," and Plaintiffs have failed to state **[**12]** a claim for unjust enrichment. [9]

A. *Common Law Tort Claims*

Assuming that the Funds have suffered damages, the Court concludes that any damages suffered by them were too remotely caused by the Defendants. Accordingly, while the Defendants may have been a cause in fact of Plaintiffs' damages, Plaintiffs' damages are too indirectly related to Defendants' actions to satisfy the requirements of proximate causation.

With regard to Plaintiffs' common law tort claims, this Court is mindful of a relatively recent decision by the Circuit Court for Baltimore City addressing Maryland's common law proximate cause requirements in the context of the State of Maryland's suit against the tobacco industry. In *State of Maryland v. Philip Morris, Inc.,* No. 96122017, CL211487, 1997 WL 540913 (Md. Cir. Ct. for Balt. City May 21, 1997), the Circuit Court for Baltimore City was presented with **[**13]** the issue of whether the State of Maryland could state a claim, in its own name, under Maryland common law to recover monies expended by the State through its medicaid program to treat smoking related illnesses of Maryland citizens. The circuit court began its extensive discussion of this issue by noting that "at common law a plaintiff had no right to recover damages from a defendant tortfeasor as a result of the defendant's injuries, harm, or lack of care to a third person, regardless of the fact that the defendant's actions may have put the plaintiff to what otherwise would have been unnecessary or increased expense." *Id.* at *9.

The circuit court then discussed the classic case of *Anthony v. Slaid, 53 Mass. (11 Met.) 290 (1846)*, in which the plaintiff had agreed to provide and pay for the medical expenses of all of the poor people in a small town. The defendant's wife committed a battery on one of town's poor people, which led to the plaintiff incurring additional medical expenses for the pauper. The *Anthony* court did not allow the plaintiff's claim, holding that the damages which plaintiff suffered as a result of the defendant's tort was "too remote and indirect." **[**14]** *State of Maryland,* 1998 WL 540913 at *10 (quoting *Anthony, 53 Mass. at 291*). As summarized by the circuit court, the "plaintiff was not permitted to maintain a cause of action against a defendant tortfeasor as a result of the tortfeasor putting plaintiff to increased medical expenses resulting from the tortfeasor's injuries to a third party." *Id.*

After discussing several more cases illustrative of this principle, [10] the circuit court **[*629]** concluded that "the State of Maryland in the present action had no right at common law, and consequently has no right now, to assert claims in its own name against Defendants as alleged tortfeasors for the harm Defendants allegedly caused (whether intentional or not) to third party smokers." [11] *Id.* at *12. The court held that "in the absence of some special statute

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[9] Thus, it is unnecessary to reach the myriad of other arguments advanced by the Defendants against Plaintiffs' individual counts.

[10] Including one from the United States Supreme Court, *Holmes v. Security Investor Protection Corp., 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)* (discussing the remoteness principle in the RICO context). *Holmes* will be discussed *infra* with regard to Plaintiffs' RICO claims.

[11] Thus, contrary to Plaintiffs' contention, the remoteness principle applies equally to both negligent and intentional torts.

allowing recovery, the damages are deemed under the proximate cause analysis to be too remote and indirect for plaintiffs to recover." [12] *Id.* at *14. However, the court held that while the State could not bring direct common law claims in its own name against the Defendants, the State was entitled to bring such claims in the name of each individually injured medicaid recipient **[**15]** under the equitable doctrine of subrogation. *Id.* at *13. Furthermore, the State had a subrogation remedy against the Defendants as provided by *Md. Code Ann. Health-Gen. § 15-120*. *Id.* at *3.

[16]** Plaintiffs in the instant case attempt to distinguish their claims from the State's claims which were rejected in *State of Maryland.* They argue that rather than seeking to recoup the medical expenses which they paid on behalf of injured smokers, they instead seek to recover for their "increased cost of doing business." [13] In essence, Plaintiffs contend that by concealing and misrepresenting the "truth" [14] about tobacco's harmful effects, the Defendants prevented the Plaintiffs "from taking action to reduce or eliminate their cost burdens from tobacco-related disease." Plaintiffs' Opposition at 10. As stated by the Plaintiffs,

> Had Defendants disclosed the truth about the addictive qualities of nicotine and the disease-causing effects of smoking, the Funds' trustees could have taken action to protect the Funds from the financial burdens of tobacco-related disease by, among other things: limiting coverage of smoking-related disease, imposing cost-sharing requirements *(e.g.* deductibles and/or co-payments) on participants who smoke; requiring smokers to participate in cessation programs; or requiring participants at risk for smoking to participate in smoking prevention **[**17]** programs.

Id. at 10-11. Plaintiffs also contend that had the Defendants not suppressed the manufacture and sale of safer cigarettes, they could have encouraged their participants to smoke the safer cigarettes, presumably thereby reducing the health costs that the smokers would have incurred.

The Defendants contend that the State of Maryland made this identical argument before the Circuit Court for Baltimore City, and that that court rejected it vis-a-vis the State's claims. [15] This Court does not have before it the pleadings that were submitted to the circuit court. To the extent that the Defendants' characterization of what transpired in **[**18]** that case is accurate, this Court **[*630]** agrees with the result reached by the circuit court. Even if the Defendants' characterization of the circuit court's ruling were wrong, however, this Court nonetheless finds that, although the question is a close one, Plaintiffs' attempt to recharacterize their injuries as "direct" fail as a matter of law.

The Defendants have stated that, in total, **[**19]** there are approximately 40 union health and welfare fund lawsuits pending against the tobacco industry in federal courts around the country. The parties have made the Court aware of three recent decisions from federal district courts addressing the issues currently under discussion in the context

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[12] The circuit court noted that its holding "does not mean that the Court is unmindful of the dilemma faced by the State and the magnitude of the harm which may have been caused by the defendants. Assuming the truth of all relevant facts as argued by the Plaintiff, it is clear that the State of Maryland has borne the tremendous burden of this health care crisis, in both lives and financial resources. Unfortunately, . . . without proper legal remedy, there exists no claim upon which relief can be granted." *State of Maryland v. Philip Morris, Inc.,* No. 96122017, CL211487, 1997 WL 540913 at *14 (Md. Cir. Ct. for Balt. City May 21, 1997).

[13] Plaintiffs disavow any intention to bring subrogation claims, presumably, among other reasons, to avoid having to identify and prove the multitude of individual cases involved.

[14] As the Plaintiffs view such "truth." The Court is expressing no opinion as to whether, on the merits, the Defendants are guilty of such concealment or misrepresentation.

[15] Defendants contend that "What the Funds fail to acknowledge is that the very same attempt to re-package the State's derivative injury claim as a claim for 'direct' harm was made by the State and rejected by the court in *State of Maryland;* both the complaint and the briefs submitted by the State contended that the State itself had 'detrimentally relied' upon defendants' supposed fraud and concealment. The *State of Maryland* court saw through that verbal charade and recognized that -- as here -- all of the claimed injuries to the State flowed from the injuries allegedly inflicted upon smokers." Defendants' Reply at 4-5.

of similar 12(b)(6) motions filed by the tobacco defendants in cigarette "cost recovery" lawsuits brought by health and welfare trusts funds. Each of those courts has considered plaintiff funds' attempts to articulate a direct injury entitling them to direct common law claims, as opposed to being limited to subrogation claims. The Court finds the analyses in those cases to be instructive. [16]

[20]** While the question is a close one, this Court finds itself in agreement with the views expressed by Judge Ryskamp of the Southern District of Florida in rejecting a plaintiff fund's attempt to recharacterize its injury more directly. Although the plaintiff fund attempted to characterize its damages as being for its increased cost of doing business, Judge Ryskamp held that "the Fund cannot escape the fact that any economic injuries which it incurred are purely derivative of the physical injuries which its participants suffered. The Fund cannot, as a matter of law, sustain a claim against the defendants without a closer connection to the defendants." *Southeast Fla. Laborers Dist. Health and Welfare Trust Fund v. Philip Morris, 1998 U.S. Dist. LEXIS 5440*, No. 97-8715- CIV, 1998 WL 186878 at *4 (S.D. Fla. Apr. 13, 1998).

Boiled down to their essence, Plaintiffs' claims are that had they known the truth about smoking, they would have been able to pay fewer medical expenses for their participants who smoked. Plaintiffs' damages would thus be the difference between the health care costs which they actually paid on behalf of injured smokers minus the amount that they otherwise would have paid absent Defendants' **[**21]** alleged misconduct. As discussed in *State of Maryland,* ***HN2***[] the longstanding common law rule is that one who pays medical expenses on behalf of an injured third party does not have a direct action against the tortfeasor who caused the injury. [17] That longstanding rule bars the Plaintiffs' claims in this case, notwithstanding Plaintiffs' artful recharacterization of them. *Cf. Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 5951*, No. 97-5344, 1998 WL 212846 at *2 (E.D. Pa. Apr. 22, 1998) (stating that the Court was not persuaded that the Plaintiffs had satisfied the element of proximate cause). *But see Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 3578*, No. 97-4550, 1998 WL 146217 at *4-5 (S.D.N.Y. Mar. 25, 1998) (Scheindlin, J.) (holding that the plaintiff funds had sufficiently alleged direct economic injury such that the requirements of proximate cause were satisfied).

[22]** Accordingly, the Court concludes that Plaintiffs' common law tort claims are too remote as a matter of law to satisfy the requirements of proximate causation. [18]

[23]** **[*631]** B. *RICO Claims*

The same principles of proximate causation which animated the Court's discussion of Plaintiffs' common law tort claims serve to bar Plaintiffs' RICO claims.

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[16] In addition, the parties have cited to numerous decisions issued in cases brought by state attorneys general or other governmental entities making similar allegations against the tobacco industry. While these decisions certainly are relevant to the instant discussion, the Plaintiff Funds stand in a somewhat different position than the states, which are sovereign entities. By contrast, the three recent federal district court decisions addressing claims brought by ERISA funds are directly on point. The Court therefore considers them to be most persuasive.

[17] Certainly the wealthy benefactor in *Anthony v. Slaid* would have paid fewer medical expenses on behalf of the town's paupers had the defendant's wife not committed a battery against one of them. Still, his claim to recoup the additional medical expenses that he was forced to pay was barred as too remote.

[18] The Court rejects Plaintiffs' contention that unlike a typical insurer, they have a "special relationship" with their participants which gives them some direct injury. As stated by the Minnesota Supreme Court in rejecting a similar argument by Blue Cross and Blue Shield of Minnesota, "It is true that Blue Cross occupies a different niche in the complex web of health care institutions than that of indemnity or insurance companies; however, these differences in legal relationship to providers and patients do not, in our view, overcome the need for a closer connection between the injury and alleged tortfeasor." *State of Minnesota v. Philip Morris, Inc., 551 N.W.2d 490, 495 (Minn. 1996)*. As Judge Ryskamp held, "This 'special relationship' fails to show that the [Plaintiff Funds have] suffered direct harm." *Southeast Fla.,* 1998 WL 186878 at *4.

In Counts I and II, Plaintiffs allege a variety of practices which they contend constitute RICO violations. ***HN3***[] Under RICO, "any person injured in his business or property by reason of a violation of *section 1962* of this chapter may sue therefor . . . ." *18 U.S.C. § 1964(c)*. In Counts I and II, Plaintiffs allege violations of *§§ 1962(a)*, *(c)*, and *(d)*. [19]

The Supreme Court has held that ***HN4***[] under *§ 1964(c)*, a plaintiff must prove that the defendant's acts were a proximate cause, in addition to being a "but for" cause, of the plaintiff's injury. [20] *Holmes v. Securities Investor Protection Corp., 503 U.S.* ***[**24]*** *258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)*. In order to satisfy RICO's proximate cause requirement, there must be "some direct relation between the injury asserted the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id. at 268-69*.

As discussed above with regard to Plaintiffs' common law tort claims, **[**25]** the Court finds that the Plaintiffs' claims are too remote to satisfy the requirements of proximate cause. This Court agrees with the views expressed by Judge Ryskamp in *Southeast Florida:*

> Inspection of the Fund[s'] claims reveal that the alleged harm does not affect the Fund[s] directly, but only affects the Fund[s'] participants. . . . The Fund[s are] not suing to recover damages which the defendants caused to [them] directly, but [are] attempting to recover economic damages which [they] incurred by virtue of [their] contractual relationship with third parties who were allegedly harmed by the defendants. The "direct relation" between the Fund[s'] alleged injury and the defendants' conduct is absent.

Southeast Fla. Laborers Dist. Health and Welfare Trust Fund v. Philip Morris, 1998 U.S. Dist. LEXIS 5440, No. 97-8715- CIV, 1998 WL 186878 at *5 (S.D. Fla. Apr. 13, 1998).

Similarly, in *City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130 (N.D. Cal. 1997)*, the court was faced with a suit by several cities and counties against cigarette manufacturers and their trade associations to recover the smoking-related health costs that they were forced to pay **[**26]** out on behalf of their residents. As in the instant case, the plaintiffs alleged that the defendants engaged in a conspiracy to mislead the plaintiffs and their residents about the dangers of smoking and the addictiveness of nicotine. *Id. at 1134*.

The defendants in *San Francisco* argued, as they do in the instant case, that the plaintiffs' damages were too remote to satisfy RICO's proximate cause requirement. As in the instant case, the Plaintiffs contended that "their harm does not flow merely from the acts of defendants toward third parties, but from the alleged misrepresentations, concealment of information, and breach of affirmative duties directed toward the plaintiffs themselves." *Id. at 1137*. Notwithstanding the plaintiffs' attempt to recharacterize their theory of recovery, Judge Jensen of the Northern District of California held that any alleged RICO violations by the defendants **[*632]** were not directly linked to the plaintiffs' increased health care expenses. *Id.*

The Supreme Court in *Holmes* listed three policy reasons for limiting recovery under RICO to direct victims. First, the Court was concerned that "the less direct an injury is, the more difficult it becomes **[**27]** to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other independent factors." *Holmes, 503 U.S. at 269*. Second, there is a need to avoid the risk of multiple recoveries. *Id.* Third, courts must take into account the fact that directly injured victims can generally be counted on to "vindicate the law as private attorneys general," thereby satisfying the deterrence purposes of RICO. *Id.*

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[19] Count I alleges violation of *§§ 1962(c)* and *(d)* by all Defendants except the Council for Tobacco Research, the Tobacco Institute, and Hill & Knowlton, Inc. Count II alleges violation of *§§ 1962(a)* and *(d)* by all Defendants.

[20] As the Supreme Court noted, "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'" *Holmes, 503 U.S. at 266 n.10* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984)).

Analysis of the *Holmes* factors supports the Court's conclusion that Plaintiffs' claims are too remote. First, and perhaps most importantly, under Plaintiffs' theory, it would be extremely difficult, if not impossible, to determine the amount of damages attributable to the Defendants' conduct given the multitude of other factors that could affect Plaintiffs' smoking related damages. For instance, it would be extremely difficult, if not impossible, to determine whether, and the extent to which, any of the Funds' participants had other health problems which may have exacerbated the costs of health care for that smoker. *See San Francisco, 957 F. Supp. at 1138*. Furthermore, taking as a given Plaintiffs' theory that they would have taken steps **[**28]** to discourage their participants from smoking, thereby reducing the Funds' outlay of smoking related medical expenses, it would be necessary to determine what impact the Funds' hypothetical steps would have had on the smoking habits of their participants, had they been hypothetically implemented, in order to determine the extent of Plaintiffs' damages.

Second, there is a definite risk of multiple recoveries in this case if Plaintiffs are allowed to proceed. The Court has been informed that there is currently pending in the Circuit Court for Baltimore County a certified class action [21] **[**29]** of all allegedly injured Maryland smokers. This plaintiff class presumably includes most, if not all, of the Funds' participants and presumably seeks to recover the same medical expenses which the Funds' seek in the instant case. [22] *Cf. Southeast Florida,* 1998 WL at *5 Furthermore, if Plaintiffs' theory were accepted, the Court sees no logical reason which would prevent the employers from attempting to recover the same monies that they paid into the Funds.

Third, the pendency of the class action in the Circuit Court for Baltimore County shows that there are ample "private attorneys general" available to vindicate the Defendants' alleged wrongs. *See id*.

In sum, the Court concludes that Plaintiffs have failed to satisfy RICO's proximate cause requirements. Accordingly, Counts I and II must be dismissed. [23]

[30]** C. *Antitrust Claims*

In Counts III, V, VI, and VII, Plaintiffs assert claims under the federal and Maryland antitrust acts. They allege, *inter alia,* that the Defendants unlawfully restrained the dissemination of information regarding the safety and addictiveness of cigarettes, thereby eliminating alternative products from the market and causing smokers to suffer smoking-related illnesses. **[*633]** Furthermore, Defendants claim that the Defendants' conspiracy in restraint of trade

> has had the purpose and effect of restraining competition in the market for cigarettes and tobacco products . . ., of artificially inflating the price of and demand for Defendants' cigarettes and tobacco products, of erecting barriers to competition and entry into the market and protecting the structure of the market, of causing the suppression of information that would otherwise have affected consumer and regulatory behavior, and of causing millions of persons to purchase cigarettes and tobacco products when they otherwise would not have done so. The natural effect of the conspiracy has been to raise and stabilize prices, wrongfully increase

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[21] *Richardson v. Philip Morris, Inc.,* No. 96145050/CE212596 (Cir. Ct. Balt. Cty.).

[22] In light of the general principles of the collateral source rule, the Court fails to see why the Plaintiffs' injured participants could not recover these same medical expenses. This is particularly so given Plaintiffs' insistence that the employer contributions to the Funds are in fact substitute wages for the employees, i.e., that it is truly the employees' own funds being contributed.

[23] Plaintiffs' reliance on *State of Florida v. American Tobacco Co.,* No. CL 95-1466 AH, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996) is misplaced. *State of Florida* was based upon Florida's RICO act, not the federal statute, and on the court's conclusion that the State, as opposed to a private litigant, did not have to meet the requirements of proximate cause. *See Southeast Florida,* 1998 WL at *5 n.5 (discussing *State of Florida)*. Furthermore, to the extent that other courts have allowed federal RICO claims to go forward in cigarette cost recovery cases, this Court notes a respectful disagreement with those decisions for the reasons stated above.

> Defendants' profits, restrain and suppress competition **[**31]** in the research, development, production, and sale of alternative products, and standardize the tobacco products manufactured and sold in the United States. The contract, combination, or conspiracy also increased smoking-related illnesses and associated health care costs and artificially suppressed research and treatment of smoking-related illnesses.

Complaint P 267-68. These practices have allegedly injured the Plaintiffs' business and property by causing "a substantial increase in the cost of medical care for their participants and beneficiaries." [24] *Id. P 270*.

[32]** The same "remoteness" principle which animated the Court's discussion of Plaintiffs' common law and RICO claims is dispositive of their antitrust claims. Absent some direct relation between the injury asserted and the allegedly unlawful conduct, the requirements of proximate cause are not satisfied. [25] *See* *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 540-41, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. Indeed, the *Holmes* court, in articulating the proximate cause requirements under RICO adopted and applied the reasoning of *Associated General Contractors* from the antitrust context. [26] **[**34]** *Holmes, 503 U.S. at 268*. As described by the *Holmes* court, *Associated General Contractors* stands for the proposition that directness of relationship between the defendant's conduct and the plaintiff's injury is a "central element" of causation under the Clayton Act. *Id. at 269*; *cf.* *Pocahontas Supreme Coal Co., Inc. v. Bethlehem Steel Corp., 828 F.2d 211, 219-20 (4th Cir. 1987)* (holding that plaintiff could not state an antitrust claim under the Clayton Act for either damages or injunctive relief because the causal **[**33]** relation between the alleged illegal conduct and the harm suffered was remote rather than direct). Accordingly, for the reasons stated above, Plaintiffs' antitrust claims must be dismissed. [27]

[*634] Furthermore, this Court agrees with the conclusions of Judges Scheindlin, Ryskamp, and Fullam [28] that the Plaintiff Funds lack "antitrust standing." *Laborers Local* *17 Health & Benefit Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 3578*, No. 97 Civ. 4550 (SAS), 1998 WL 146217 at *10 (S.D.N.Y. Mar. 25, 1998); *Southeast Fla. Laborers Dist. Health* **[**35]** *and* *Welfare Trust Fund v. Philip Morris, 1998 U.S. Dist. LEXIS 5440*, No. 97-8715-

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[24] The claims brought under the Maryland Antitrust Act assert essentially the same antitrust violations. The Maryland General Assembly has declared that courts construing that Act should be guided by the interpretations given to the federal antitrust acts. *Md. Code Ann. Com. Law II § 11-202*; *Cities Serv. Oil Co. v. Burch,29 Md. App. 430, 349 A.2d 279, 283 (Md. Ct. Spec. App. 1975)*. Thus, the parties agree that the Court's inquiry is the same under both the federal and Maryland statutes. *See* Plaintiffs' Opposition at 32.

[25] Although § 4 of the Clayton Act states that "any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue," federal courts have not interpreted this section as broadly as its literal language could suggest. As stated by the Supreme Court, "It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535, 74 L. Ed. 2d 723, 103 S. Ct. 897* (quoting *Blue Shield of Virginia v. McCready, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*.

[26] The *Associated General Contractors* court stated that Congress intended that antitrust litigation "would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation", including the requirements of proximate cause. *Associated General Contractors, 459 U.S. at 533*.

[27] The fact that the Circuit Court for Baltimore City allowed the State of Maryland to pursue its claim under the Maryland Antitrust Act does not help the Plaintiff Funds. The circuit court based its decision on a provision of the Maryland statute which it felt made "it absolutely clear that the Maryland legislature intended for the State to pursue causes of action against potential antitrust violators regardless of whether injuries sustained by the state were remote and regardless of whether or not the State dealt directly with the alleged violator." *State of Maryland v. Philip Morris, Inc.,* No. 96122017, CL211487, 1997 WL 540913 at *20 (Md. Cir. Ct. for Balt. City May 21, 1997). There is no such statutory provision for private plaintiffs like the Plaintiff Funds.

[28] The three judges who, to date, have issued decisions in cigarette cost recovery suits brought by ERISA funds against the tobacco industry.

CIV, 1998 WL 186878 at *6 (S.D. Fla. Apr. 13, 1998); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 5951*, No. 97-5344, 1998 WL 212846 at *3 (E.D. Pa. Apr. 22, 1998).

HN5[] Antitrust injury has been defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. As stated by the United States Court of Appeals for the Fourth Circuit, "the damages sought must flow from that conduct which is proscribed by the antitrust laws. Because the antitrust laws are intended to protect competition . **[**36]** . . only injury caused by damage to the competitive process may form the basis of an antitrust claim." *Thompson Everett, Inc. v. National Cable Advertising, L.P., 57 F.3d 1317, 1324 (4th Cir. 1995)* (citations omitted).

In the context of this case, as aptly stated by Judge Ryskamp,

> The gravamen of the Fund[s'] complaint is that health care prices soared as a result of the defendants' concealment of information. Because many of the Fund[s'] participants were addicted to cigarettes, the Fund[s'] health care costs increased. This injury is simply not the type of injury that the antitrust laws were intended to prevent. *See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (antitrust injury consists of injury caused by higher prices, reduced output, or damage to a competitor's business). Furthermore, the claim is wholly derivative and thus not cognizable as an antitrust injury.

Southeast Florida, 1998 WL 186878 at *6 (final citation omitted).

Accordingly, the Court concludes that Plaintiffs' antitrust claims must be dismissed. [29]

[37]** D. *Consumer Protection Act Claim*

In Count IV, Plaintiffs assert a claim under the Maryland Consumer Protection Act. ***HN6***[] Under the statute, "any person may bring an action to recover for injury or loss sustained by him *as the result* of a practice prohibited by" the Act. *Md. Code Ann. Com. Law II § 13-408* (emphasis added). Plaintiffs' theory appears to be that (1) the Defendants engaged in an unfair or deceptive trade practice by misrepresenting the harmful effects of smoking and the addictive properties of nicotine, (2) individual smokers were misled, **[*635]** (3) smokers continued to smoke cigarettes, (4) smokers contracted smoking-related illnesses and incurred medical costs, and (5) the Plaintiffs therefore paid more for tobacco-related medical expenses of their participants and beneficiaries than they otherwise would have.

For the reasons stated above with regard to Plaintiffs' other claims, the Court concludes that the causal connection between the Defendants' alleged unlawful trade practices and the Plaintiffs' alleged injury is too tenuous to fall within the Consumer Protection Act. Any injuries sustained by the Plaintiff Funds were not "as the result of a

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[29] Plaintiffs' reliance on *Blue Shield of Va. v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)* is misplaced. In *McCready,* the plaintiff was a subscriber in Blue Shield. She alleged an antitrust conspiracy between Blue Shield and an organization of psychiatrists to exclude psychologists from receiving compensation from Blue Shield. Thus, the plaintiff could not receive reimbursement for the mental health treatment she received from a psychologist, although she could have been reimbursed if she had visited a psychiatrist instead. The Supreme Court held that she had standing because she was a consumer of psychotherapy services who was injured by the alleged conspiracy to prevent psychologists from serving Blue Shield subscribers. Thus, "*Blue Shield* did not involve a derivative claim. On the contrary, it involved a purchaser's claim against an antitrust offender. In this case, the Fund[s have] not purchased any products from the defendants. Thus, [their] claim is wholly derivative." *Southeast Florida,* 1998 WL 186878 at *6 n.7. The Plaintiff Funds are not in an analogous position to the plaintiff in *McCready.* On the allegations of the instant case, if anyone other than a competitor had standing to assert an antitrust injury stemming from the Defendants' alleged conspiracy to stifle information about safer cigarettes and the health consequences of tobacco, by the reasoning of *McCready,* it would be individual smokers, as they were the consumers of tobacco products.

practice prohibited **[**38]** by" the Act. *Cf.* Sacks v. Philip Morris, Inc., 1996 U.S. Dist. LEXIS 15184, No. Civ. A. WMN-95-1840, 1996 WL 780311 at *2 (D. Md. Sept. 19, 1996) (holding that the causal connection between defendant's misrepresentations about the technical feasibility of making a "fire-safe" cigarette and a fire, which was begun when a burning cigarette ignited a sofa, was too tenuous to fall within the Act). [30] **[**39]** Accordingly, Plaintiffs' Consumer Protection Act claim must be dismissed. [31]

E. *Unjust Enrichment*

In Count VIII, Plaintiffs assert a claim for unjust enrichment. ***HN7***[] The elements of a claim for unjust enrichment are

> 1. A benefit conferred on the defendant by the plaintiff; 2. An appreciation or knowledge by the defendant of the benefit; and 3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

Richard F. Kline, Inc. v. Signet Bank/Maryland, 102 Md. App. 727, 651 A.2d 442, 444 (Md. Ct. Spec. App. 1995) (quoting Yost v. Early, 87 Md. App. 364, 589 A.2d 1291 (Md. Ct. Spec. App. 1991)).

In essence, Plaintiffs **[**40]** allege that they have unjustly enriched the Defendants by paying the medical expenses of tobacco users who were injured by the Defendants' allegedly unlawful conduct. Plaintiffs contend that by paying medical expenses arising out of tobacco-related illnesses, they relieved the Defendants of their obligation to pay such medical costs, thereby unjustly enriching the Defendants. The Court concludes that Plaintiffs have failed to state a claim.

A necessary element of a claim of unjust enrichment is that the plaintiff conferred a benefit on the defendant. The Plaintiffs paid the smoking-related medical costs of their participants because they were legally obligated by contract to do so. Thus, the expenses that they incurred were at the behest of their participants. The Plaintiff Funds did not confer a benefit on the Defendants. [32] *Laborers Local* 17 Health & Benefit Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 3578, No. 97 Civ. 4550(SAS), 1998 WL 146217 at *14 (S.D.N.Y. Mar. 26, 1998); *see also* Southeast Florida Laborers Dist. Health and Welfare Trust Fund v. Philip Morris, 1998 U.S. Dist. LEXIS 5440, No. 97-8715- CIV, 1998 WL 186878 at *4 (S.D. Fla. Apr. 13, 1998) **[*636]** ("The Fund has not cited, nor has the Court located, any Florida **[**41]** case employing an unjust enrichment theory to obligate a defendant to provide medical care to smokers where the plaintiff is legally obligated to do so."). [33] Accordingly, Plaintiffs' unjust enrichment claim must be dismissed. [34]

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[30] The parties dispute whether, under the CPA, the Plaintiffs must be "consumers" of cigarettes in order to state a claim. In *State of Maryland,* relying on the statutory language that "any person" may bring a CPA claim, the Circuit Court for Baltimore City allowed the State's Consumer Protection Act claim to go forward, finding that "neither the State nor any other plaintiff is required to be a consumer in order to assert a cause of action for damages under the CPA." *State of Maryland v. Philip Morris, Inc.,* No. 96122017, CL211487, 1997 WL 540913 at *18 (Md. Cir. Ct. for Balt. City May 21, 1997). Other courts have stated, in a variety of contexts, that the CPA only provides a cause of action for consumers. *See, e.g.,* Scotch Whisky Ass'n v. Majestic Distilling Co., Inc., 958 F.2d 594, 597 n.9 (4th Cir. 1992) (citing Layton v. AAMCO Transmissions, Inc., 717 F. Supp. 368, 371 (D. Md. 1989)). In light of the Court's conclusion that the causal connection between the alleged CPA violation and Plaintiffs' injuries is too tenuous, it is unnecessary to decide this issue.

[31] Although the *State of Maryland* court allowed the State's CPA claim to go forward, it did not separately address the causation issue discussed above. It is not clear whether such a challenge was made by the defendants in that case. In any event, irrespective of what the *State of Maryland* court may or may not have been presented with, this Court concludes that Plaintiffs have failed to state a claim.

[32] Indeed, the Court fails to see how the Plaintiffs "discharged" or "satisfied" any obligation which the Defendants had to pay the medical expenses of individual smokers. Given the collateral source rule, the Court assumes that the Defendants are still potentially liable to individual smokers for such damages.

[33] The Court does not reach the Defendants' contention that this claim must be dismissed because the Plaintiffs have an adequate remedy at law.

[42]** IV. *CONCLUSION*

For the foregoing reasons,

1. Certain Defendants' Motion to Dismiss the First Amended Complaint is GRANTED.

2. Certain Defendants' Alternative Motion to Dismiss for Failure to Join Necessary parties is DENIED AS MOOT.

3. Judgment shall be entered by separate Order.

SO ORDERED this *13th* day of July, 1998.

Marvin J. Garbis

United States District Judge

JUDGMENT ORDER

By separate Order issued this date, the Court has granted the motion entitled "Certain Defendants' Motion to Dismiss the First Amended Complaint" which was adopted by all Defendants.

Accordingly, Judgment is hereby entered in favor of Defendants Philip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, B.A.T. Industries P.L.C., Lorillard Tobacco Company, Liggett Group, Inc., The American Tobacco Company, The Council for Tobacco Research -- U.S.A., Inc., The Tobacco Institute, Inc., Smokeless Tobacco Council, Inc., Hill & Knowlton, Inc., and United States Tobacco Company and against Plaintiffs Seafarers Welfare Plan, United Industrial Workers Welfare Plan, Construction Workers' Trust Fund, and Cabinetmakers' Local No. 974 and Carpenters' Local No. **[**43]** 1110 Health and Welfare Fund:

1. Dismissing Plaintiffs' claims with prejudice and

2. Awarding the Defendants their assessable costs.

3. This Order shall be deemed to be a final judgment within the meaning of *Rule 58 of the Federal Rules of Civil Procedure*.

SO ORDERED this *13th* day of July, 1998.

Marvin J. Garbis

United States District Judge

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[34] As noted in a recent decision in *Rossello v. Brown & Williamson Tobacco Corp.,* No. CIV. 97-1910(JAF), 1998 WL 313365 (D.P.R. June 2, 1998), if anyone, "it is not Defendants who have received a benefit from [Puerto Rico's] medical care expenditures, but rather the individual smokers. Plaintiffs' claim that they have spared Defendants the liability and litigation expenses is too speculative and remote to constitute a benefit." *Id.* at *16.

LexisNexis®

Brookins v. International Motor Contest Ass'n

United States District Court for the Northern District of Iowa, Cedar Rapids Division

July 15, 1998, Decided ; July 15, 1998, Filed

Civ. No. C96-134 MJM

Reporter

1998 U.S. Dist. LEXIS 14225 *; 1998-2 Trade Cas. (CCH) P72,278

GAIL BROOKINS, d/b/a ERNIE GLIDE TRANSMISSIONS, a sole proprietorship, and ERNIE BROOKINS, Plaintiffs, v. INTERNATIONAL MOTOR CONTEST ASSOCIATION, an Iowa corporation; BILLY JOE BUSHORE, d/b/a BUSHORE RACING ENTERPRISES, and KATHY ROOT, Defendants.

Disposition: [*1] Defendants' motion for summary judgment granted as to plaintiffs' first cause of action, the antitrust claim in this case, resulting in dismissal of all claims as against Billy Joe Bushore, d/b/a Bushore Racing Enterprises. Summary judgment denied as to the second and third causes of action. Summary judgment granted as to plaintiffs' first action of action. Summary judgment denied as to plaintiffs' second and third causes of action.

Core Terms

transmissions, racing, track, oval, plaintiffs', summary judgment, market power, anticompetitive, sanctioned, antitrust, effects, racers, intentional interference, adverse effect, detrimental effect, cause of action, manufacturers, technological, predominant, rule-making, deposition, injure

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN1[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, broadly prohibits every contract, combination or conspiracy, in restraint of trade or commerce among the several states.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

The true test of legality is whether the restraint imposed is such as merely regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

Isolated statements from customers of preference for the product and service of the excluded competitor are not a sufficient empirical demonstration concerning the adverse effect of the defendants' arrangement on price or quality.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

Only if a plaintiff succeeds in establishing the actual adverse effects of an alleged restraint does the burden shift to the defendant to establish its procompetitive virtues.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

Intent is relevant to the reasonableness inquiry, but only to help courts interpret the effects of defendants' actions. Anticompetitive intent is not by itself sufficient to meet the adverse-effect requirement.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

Antitrust liability cannot be established on a mere showing that an organization has applied its rule-making and enforcing authority in an arbitrary or unreasonable manner.

Counsel: For GAIL BROOKINS dba Ernie Glide Transmissions, ERNIE BROOKINS, plaintiffs: Daniel L Manning, Connolly-O'Malley-Lillis-Hansen, Des Moines, IA. Steven G York, Esq, Cairns Dworkin & Chambers PC, Denver, CO. B Lawrence Theis, Perkins Coie, Denver, CO.

For INTERNATIONAL MOTOR CONTEST ASSOCIATION, KATHY ROOT, BILLY JOE BUSHORE dba Bushore Racing Enterprises, defendants: Bruce L Braley, Dutton Braun Staack Hellman Iversen, Waterloo, IA.

For INTERNATIONAL MOTOR CONTEST ASSOCIATION, counter-claimant: Bruce L Braley, Dutton Braun Staack Hellman Iversen, Waterloo, IA.

For GAIL BROOKINS dba Ernie Glide Transmissions, ERNIE BROOKINS, counter-defendants: Daniel L Manning, Connolly-O'Malley-Lillis-Hansen, Des Moines, IA. Steven G York, Esq, Cairns **[*2]** Dworkin & Chambers PC, Denver, CO. B Lawrence Theis, Perkins Coie, Denver, CO.

Judges: Michael J. Melloy, Chief Judge, UNITED STATES DISTRICT COURT.

Opinion by: Michael J. Melloy

Opinion

Memorandum Opinion and Order on Motions for Summary Judgment

Introduction

Gail Brookins is the sole proprietor of "Ernie Glide Transmissions," a business that produces "Ernie Glide" and "Ernie Slide" transmissions. Both the Glide and the Slide transmissions were developed and patented by Ernie Brookins, who is Gail's husband and an employee of Ernie Glide Transmissions.

The Glide and Slide were designed to be used in races sponsored by the International Motor Contest Association ("IMCA"), a for-profit Iowa corporation that serves as a sanctioning and rule-making authority for stock and modified stock car racing. The Glide transmission has been used in IMCA races since early in this decade. In 1993, however, more racers began to use the Glide transmission, and in 1994 the Glide transmission carried Mark Noble to the championship of the modified nationals in Boone, Iowa.

The Brookinses claim that, after 1994, the IMCA and Kathy Root, its president, conspired with Bushore Racing Enterprises ("Bushore") and **[*3]** other manufacturers of transmissions to prevent the use of the Glide or Slide in IMCA-approved events. IMCA prevented the use of the Glide or Slide by continually amending its rules so as to outlaw transmission features or configurations that only the Glide or Slide possessed. For example, a draft of the IMCA's 1997 rules allowed the use of a "working disc type or approved coupler type clutch." The Slide may have been legal for use in IMCA races under the "approved coupler type clutch" language, and so the IMCA quickly revised its rules to require the use of a "working disc type or approved *cone* type clutch." Since the Slide, alone among transmissions, used neither a disc type nor a cone type clutch, the revision rendered the Slide illegal.

The Brookinses claim that this conspiracy to keep the Glide and Slide out of IMCA-sponsored races violated section one of the Sherman Act, *15 U.S.C. § 1 et seq.*, and also constituted intentional interference with existing and prospective business advantage. Accordingly, they filed this suit under this Court's federal question jurisdiction, *28 U.S.C. § 1331*, and supplemental jurisdiction, *28 U.S.C. § 1367*, seeking damages and an injunction. **[*4]** The IMCA filed state-law counterclaims, alleging that the Brookinses interfered with IMCA's existing and prospective business advantage.

IMCA has moved for summary judgment, arguing that the Brookinses cannot show the existence of an agreement or that the agreement was an unreasonable restraint of trade. In particular, IMCA argues that the Brookinses have failed to show that it or its alleged conspirators possess market power in the "oval track racing transmission market," the product market alleged in the Brookinses second amended complaint. *See Doc. # 50,* P 64. IMCA also argues that the Brookinses' state law claims fail for various reasons. The Brookinses have resisted that motion.

II. Discussion

A. The Antitrust Claim

HN1[] Section One of the Sherman Act, *15 U.S.C. § 1 et seq.*, broadly prohibits "every contract, combination … or conspiracy, in restraint of trade or commerce among the several States[.]" The Supreme Court held early on that *§ 1* does not prohibit "every" agreement in restraint of trade - an interpretation that would have "made eternal the bellum omnium contra omnes and disintegrated society so far as it could into individual atoms," *Northern Securities* **[*5]** *Co. v. U.S., 193 U.S. 197, 411, 48 L. Ed. 679, 24 S. Ct. 436 (1904)* (Holmes, J, dissenting) - holding instead that *§ 1* prohibits only agreements that unreasonably restrain trade. *See, e.g., U.S. v. Joint-Traffic Ass'n, 171 U.S. 505, 19 S. Ct. 25, 43 L. Ed. 259 (1898)*; *Board of Trade of City of Chicago v. U.S., 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*. In *Board of Trade,* Justice Brandeis offered what the Supreme Court in *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343 n. 13, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)* called the "classic statement" of this reasonableness approach to *§ 1*:

> **HN2**[] The true test of legality is whether the restraint imposed is such as merely regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is **[*6]** not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

246 U.S. at 238; *see also* *State Oil Co. v. Khan, 522 U.S. 3, 139 L. Ed. 2d 199, 118 S. Ct. 275, 279 (1997)* ("The finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.").

There are some restraints that "are so inherently anticompetitive that they are illegal *per se,* without inquiry into the reasonableness of the restraint or the harm caused." *Double D Spotting Service, Inc. v. Supervalu, Inc., 136 F.3d 554, 558 (8th Cir. 1998)*. As the Supreme Court has explained, restraints are condemned *per se* when "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *State Oil, 118 S. Ct. at 279* (quotation and citation omitted). The category of restraints **[*7]** condemned *per se* is narrow, *see All* *Care Nursing Service, Inc. v. High Tech Staffing Services, Inc., 135 F.3d 740, 746 (11th Cir. 1998)*, and the Brookinses do not contend that the alleged restraint in this case should be condemned *per se.* Accordingly, in order to show a violation of *§ 1*, the Brookinses must show that the restraint at issue here "imposes an unreasonable restraint on competition." *Double D, 136 F.3d at 558*.

The Eighth Circuit has held that whether a restraint is unreasonable generally depends upon the outcome of "an inquiry into the market structure and the defendant's market power[.]" *Double D, 136 F.3d at 558*. Such an inquiry is necessary only if the plaintiff cannot show actual detrimental effects on competition. As the Supreme Court has explained, "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects … can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-61, 90 L. Ed.* ***[*8]*** *2d 445, 106 S. Ct. 2009 (1986)* (quotations and citation omitted). Accordingly, a plaintiff can show a violation of *§ 1* by showing "actual detrimental effects" on competition attributable to the challenged restraint, or by showing that the "market structure and the defendant's market power" are such that the challenged restraint is likely to injure competition. (Whether the plaintiff may recover for the *§ 1* violation depends in part on a further showing that the challenged restraint has caused the plaintiff antitrust injury.) In this case, the Brookinses rely on both purported "actual detrimental effects" and on market analysis to show that competition may be harmed by the challenged restraint. The Court will consider first the adequacy of the Brookinses' market analysis.

The Brookinses have not provided the Court with any means to conduct "the inquiry into the market structure and the defendant's market power" required by the Eighth Circuit. *Double D, 136 F.3d at 558*. The Brookinses have not identified how much of the market for oval track racing transmissions is accessible only with the IMCA's approval, aside from assertions that "over 45% of all sanctioned tracks in **[*9]** the country are run under an IMCA banner" and that IMCA "has more members than other sanctioning body [sic] such as CART, USAC, and NASCAR and has the largest fan base." *See Doc. # 82, PP 3 - 4.* These assertions are not helpful to the task at hand; the relevant question is how many racers (the customers for the Brookinses' transmissions) compete under the IMCA banner and will only buy transmissions that are approved by IMCA. That number cannot be drawn from the information provided by the Brookinses. Forty-five percent of the country's "sanctioned tracks" might host only ten or twenty percent of the country's racers. IMCA might have more members than CART alone, or USAC alone, or NASCAR alone; but it seems doubtful that IMCA has more members than all of those organizations combined. *See* *Koszela v. NASCAR, 646 F.2d 749, 750 (2nd Cir. 1981)*. In any event, the fact that IMCA has more members than some other sanctioning body reveals nothing at all about what part of the market for oval track racing transmissions is accessible only with the IMCA's approval. Even assuming that market share alone can serve as a proxy for anticompetitive effects, *see* K.M.B., 61 F.3d 123, 129, IMCA's **[*10]** market share is neither revealed by direct evidence nor reasonably inferred from the evidence offered by the Brookinses.

The Brookinses seem to rely solely on IMCA's unspecified market share to demonstrate the anticompetitive effects of the challenged restraint. The Brookinses offer no evidence that the market structure of the oval track racing transmission market gives IMCA any power to raise prices, reduce output, or exclude competition in the oval track racing transmission market. The Brookinses do not explain how the IMCA could force IMCA racers to use transmissions that are more dangerous, *see Doc. # 82, P 73,* heavier, *id., P 72,* less reliable, *id., PP 73, 74,* and no cheaper, *id., P 71,* than the Ernie Slide without causing racers to switch to races sanctioned by CART or NASCAR or USCA. *See also id., PP 13, 15* (noting alleged cost, efficiency, and safety advantages of Ernie Glide); *Affidavit of Lonnie Hoover, P 11* (asserting that Slide transmission poses less risk of "catastrophic fragmentation or explosion" than other transmissions). Without such an explanation any agreement between the IMCA and certain oval track racing transmission manufacturers is not **[*11]** of concern to the antitrust laws. *See, e.g.,* *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994)* ("If the structure of the market is such that there is little potential for consumers to be harmed, we need not be especially concerned with how firms behave because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers."), *quoting* Hay, *Market Power in Antitrust,* 60 Antitrust L.J. 807, 808 (1992). If IMCA truly is forcing its racers to use more expensive, less reliable, and more dangerous transmissions, it can expect to lose racers to sanctioning bodies that do not impose such burdens. In short, the Brookinses have failed to meet their burden of showing that a reasonable jury could conclude, after "an inquiry into the market structure and the defendant's market power," *136 F.3d at 558*, that the challenged restraint is likely to have anticompetitive effects.

The Brookinses also rely, however, on a showing of actual injury to competition in the oval track racing transmission market. The injuries identified by the Brookinses are that the reasonably priced Glide and Slide are not available for purchase and that **[*12]** technological development in the oval track racing transmission market is stifled by IMCA's rule-making. *See Doc. # 81, at 15 - 16.* However, neither of these alleged injuries reveals an actual adverse effect on competition.

As far as the exclusion of the competitively priced Glide and Slide is concerned, nothing in the record indicates that exclusion has had an adverse effect on competition in the oval track racing transmission market. There has been no showing that the output of "oval track racing transmissions" has fallen below the level it would reach under competitive conditions. There has been no showing that the price of oval track racing transmissions has gone up because of the attempted exclusion of the Glide and Slide. All the Brookinses have shown is that their products may be unavailable to racers who compete in IMCA-sanctioned events, but the effects of that unavailability on the market as a whole are entirely unexplained. If a plaintiff could generate a jury question on injury to competition simply by asserting that his less expensive or superior product was excluded from the market, the distinction between injury to a competitor and injury to competition would be **[*13]** lost. For that reason, the courts have held that the mere fact that a certain supplier is prevented from participating in the market does not of itself show an actual adverse effect. *See, e.g.,* *K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co., 61 F.3d 123, 128 (2nd Cir. 1995)* ***HN3***[] ("Isolated statements [from customers] of preference [for the product and service of the excluded competitior] are not a sufficient empirical demonstration concerning the adverse effect of the defendants' arrangement on price or quality.") (citation and internal quotation omitted); *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 546 (2nd Cir. 1993)*.

As far as technological development is concerned, there is nothing in the record to indicate that the exclusion of the Glide or Slide has hampered technological development of oval track racing transmissions. The record citation offered by the Brookinses to support the theory of injury to technological advancement is inapposite, since technological development is not mentioned there. *See Doc. # 82, P 124.* The cited portion of the record does express concern that "if the transmission manufacturers **[*14]** don't start designing something knew [sic], utilizing something that's available on the market today, it's going to be where we won't have transmissions for racing." *Doc. # 24, p. 162, lines 19 - 23.* Nothing indicates that the presence of the Glide or Slide on the market would prompt the development of "something [new]." Indeed, one would think that the prospect of "[getting] to [] where we won't have transmissions for racing" would be the most effective spur for racing transmission manufacturers to develop "something new" in order to avoid going out of business.

The lack of market analysis by the plaintiffs may arise from a belief that simply showing a lack of justification for the challenged restraint is enough to make out a *§ 1* case. *See Doc. # 81, at 12 - 14; id., at 14* ("The fact of the matter is that defendants were not acting against the Ernie Slide and Ernie Glide to promote any legitimate goal of rule making [sic].") This is a misconception. Section One does not require a defendant to justify a challenged restraint unless and until the plaintiff has shown that the restraint poses some real and substantial threat to competition. As the Second Circuit has **[*15]** explained, ***HN4***[] "Only if a plaintiff succeeds in establishing the actual adverse effects of an alleged restraint does the burden shift to the defendant to establish its procompetitive virtues." *Clorox Co. v. Sterling Winthrop, Inc. 117 F.3d 50, 59 (2nd Cir. 1997)*, *citing K.M.B. Warehouse, 61 F.3d at 127*; *see also* Areeda, ***Antitrust Law***, P 1503 p. 372 (1986 ed.) ("Every antitrust suit should begin by identifying the ways in which a challenged restraint might possibly impair competition.").

It may be that the Brookinses suppose that the lack of procompetitive justifications for IMCA's rule-making reveals an anticompetitive intent on the part of IMCA, and that anticompetitive intent alone suffices to make out a *§ 1* case. *See Doc. # 81, at 11.* This too is a misconception. As the Supreme Court noted in *Board of Trade,* an antitrust defendant's intent may help the court decide in doubtful cases whether a challenged restraint is likely to injure competition, but the Court was careful to note that "a good intention will [not] save an otherwise objectionable regulation or the reverse[.]" *246 U.S. at 238*. As the Second Circuit has held, ***HN5***[] "Intent is relevant to the **[*16]** reasonableness inquiry, but only to help courts interpret the effects of defendants' actions….Anticompetitive intent is not by itself sufficient to meet the adverse-effect requirement." *K.M.B. Warehouse, 61 F.3d at 130*; *see also SCFC ILC, 36 F.3d at 970* (holding that if conduct is "not objectively anticompetitive the fact that it was motivated by hostility to competitors … is irrelevant.") (citation and internal quotation omitted). The same might be said of the Brookinses' argument that IMCA applied its rule-making and enforcing authority arbitrarily against the Brookinses. At least since the Supreme Court's decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*, it has been clear that ***HN6***[] antitrust liability cannot be established on a mere showing that an organization has applied its rule-making and enforcing authority in an arbitrary or unreasonable manner. *See, e.g., Moore v. Boating Industry Ass'n, 819 F.2d 693 (7th Cir. 1987)*; *Carleton v. Vermont Dairy Herd Improvement Ass'n, Inc., 782 F. Supp. 926, 932 (D. Vt. 1991)*; *Consolidated Metal Products, Inc. v. American Petroleum* ***[*17]*** *Institute, 846 F.2d 284, 291 n. 20 (5th Cir. 1988)*.

In summary, the Brookinses have failed to adduce facts from which a reasonable jury could conclude that the challenged restraint in this case poses a threat to competition in the oval track racing transmission market. The Brookinses have offered no market analysis to support such a conclusion and have identified no actual adverse effects on competition. Accordingly, IMCA's motion for summary judgment on the *§ 1* claim must be granted.

B. State Law Claims

The Brookinses have also brought state-law claims against the defendants. Although the usual practice is to dismiss pendent state-law claims when the federal claims have been disposed of, *see Ivy v. Kimbrough, 115 F.3d 550, 552 (8th Cir. 1997)*, in this case the Court will continue to exercise jurisdiction over those claims in the interest of judicial economy.

The Brookinses have asserted the state-law claims of intentional interference with existing contracts and intentional interference with prospective business advantage. These claims are brought only against IMCA and Kathy Root. Although the elements of those claims differ slightly, both require the plaintiff to prove **[*18]** that the defendant acted with the predominant purpose of financially injuring or destroying the plaintiff. *See Rail Intermodal Specialists, Inc. v. General Electric Capital Corp., 103 F.3d 627, 631 (8th Cir. 1996)*; *see also Berger v. Cas' Feed Store, Inc., 543 N.W.2d 597, 599 (Iowa 1996)* (reversing jury award of damages for intentional interference with a contract when there was "no evidence of a predominant purpose of causing injury to the plaintiffs[.]"); *Wilkin Elevator v. Bennett State Bank, 522 N.W.2d 57, 62 (Iowa 1994)*. The prospect of financially injuring or destroying the plaintiff must be the animating principle of the defendant's conduct; financial injury or destruction caused by the defendant's pursuit of some other goal does not satisfy this requirement. *See Willey v. Riley, 541 N.W.2d 521, 526-27 (Iowa*

1995) ("Intentional interference with a prospective business contract is an intentional tort which requires a showing that the sole or predominant purpose of the actor's conduct was to financially injure or destroy the plaintiff."); Wilkin, 522 N.W.2d at 62 (no liability for interference when defendant acted to "protect its own financial interests"); **[*19]** Berger, 543 N.W.2d at 599 (same). If a defendant acted "for two or more purposes, his improper purpose must predominate in order to create liability." Wllley, 541 N.W.2d at 527.

The depositions, affidavits, and other evidence on file in this case shows that there is a genuine issue of material fact as to the defendant's motivation in connection with the rule making authority in this case. Taking the evidence in the light most favorable to the plaintiffs, there is considerable evidence to show that the predominant purpose of many of the rules enacted by the IMCA were done with the intent to prevent the plaintiffs from being able to sell their transmission to participants in races sponsored by the IMCA.

There is considerable evidence that rules were enacted in this case as the result of complaints by the plaintiffs' competitors. There is also evidence that those competitors were consulted about plaintiffs' transmissions. Kathy Root conceded as much in her deposition. See, Root deposition, p.87.

There are also a number of inconsistencies in the preliminary injunction hearing transcript, depositions, and other documents in this case about the purpose of the rules. There is considerable **[*20]** dispute about whether safety was a factor in the exercise of the rule making authority. There is also a dispute as to whether the safety concerns, if any, were directed exclusively at the plaintiffs. As an example, there is evidence that IMCA put into effect a rule that required that the bellhousing on IMCA approved transmissions have SFI approval. The plaintiffs promptly sought and obtained such approval at some expense to the plaintiffs. Whether it became clear, however, that a number of the other manufacturers would find it difficult, if not impossible, to also obtain SFI approval, the rule was quickly dropped.

Bill Zwanziger testified at p.195 of his deposition that the sole purpose of the "disk type or cone type" rule was to outlaw the Ernie Glide Transmission for 1997. There is significant evidence that every time the plaintiffs attempted to modify their transmissions to meet the most recent rule change by the IMCA, that the IMCA would then change the rule or create new rules that would impede the ability of the plaintiffs to market their transmissions.

In summary, there is a significant factual dispute as to the motivation of IMCA and Kathy Root in connection with the rule **[*21]** making process in this case. There are also factual disputes as to the defendants' knowledge as to the effects the rule changes would have on plaintiffs' business. There is ample evidence in the record to show that the defendants were well aware of the fact that the outlawing of the plaintiffs' transmissions for IMCA sanctioned races would have a devastating impact upon the plaintiffs' business.

Accordingly, summary judgment will be denied on plaintiffs' state law claims of intentional interference with the contractual relationship (second claim for relief) and intentional interference with the prospective business advantage (third claim for relief).

C. Summary

In summary, defendants' motion for summary judgment is granted as to plaintiffs' first cause of action, the antitrust claim in this case. This results in the dismissal of all claims as against Billy Joe Bushore, d/b/a Bushore Racing Enterprises.

Summary judgment is denied as to the second and third causes of action. These causes of action are asserted only against IMCA, an Iowa corporation, and Kathy Root.

The Court will retain its supplemental jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1367(a). **[*22]** The reason the Court has elected to exercise its supplemental jurisdiction is the fact that this case has been on file in this Court for over two years, the undersigned issued the injunction which is at issue in this case, any damages which may arise out of the issuance of that injunction should be handled by the undersigned in the event it is determined that the plaintiffs ultimately prevail, and finally, this case is within four months of the trial date in this Court.

IT IS THEREFORE ORDERED that summary judgment is granted as to plaintiffs' first cause of action. That cause of action is dismissed. Defendant Billy Joe Bushore, d/b/a Bushore Racing Enterprises is dismissed as a defendant.

IT IS FURTHER ORDERED that summary judgment is denied as to plaintiffs' second and third causes of action. The Court will continue to exercise jurisdiction over plaintiffs' second and third causes of action.

Done and So Ordered this 15th day of July, 1998.

Michael J. Melloy, Chief Judge

UNITED STATES DISTRICT COURT

International Test & Balance, Inc. v. Associated Air & Balance Council

United States District Court for the Northern District of Illinois, Eastern Division

July 15, 1998, Decided

No. 98 C 2553

Reporter

14 F. Supp. 2d 1033 *; 1998 U.S. Dist. LEXIS 10696 **; 1999-1 Trade Cas. (CCH) P72,506

INTERNATIONAL TEST AND BALANCE, INC., Plaintiff, v. ASSOCIATED AIR AND BALANCE COUNCIL, and Certain Members Thereof, Whose Identities Presently are Unknown, Defendants.

Disposition: [1]** Plaintiff's Motion for Preliminary Injunction (Doc. No. 5) denied.

Core Terms

expulsion, balancing, Sherman Act, Antitrust, membership, allegations, preliminary injunction, rule of reason, competitor, Burners, model code, testing, anti trust law, contractors, conspiracy, courts, merits, cases, restraint of trade, anticompetitive, complaints, probation, firms, compete, reasons, argues, trade association, market power, per se rule, completion

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction is a remedy that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. In order to prevail on a motion for a preliminary injunction, the movant must demonstrate (1) some likelihood, a better than negligible chance, of success on the merits, and (2) an inadequate remedy at law and irreparable harm if preliminary relief is denied. If the court finds either of these facts absent, then the court's analysis ends and the preliminary injunction should not be issued. On the other hand, if the movant demonstrates these elements, then the court considers the irreparable harm to the non-movant if preliminary relief is granted as balanced against the irreparable harm to the movant if preliminary relief is denied, and the public interests involved. The court uses a sliding scale approach to this balancing test; that is, the more likely it is that the movant will succeed on the merits, the less the balance of the irreparable harms need weigh toward its side.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN2[] **Federal & State Interrelationships, Erie Doctrine**

Illinois law provides that its courts should use the construction of federal ***antitrust law*** by federal courts as a guide in the interpretation of statutes that are substantially similar to federal ***antitrust law***.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

740 Ill. Comp. Stat. 10/3 provides that every person shall be deemed to commit a violation of this act who shall make any contract with, or engage in any combination or conspiracy with, any person who is, or but for a prior arrangement will be, a competitor of such person to price fix, to manipulate supplies, sales or production for the purposes of price fixing, allocating or dividing customers territories, supplies, sales, or markets, functional, or geographical, for any commodity or service, or by contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Per Se Rule & Rule of Reason, Per Se Violations

Under Section 1 of the Sherman Act, codified at 15 U.S.C.S. § 1, courts determine based on the nature of the restraint whether a per se violation exists or whether the "Rule of Reason" should apply. The per se rule applies when the practice facially appears to be one that will always or will almost always tend to restrict competition and decrease output. Restraints that are per se unreasonable include agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry or restraint is needed to establish their illegality, horizontal price fixing conspiracies, certain attempts at market allocation, and group boycotts if used to enforce a rule or policy or practice that is itself illegal per se.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN5[] Antitrust & Trade Law, Sherman Act

Most antitrust claims under *Section 1* of the Sherman Act, codified at *15 U.S.C.S. § 1*, are subject to the Rule of Reason. The rule of reason category includes agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business involved, the particular restraints history, and the reasons it is imposed. The test of legality under the rule of reason is whether the challenged conduct promotes or suppresses competition.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] Higher Education & Professional Associations, Professional Associations

A trade association's decision to expel one of its members is more properly described as a concerted refusal to deal or group boycott. Under the Illinois Antitrust Act, codified at Ill. Comp. Stat. 10/3, that conduct is subject to the Rule of Reason.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN7[] Higher Education & Professional Associations, Colleges & Universities

The threshold issue in any rule of reason case is market power. Without proof of market power to restrain competition substantially, any case under the Rule of Reason collapses. Market power entails cutting back output in the market and thus driving up prices to consumers. Market power can be evident where the defendant has unique access to a business element necessary for effective competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A trade association is not by its nature a walking conspiracy, and the antitrust laws are not panaceas for all business affronts which seem to fit nowhere else. Animosity, even if rephrased as "anticompetitive effect," is not illegal without illegal anticompetitive effects. It is injury to the market, not injury to an individual competitor, that violates the antitrust laws.

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For ASSOCIATED AIR BALANCE COUNCIL, defendant: James E Anderson, Howe Anderson & Steyer, PC, Washington, DC.

Judges: CHARLES RONALD NORGLE, SR., Judge, United States District Court.

Opinion by: CHARLES RONALD NORGLE, SR.

Opinion

[*1035] ***OPINION AND ORDER***

CHARLES R. NORGLE, SR., District Judge:

Before the court is Plaintiff's Motion for a Preliminary Injunction (Doc. No. 5). For the following reasons, Plaintiff's Motion is denied.

I. BACKGROUND

On March 27, 1998, International Test and Balance, Inc. ("International"), an Illinois corporation, filed a three-count complaint against its former trade association, Associated Air Balance Council ("AABC"), and certain unknown members of AABC, in the Circuit Court of Cook County, Illinois. Counts I and II allege conspiracy in restraint of trade and an unlawful monopoly, respectively, in violation **[**2]** of *Section 10/3* of the Illinois Antitrust Act. *See 740 ILCS 10/3*. Count III alleges common law intentional interference with contract.

On April 27, 1998, AABC, a California corporation with its principal place of business in Washington, D.C., removed the case to federal court, claiming diversity of citizenship. [1] International has since amended **[*1036]** its complaint

[1] Because "federal courts are courts of limited jurisdiction," *Matter of County Collector, 96 F.3d 890, 895 (7th Cir. 1996)*, the court has a "nondelegable duty to police the limits of federal jurisdiction with meticulous care." *Market Street Assocs. Ltd v. Frey, 941 F.2d 588, 590 (7th Cir. 1991)*; *see also Krueger v. Cartwright, 996 F.2d 928, 930 (7th Cir. 1993)*; *Fed. R. Civ. P. 12(h)(3)*. It does not escape the court's attention that there are jurisdictional issues in this case. First, because International's complaint

to include a claim of "wrongful expulsion," and now moves for a preliminary injunction that would reinstate its membership in AABC pending a full-trial on the merits. At trial, International would seek a permanent injunction that would prevent AABC from unlawfully excluding International from membership in AABC. The relevant facts follow.

[3]** International provides testing and balancing services of heat, vent and air conditioning ("HVAC") equipment to mechanical contractors and others in the construction industry. Testing and balancing is the process of measuring, regulating and adjusting the HVAC system of a building to insure that it complies with performance specifications. In the course of balancing, International utilizes instruments to take readings of the air and water flow through the HVAC system. International also notes the settings of the mechanical devices, makes necessary adjustments and recommendations, and documents its findings in a balancing report to the client.

Up until its expulsion on May 1, 1998, International was a member of AABC. AABC is a non-profit trade association composed of 85 independent firms that provide testing and balancing services of HVAC systems throughout the United States. Membership in the AABC is allegedly desirable because firms must meet certain requirements evidencing competence, and because it enables firms to issue a "National Project Certification Performance Guaranty" ("Guaranty"). Issuance of the Guaranty indicates that the HVAC equipment installed during a project meets **[**4]** engineering expectations and is balanced in accordance with accepted trade practice and the AABC National Standards.

Additionally, the Guaranty enables a party who uses the services of a AABC member, *e.g.*, a contractor or engineer, to file a complaint with AABC if the services performed by the member fail to meet quality specifications, are inadequate, or otherwise insufficient. AABC then initiates an investigation into the allegations of the complaint and agrees to supervise any remaining work. That turn of events is what happened here, and is what led to the eventual expulsion of International from AABC.

In 1995, International entered into a contract with Western Sheet Metal, Inc. ("Western") to provide test and balancing services at the Copper Hills School Project ("Project") for the Jordan School District in Salt Lake City, Utah. In early 1997, Olsen & Peterson ("O&P"), a mechanical engineering consulting firm working on the Project, filed two successive complaints with AABC regarding International's performance. [2] In the first complaint, dated March 25, 1997, O&P wrote a letter to AABC's executive director, Kenneth Sufka ("Sufka"), alleging that International was failing **[**5]** to complete its work on the Project. (*See* Def.'s Mem. in Opp'n, Ex. 3.) The letter also strongly expressed O&P's dissatisfaction with International and questioned how International qualified for membership in the AABC. In accordance with AABC's policies and procedures, Sufka notified International of O&P's complaint and provided International 14 days to respond. (*See id.*, Ex. 4.) In a letter to Sufka dated April 14,

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includes allegations against "unknown members" of AABC, the citizenship of those members is unknown. Nonetheless, "naming a John Doe defendant will not defeat the named defendants' right to remove a diversity case if their citizenship is diverse from that of the plaintiffs." *Howell v. Tribune Entertain. Co., 106 F.3d 215, 218 (7th Cir. 1997)*; *see also* *Salzstein v. Bekins Van Lines, Inc., 747 F. Supp. 1281, 1283 n.4 (N.D. Ill. 1990)*. The named party here, AABC, is, standing alone, of diverse citizenship. However, certain membership organizations "take the citizenship of each member." *Indiana Gas Co., Inc., v. Home Ins. Co., 141 F.3d 314, 316 (7th Cir. 1998)*; *Nat'l Assoc. of Realtors v. Nat'l Real Estate Assoc., 894 F.2d 937, 940 (7th Cir. 1990)* (citizenship of incorporated trade association was that of its members because the members were the real parties in interest); *Nat' Assoc. of Realtors, 699 F. Supp. 678, 679 n. 3 (N.D. Ill. 1988)*. On the other hand, "for purposes of diversity jurisdiction[,] a corporation is a corporation is a corporation." *Cote v. Wadel, 796 F.2d 981, 983 (7th Cir. 1986)*. If AABC assumes the citizenship of its members, then jurisdiction may be absent because AABC has admitted in its later pleadings that it has one member in Illinois (citizenship unknown) (*see* Def.'s Mem. in Opp'n at 7.), the state where International is a citizen. With an abundance of caution, the court proceeds under *Cote*, and concludes that diversity jurisdiction exists because the citizenship of International is diverse from the citizenship of AABC. *See* *Nat'l Assoc. of Realtors, 894 F.2d at 939-40* (concluding that for diversity purposes, the inquiry into the relevant citizenship of an incorporated trade association depends upon whether the members or the association are the real parties in interest).

[2] In at least one part of the record, there is a reference to an additional complaint filed against International prior to the complaints filed in early 1997. (See Def.'s Mem. in Opp'n at Ex. 4.). That complaint, lodged by Western in October 1996, accused International of failing to complete its work. Because neither party provides further elaboration on that complaint, the court will not deem it relevant for purposes of this discussion.

1997, International denied O&P's allegations and cited the inability **[*1037]** of the mechanical contractor on the project to complete its own work as the reason for the subsequent delay in performance by International. (*See id.*, Ex. 5.)

[6]** On April 22, 1997, O&P sent a second letter of complaint to AABC. (*See id.*, Ex. 6.) In that letter, O&P alleged that a report issued by International in April 1996 was "totally unacceptable" and "in substantial noncompliance with the contract documents." (*Id.*) Sufka in turn notified International of the second complaint and directed International to send AABC a copy of the final balancing report and a copy of the drawings for the Project. (*See id.*, Ex. 7.) On May 22, 1997, International sent the relevant documents to AABC. (*See id.*, Ex. 8.) AABC then initiated an investigation into the complaints against International.

On May 30, 1997, AABC held a meeting in Salt Lake City to address O&P's complaints against International. A vice-president of AABC, Robert Conboy ("Conboy"), along with representatives of International, O&P, and other contractors on the Project, attended. After reviewing the allegations against International, the attendees (except those from O&P) conducted a walk-through at the site of the Project. Upon completion of the walk-through, it was agreed that 18 of the 25 deficiencies that International had previously claimed as stumbling blocks were no longer **[**7]** at issue. For the remaining seven deficiencies, however, the parties agreed to coordinate their efforts to allow prompt completion. (*See id.*, E's. 9, 10.)

In early August 1997, Conboy and another AABC vice-president, Mike Young ("Young"), visited the site of the Project in connection with the ongoing investigation of International's performance. The purpose of the visit was to determine the accuracy of International's most-recent report on the Project. Upon completion of the visit, Conboy issued a report criticizing the accuracy of International's report and expressing doubt on the latest deficiencies that International claimed was preventing it from completing its work. (*See id.*, E's. 11, 12.)

Based on the findings and conclusions in Conboy's report, the AABC Board of Directors concluded that International had failed to comply with AABC policies and standards, a condition of membership. Accordingly, on November 5, 1997, the Board voted to place International on probation. (*See id.*, E's. 20, 27.) International then petitioned AABC to reconsider its decision. (*See id.*, Ex. 15.)

While International's appeal was pending, O&P and other contractors visited the site of **[**8]** the Project to verify the results of International's latest report. O&P determined that the air system on the Project was still not properly balanced. O&P advised International of its conclusion and stated that the Jordan School District did not want International to return to the site. O&P later persuaded the school district to allow International to return and complete its work. (*See id.*, E's. 16-18.)

On February 13, 1998, the Board issued a written opinion detailing the results of its investigation and rejecting International's appeal. (*See id.*, Ex. 20.) The Board also took issue with International's challenge of the investigation results. Most notably, the Board emphasized that it was International personnel, rather than AABC representatives, who performed the investigation's test readings that indicated prior inaccuracies. "AABC representatives merely observed the procedure and compared the information obtained with the information contained in [International's] report." (*Id.* at p. 5.) Finally, the Board outlined the conditions of International's probation:

> 1) That International be placed on probation for a period of two years, beginning on January 31, 1998;
>
> 2) **[**9]** That International comply with the terms and conditions of the probation as described in the AABC Policies and Procedures;
> 3) That International pay the costs ($ 4,728) for the AABC investigation of the Project as required by the AABC Policies and Procedures on or before March 1, 1998;
> 4) That International provide a written statement concerning its views on AABC independence, the National Performance Guaranty, and the AABC Policies and Procedures no later than March 1, 1998;
>
> **[*1038]** 5) That International return to the Project to complete the balancing in accordance with AABC standards.

(*Id.* at p. 6.)

The terms of the probation also meant that, pursuant to the Guaranty, International became subject to the supervision of AABC for its remaining work on the Project. (*See id.*, Ex. 21) The Board assigned AABC's Executive Vice-President, Rick Cox ("Cox"), and another AABC representative, Herb Crask ("Crask"), to supervise International's completion of the Project. (*See id.*, E's. 22, 23.) In addition to his position as Executive Vice-President of AABC, Cox was employed by one of AABC's members, Technical Air Balance, Inc. ("Technical").

At a March 2, 1998, meeting of all **[**10]** relevant contractors on the Project, Cox iterated AABC's supervisory role, and later performed an on-site inspection with the group. Once on-site, Cox and Crask determined that nothing was preventing International from completing its balancing of the system. Gary Tarazzi ("Tarazzi"), International's President, immediately disputed that conclusion, and claimed that International had already balanced the system. As such, Tarazzi hinted that International would not be willing to complete the job. Cox then ended the meeting and stated that he would send his findings to the Board. Before leaving, however, Cox provided representatives of two contractors on the Project with the business card of Technical. (*See id.*)

In a letter dated March 25, 1998, the Board informed International of its intent to expel the company from its membership. (*See id.*, Ex. 27.) The Board cited International's failure to complete its duties on the Project and its failure to comply with most, if not all, the conditions of probation. The Board invited International to present reasons against expulsion at its next meeting scheduled for April 17, 1998.

On April 17, 1998, Tarazzi appeared before the Board and **[**11]** asserted International's position. Finding those reasons unacceptable, the Board expelled International. As grounds for expulsion, the Board cited International's alleged inadequate performance on the Project and International's to comply with the terms of its probation. The Board also noted that the school district had ordered International off the site of the Project. Consequently, AABC assumed responsibility for the completion of the Project. (*See id.*)

According to International, its expulsion ran afoul of the Illinois Antitrust Act. *See* 740 ILCS 10/3. International alleges that "Unnamed Defendants and AABC, acting in concert, combined, contracted, and conspired horizontally to exclude [International] from the relevant service and geographic markets . . . ." (Compl. at P 26.) International seeks reinstatement in AABC, arguing that its expulsion constitutes an unlawful restraint of trade because "membership in the AABC is a highly advantageous, and in some instances, a necessary credential in the marketplace for test & balance services." (Pl.'s Mem. in Supp. at 1.) Furthermore, International avers, "removal of [International] from the AABC group will significantly reduce **[**12]** competition . . . ." (*Id.* at 2.)

II. DISCUSSION

At the outset, the court notes that neither party addresses whether AABC is exempt from liability under the Illinois Antitrust Act. The Illinois Antitrust Act "was intended to apply only to conduct relating to for-profit enterprises." O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065 (7th Cir. 1997) (*citing* 740 ILCS 10/2). Although this appears to be a crucial, and perhaps dispositive issue, "'it is not the role of [the] court to research and construct the legal arguments open to parties, especially when they are represented by counsel.'" Doherty v. City of Chicago, 75 F.3d 318, 324 (7th Cir. 1996) (*quoting* Sanchez v. Miller, 792 F.2d 694, 703 (7th Cir. 1986)). Therefore, the court will leave that issue for another day and address the merits of International's motion for a preliminary injunction.

HN1[] "A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Boucher v. School Bd. of Greenfield, 134 F.3d 821, 823 (7th Cir. 1998) (citations and internal quotation marks omitted.). In order to prevail **[**13]** on a motion for a preliminary **[*1039]** injunction, the movant must demonstrate (1) some likelihood, *i.e.*, a better than negligible chance, of success on the merits, see Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc., 128 F.3d 1111, 1114-15 (7th Cir. 1997) and (2) "'an inadequate remedy at law and irreparable harm if preliminary relief is denied.'" *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 507 (7th Cir. 1998) (*quoting* TMT North America, Inc. v. Magic Touch GmbH, 124 F.3d 876, 881 (7th Cir. 1997)); *see also* Wisc. Music Network, Inc. v. Muzak Limited P'Ship, 5 F.3d 218, 221 (7th Cir. 1993). If the court finds either of these facts absent, then the court's analysis "ends and the preliminary injunction should not be issued." Adams v. City of Chicago, 135 F.3d 1150, 1154 (7th Cir. 1998); *see also* Abbott Lab. v. Mead Johnson & Co., 971 F.2d 6, 11-12 (7th Cir. 1992); Illinois Council on

Long Term Care v. Bradley, 957 F.2d 305, 307 (7th Cir. 1992). On the other hand, if the movant demonstrates these elements, "then the court considers the irreparable harm to the [non-movant] if preliminary relief is granted as balanced against the irreparable **[**14]** harm to [the movant] if preliminary relief is denied, and the public interests involved." *Baldwin*, 137 F.3d at 507 (citations omitted.); *see also* Boucher, 134 F.3d at 824. The court uses a sliding "scale approach" to this balancing test; that is, "the more likely it is that [the movant] will succeed on the merits, the less the balance of the irreparable harms need weigh toward its side . . . ." Abbott Lab., 971 F.2d at 12; *cf.* General Leaseways, Inc. v. Nat'l. Truck Leasing Assoc., 744 F.2d 588, 590-91 (7th Cir. 1984).

Before addressing the necessary elements for a preliminary injunction to issue, the court notes that International's memorandum of law is inadequate. Rather than focus on those elements, International engages in a discussion of three leading antitrust cases that it argues control here: (1) Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961); (2) Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (2d Cir. 1988) [3]; (3) American Society of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982). While those cases may be relevant, **[**15]** International only belatedly addresses the prerequisites for a preliminary injunction. Even then, however, International's discussion is sparse, consisting of about one page. This lack of analysis certainly detracts from International's attempt to meet its burden and obtain this extraordinary remedy.

In its opening memorandum, International argues that it is likely to succeed on the merits because:

> Ejection of this company flies in the face of thousands of successful jobs, all tested & balanced to the complete satisfaction of owners, engineers and building contractors across America. The test & balance personnel employed by [International] were and are among the finest in the land. [International] was and **[**16]** is in full compliance with the AABC rules and regulations. Expulsion of this proud and hard working company was merely part of a plan fomented by certain directors of AABC, to manipulate the marketplace and reduce competition among the remaining AABC companies. . . . [International] will plead and prove that Messrs. Cox, Sufka and other unknown confederates conspired to reduce competition within AABC and the test and balance industry.

(Pl.'s Mem. in Supp. at 10-11.) Accordingly, International rests on its alleged ability to prevail on Count I of its complaint, *i.e.*, to show that its expulsion was an unlawful restraint of trade in violation of the Illinois Antitrust Act, 720 ILCS 10/3. International does not submit any arguments with respect to Counts II through IV. *Cf.* Doe, By and Through G.S. v. Johnson, 52 F.3d 1448, 1457 (7th Cir. 1995) (stating that "a litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority, forfeits the point.").

Before delving into the merits of International's antitrust claim, a point of clarification is necessary. International chose to **[*1040]** bring its suit **[**17]** under the antitrust laws of the state of Illinois, rather than under federal law. Nonetheless, ***HN2***[] "Illinois law provides that its courts should use the construction of federal ***antitrust law*** by federal courts as a guide in the interpretation of statutes that are substantially similar to federal ***antitrust law***." Sportmart, Inc., v. No Fear, Inc., 1996 U.S. Dist. LEXIS 7606, 94 C 4890, 1996 WL 296643, at *17 (N.D. Ill. June 3, 1996) (*citing* State of Illinois ex rel. Burris v. Panhandle Eastern Pipeline Co., 935 F.2d 1469, 1479-80 (7th Cir. 1991)); *see also* 740 ILCS 10/11 (1997) ("When the wording of [the Illinois Antitrust Act] is identical or similar to that of federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide . . . ."); Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc., 162 Ill. 2d 99, 642 N.E.2d 470, 472, 204 Ill. Dec. 769 (Ill. 1994) (noting this principle, but also emphasizing that "the Federal decisions are not binding on [Illinois courts]."); Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 188 (7th Cir. 1985); Collins v. Assoc. Pathologists, Ltd., 676 F. Supp. 1388, 1407 (C.D. Ill. 1987). **[**18]**

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[3] In Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988), the Supreme Court affirmed the Second Circuit's decision. International fails to cite the Supreme Court's decision and instead limits its discussion to the Second Circuit's opinion.

Here, the Illinois Antitrust Act's prohibition of conspiracies in restraint of trade, *740 ILCS 10/3(1)* & *(2)*, was intentionally based on *Section 1* of the Sherman Act, *15 U.S.C. § 1*. *See* *Laughlin v. Evanston Hosp., 133 Ill. 2d 374, 550 N.E.2d 986, 991 (Ill. 1990)*; *People ex rel. Scott v. College Hills Corp., 91 Ill. 2d 138, 435 N.E.2d 463, 469-71, 61 Ill. Dec. 766 (Ill. 1982)*; *Blake v. H-F Group Multiple Listing Service, 36 Ill. App. 3d 730, 345 N.E.2d 18, 24 (Ill. App. Ct. 1976)*. *Section 10/3* of the Illinois Antitrust Act provides, in relevant part:

> ***HN3***[] Every person shall be deemed to have committed a violation of this Act who shall:
>
> (1) Make any contract with, or engage in any combination or conspiracy with, any person who is, or but for a prior arrangement would be, a competitor of such person:
>
> (a) [to price fix]; (b) [to manipulate supplies, sales or production for the purposes of price fixing];
>
> (c) allocating or dividing customers territories, supplies, sales, or markets, functional, or geographical, for any commodity or service; or
>
> (2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce . . . **[**19]** .

740 ILCS 10/3 (1998).

Similarly, albeit less verbose, *Section 1* of the Sherman Act forbids "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the states." *15 U.S.C. § 1*. Although the terms of *Section 1* of the Sherman Act "prohibit every agreement in 'restraint of trade,'" [the Supreme Court] has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan, 139 L. Ed. 2d 199, 118 S. Ct. 275, 279 (1997)* (citations omitted).

One significant difference between the Illinois Antitrust Act and *Section 1* of the Sherman Act is that the Illinois statute codifies what restraints are illegal "per se," *740 ILCS 10/3(1)(a)-(c)*, versus restraints that should be analyzed under the "Rule of Reason," *740 ILCS 10/3(2)*. *See Sportmart, Inc.*, 1996 WL 296643, at *17 (*citing* *740 ILCS 10/3* Bar Committee Comments - 1967 (1993)); *Blake, 345 N.E.2d at 25-26*; *see generally* *Ethan Allen, Inc., 642 N.E.2d at 472* (noting the differences between *section 10/3(3)* of the Illinois Antitrust Act and *Section 2* of the Sherman Act). ***HN4***[] Under *Section 1* of the Sherman Act, by contrast, courts determine, "based on the **[**20]** nature of the restraint," whether a per se violation exists or whether the "Rule of Reason" should apply. *Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)*.

In cases involving *Section 1* of the Sherman Act, courts "apply the per se rule when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" *General Leaseways, Inc. v. Nat'l. Truck Leasing Assoc., 744 F.2d 588, 595 (7th Cir. 1984)* (*quoting* *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979))*. "Restraints that are per se unreasonable include agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry or restraint is needed to establish their illegality." *Wilk v. American Medical Association, 895 F.2d 352, 358* ***[*1041]*** *(7th Cir. 1990)* (*citing* *Nat'l Society of Professional Engineers v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978))*. Examples of per se rule offenses under *Section 1* of the Sherman Act include: (1) horizontal price fixing conspiracies, see *Arizona v. Maricopa* ***[**21]*** *County Medical Society, 457 U.S. 332, 348, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*; (2) certain attempts at market allocation, see *Blackburn v. Sweeney, 53 F.3d 825, 827 (7th Cir. 1995)* and *General Leaseways, 744 F.2d at 595*; and (3) group boycotts, "if used to enforce a rule or policy or practice that is itself illegal per se [*e.g.*, illegal price-fixing], *Vogel v. American Society of Appraisers, 744 F.2d 598, 600 (7th Cir. 1984)*. The Supreme Court recently reiterated its disfavor of applying the per se rule to "'restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" Khan, 118 S. Ct. at 279 (*quoting* FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458-59, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)).

Because of the limited instances where the per se rule is applied, **HN5**[] most antitrust claims under Section 1 of the Sherman Act are subject to the Rule of Reason. *See* Khan, 118 S. Ct. at 279; *see also* Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advert. Assoc., Inc., 672 F.2d 1280, 1284 (7th Cir. 1982). "The rule of reason category includes agreements whose **[**22]** competitive effect can only be evaluated by analyzing the facts peculiar to the business involved, the particular restraints history, and the reasons it was imposed." Wilk, 895 F.2d at 358 (*citing* Nat'l Society of Professional Engineers, 435 U.S. at 692); *see also* Khan, 118 S. Ct. at 279; Wisc. Music Network, Inc. v. Muzak Limited P'Ship, 5 F.3d 218, 222 (7th Cir. 1993). "The test of legality under the rule of reason is whether the challenged conduct promotes or suppresses competition." *Id.*

In this case, International alleges that its expulsion was "unlawful per se as restraints of trade by means of horizontal market allocation or division, all within the meaning of 740 ILCS 10/3." (Compl. at P 28.) Alternatively, International alleges that its expulsion "unreasonably restrain[s] trade, by means of horizontal market allocation or division, all within the meaning of 740 ILCS 10/3." (Id. at P 29.) In other words, International's alternative claim seeks to invoke the Rule of Reason if the per se rule does not apply. In light of the facts supporting International's allegations, the court finds that the Rule of Reason should apply, but not based on the theory that **[**23]** International espouses.

Market allocation is indeed per se illegal under the Illinois Antitrust Act. *See* 740 ILCS 10/3(1)(c). The facts that International presents here, however, do not suggest market allocation. *Cf.* Blake, 345 N.E.2d at 27-28. Rather, **HN6**[] a trade association's decision to expel one of its members is more properly described as a "concerted refusal to deal" or "group boycott." *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 290, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985). Under the Illinois Antitrust Act, that conduct is subject to the Rule of Reason. *See* 740 ILCS 10/3 Bar Committee Comments - 1967 [4]; *see also* Blake, 345 N.E.2d at 27-28 (noting that those agreements not specifically listed under Section 10/3(1), including concerted refusals to deal, are subject to the rule of reason).

[24]** In general, courts addressing facts similar to those at bar under Section 1 of the Sherman Act share this view. *See* Northwest Wholesalers, 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202; *see also* Phil Tolkan Datsun, Inc., 672 F.2d at 1285 ("Membership arrangements in trade associations form an exception to the general rule that group boycotts constitute per se antitrust violations."); United States Trotting Assoc. v. Chicago Downs Assoc., Inc., 665 F.2d 781, 789-90 (7th Cir. 1981); Martin v. American Kennel Co., 697 F. Supp. 997, 1000 (N.D. Ill. 1988); Carleton v. Vermont Dairy Herd Improv. Assoc., 782 F. Supp. 926, 932-33 (D. Vermont 1991). Notably, none of International's arguments attempt in any way to show market allocation. For these reasons, the court will apply the Rule of Reason in **[*1042]** determining whether International has a "better than negligible" chance of showing that its expulsion was an unreasonable restraint of trade.

"The Illinois Supreme Court has indicated that the rule of reason should be applied similarly under Illinois law, as it is under the Sherman Act." *Sportmart*, 1996 WL 296643, at *18 (*citing* College Hills Corp., 435 N.E.2d at 471-72. **HN7**[] "The threshold issue in any **[**25]** rule of reason case is market power." Wilk, 895 F.2d at 359. Without proof of market power to restrain competition substantially, "any case under the Rule of Reason collapses . . . ." L.A.P.D., Inc. v. General Elect. Corp., 132 F.3d 402, 405 (7th Cir. 1997); *see also* Ehredt Underground, Inc. v. Comm. Edison Co., 90 F.3d 238, 239 (7th Cir. 1996). Market power "entails cutting back output in the market and thus driving up prices to consumers." Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994). Market power can be evident where the defendant has "unique access to a business element necessary for effective competition." Northwest Wholesale Stationers, Inc., 472 U.S. at 298.

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[4] "Illinois courts have endorsed the Bar Committee's interpretation of the [Illinois Antitrust Act]." *Sportmart*, 1996 WL 296643, at *17 (*citing* Ethan Allen, Inc., 642 N.E.2d at 474).

In this case, International has not shown that AABC membership allows the exercise of market power or that it provides exclusive access to a necessary business element. *See* *Vogel, 744 F.2d at 604* (To succeed at trial, plaintiff would have to show that association's "members as a group have a substantial share of the market . . . ."). While International claims that membership is "highly advantageous," it concedes that membership is necessary only "in **[**26]** some instances." (Pl.'s Mem. in Supp. at 1.) Even those allegations are devoid of any support in the record, however. In fact, AABC points out that there are approximately 500 independent testing and balancing firms in the United States; only 85 of these firms are members of AABC. Furthermore, while there are approximately 12 independent testing and balance firms in the Chicago area, only one is a member of AABC. International did not even attempt to define the relevant market. *See* *Vogel, 744 F.2d at 604* (stating that a plaintiff must establish the relevant market to prevail under *Section 1* of the Sherman Act). Therefore, with no indication to the contrary, it is clear that a testing and balancing firm can effectively compete without being a member of AABC. Put another way, the exclusion of International from AABC will not cause a decrease in output of testing and balancing services. *See* *Sanjuan, 40 F.3d at 251* (association's refusal to certify plaintiffs did not "remove their output from the market and therefore [did] not raise prices to consumers."); *see also* *In re Circuit Breaker Litigation, 984 F. Supp. 1267, 1281 (C.D. Calif. 1997)* (refusal of certification had no **[**27]** effect on the market).

The court also finds that the three cases that International cites in support of its motion (*Radiant Burners; Indian Head*; and *Hydrolevel*) are distinguishable to the case at bar. In general, these cases address the potential of a standard-making organization to abuse its power where "it is used to exclude competitors from a market by denying them the needed stamp of approval." *See* *ECOS Electronics Corp. v. Underwriters Laboratories, 743 F.2d 498, 502 (7th Cir. 1984)* (discussing *Radiant Burners* and *Hydrolevel*). International argues that membership in AABC and the accompanying Guaranty are comparable necessities in the testing and balancing industry. The current record, however, does not support that conclusion. Nevertheless, the court will examine each of the cases that International cites in turn.

1. *Radiant Burners*

In *Radiant Burners*, the American Gas Association ("AGA"), a standard-making organization within the gas industry, twice refused to provide its "seal of approval" on plaintiff's gas burners. *364 U.S. at 658*. Because the plaintiff's gas burners did not receive the AGA's seal of approval, gas utilities refused to supply **[**28]** gas for use in the plaintiff's gas burners. *See id.* The gas burners were therefore unmarketable. See id. The plaintiff filed suit against the AGA and the gas utilities, alleging that their refusal to supply gas based on the absence of AGA approval was an unlawful restraint of trade under *Section 1* of the Sherman Act. *See* *id. at 658-59*. The plaintiff also alleged that the AGA's approval process was **[*1043]** unduly influenced by its gas utility members because some of them were in competition with the plaintiff. *See id.* Reversing a lower court's dismissal of the complaint, the Supreme Court held that such allegations state a claim under *Section 1* of the Sherman Act because "the alleged conspiratorial refusal to provide gas for use in [the plaintiff's gas burners] interferes with the natural flow of interstate commerce and clearly has, by its 'nature' and 'character', a 'monopolistic tendency.'" *Id. at 660*.

International argues that the facts of *Radiant Burners* are analogous to the case at bar because, in the testing and balancing industry, "membership in AABC is desirable and sometimes even a requirement," and because the Guaranty provides "an important advantage over non-members." **[**29]** (Pl.'s Mem. in Supp. at 7.) Furthermore, International claims that its poor evaluations on the Project were actually the result of a conspiracy because competitors sat on AABC's Board and investigated O&P's complaints. (*Id.*) Accordingly, International contends that under *Radiant Burners*, the facts at bar are "sufficient to state a claim for relief under *section 1* of the Sherman Act." (Pl.'s Mem. in Supp. at 7-8.)

International's reliance on *Radiant Burners* is misplaced. The Court in *Radiant Burners* simply held that the plaintiff's allegations survived a motion to dismiss. *364 U.S. at 660*. Under federal notice pleading standards, a motion to dismiss should not be granted "unless it is impossible [for the plaintiff] to prevail under any set of facts that could be proved consistent with his allegations." *Albiero v. City of Kankakee, 122 F.3d 417, 419 (7th Cir. 1997)*; the burden is on the defendant to persuade the court that the plaintiff's allegations are wanting. Here, by contrast, the motion before the court is a motion for a preliminary injunction. Therefore, the burden was on International to show that it has "a better than negligible chance" of success on the **[**30]** merits. *See Meridian Mut. Ins. Co., 128 F.3d at 1114-15*; *see also Boucher, 134 F.3d at 823*. As explained above, International has not done so, to any degree. *Cf. McDaniel v. Appraisal Institute, 117 F.3d 421, 423 (9th Cir. 1997)* (emphasizing the difference between a *Rule 12(b)(6)* motion and a motion for summary judgment, where "it was incumbent on the plaintiff to present evidence.").

2. *Indian Head*

International also relies on the Second Circuit's opinion in *Indian Head, 817 F.2d 938 (2nd Cir. 1987)*. In that case, Indian Head sued a competitor, Allied Tube & Conduit, Corp. ("Allied") under *Section 1* of the Sherman Act after Allied unduly prevented Indian Head's product from being approved by the National Fire Protection Association ("NFPA"), the publisher of the industry's model code. *817 F.2d at 939*. The model code, which established product standards within the industry, was "the most widely disseminated and adopted model code in the world. . . . [A] substantial number of state and local governments adopt the [model code] as law in whole or in part." *Id.*

Allied was eligible to vote on whether Indian Head's product would receive model code approval. **[**31]** *See id. at 940*. Prior to the NFPA's annual meeting where the vote would be held, Allied formulated a plan to insure that Indian's product would not receive the required number of votes for approval. *See id.* Implementing campaign tactics that would make some precinct captains blush, Allied

> arranged for 155 persons -- including employees, sales agents, the agents' employees, company executives, employees of two of Allied divisions, and the wife of the national sales director -- to join the NFPA, to register as voting members, and to attend the annual meeting to vote against [approval of the plaintiff's product]. [The defendant] also paid over $ 100,000 for the membership, registration, and attendance expenses of these voters. . . . At the annual meeting, [the defendant] instructed its personnel where to sit, based upon a detailed seating chart, and appointed group leaders to instruct voters how the discussion is progressing and how to vote. Boxed lunches were provided and the voters were told to stay nailed to their seats until the end . . . . Group leaders used walkie-talkies and hand signals to facilitate communication.

[*1044] *Id. at 940-41*. Not surprisingly **[**32]** then, the die was cast, and when the vote was taken, Allied's confederates were responsible for the NFPA's refusal to approve Indian Head's product. *See id.*

At trial, the jury entered judgment in favor of Indian Head. *See id.* The trial court, however, granted Allied's motion for a judgment notwithstanding the verdict, holding that the Noerr-Pennington doctrine [5] required that the jury's verdict be set aside. *See id. at 942*. On appeal, the Second Circuit vacated the trial court's decision, holding that Noerr-Pennington immunity should not be extended "to lobbying activities directed toward a 'quasi-legislative' body such as the NFPA." *See id.* The court of appeals also rejected Allied's cross appeal which sought a declaration that its activities were not a restraint of trade as a matter of law. *See id. at 946-47*. The Second Circuit held that although Allied tactics were in literal compliance with the NFPA's rules, "Allied violated the integrity of the NFPA's procedures . . . for the sole purpose of achieving an anticompetitive result -- the exclusion of [Indian Head's product] from the market place." *See id.*

[33]** International argues that *Indian Head* controls here because the AABC Board "was packed with competitors of International, who stood to benefit personally from [its] expulsion" and because Cox, another alleged competitor of International, participated in AABC's investigation. (Pl.'s Mem. in Supp. at 8.) International's argument, based solely on conclusory allegations, is not persuasive. International has failed to show that its expulsion was the result

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[5] The Noerr-Pennington Doctrine is not at issue here. Roughly speaking, the doctrine defines the boundary between an industry's concerted governmental lobbying efforts, which are legal, and "abuses of administrative or judicial processes that may result in antitrust violations." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*; *see also Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*; *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*.

of egregious conduct comparable to the facts in *Indian Head*. First, there is no evidence that AABC's Board was "packed" with competitors. With no indication to the contrary, it appears that the Board members were duly elected in compliance with AABC's bylaws and with no ulterior motives to exclude competition. International fails to even identify specific Board members and their alleged affiliation with firms that compete in International's market. Moreover, International concedes that Sufka, the Executive Director of AABC who initiated and oversaw the investigation of International, had no affiliation with any competitor. (Pl.'s Mem. in Supp. at 7.) In sum, there is no indication that International's expulsion was the result **[**34]** of anticompetitive bias on the part AABC's Board. Instead, it appears that International's expulsion occurred in compliance with AABC's bylaws and, more importantly, only in response to International's unreasonable conduct, both on the Project and in response to AABC's legitimate inquiries. *See* *Pretz v. Holstein Friesian Assoc. of America, 698 F. Supp. 1531, 1540 (D. Kansas 1988)* (noting that procedural safeguards, though not determinative, suggest reasonableness of a defendant's restraint). International may have the opportunity to show otherwise at trial, but for now, the record does not support International's assertions.

And while the action of Cox, an alleged competitor, to distribute business cards at a meeting raises questions, that alone, especially in light of International's flouting of AABC's bylaws, is not enough to show that AABC's expulsion was tainted or violated the antitrust laws. *See* *Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 558 (7th Cir. 1980)* ("a loss by the plaintiff of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market."). The court also notes that Cox swears that his firm does not directly **[**35]** compete with International (Def.'s Mem. in Opp'n, at Ex. 23); International's failure to even attempt to define the relevant market allows the court to not question Cox's averment. Finally, the court again emphasizes that International has failed to show that membership in AABC is essential to compete, unlike the model code approval sought in *Indian Head*.

[*1045] 3. *Hydrolevel*

The third case that International relies upon is *Hydrolevel, 456 U.S. at 579, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*, a case with facts similar to those in *Indian Head*. In *Hydrolevel*, the plaintiff, Hydrolevel, Inc. ("Hydrolevel"), developed an improved fuel cutoff device for use in boilers. *See* *id. at 559*. Based on the improved device, Hydrolevel received business from a client that had previously purchased the product of the dominant competitor in the market, McDonnell & Miller ("M&M").

M&M was a member of the American Society of Mechanical Engineers ("ASME"), which published the industry's highly-influential model code. *See* *id. at 559-60*. The model code was adopted by federal regulations, 46 states, and all but one of the Canadian provinces. *See* *id. at 559*. An executive of M&M **[**36]** sat as vice-chairman of the ASME subcommittee that wrote the segment of the model code governing fuel cutoff devices. *See id.* Sensing that Hydrolevel's device would intrude into M&M's market share, the M&M executive, in his capacity as vice-chairman of the subcommittee, participated in the drafting of an unsupported and inconsistent statement that condemned Hydrolevel's device as unsafe under ASME's standards. *See* *id. at 561-62*. Based on that statement, M&M orchestrated an effective publicity campaign that said Hydrolevel's device violated ASME's model code; consequently, Hydrolevel's business suffered. *See* *id. at 563*. In response to Hydrolevel's ensuing complaints, ASME initiated an investigation which ultimately concluded that no wrongdoing had occurred. *See* *id. at 563-64*. Hydrolevel then filed suit against M&M and ASME, alleging violations of *Sections 1* and *2* of the Sherman Act. *See* *id. at 564*. After M&M settled the suit with Hydrolevel, the case went to trial against ASME. The jury returned a verdict in favor of Hydrolevel, which the Second Circuit subsequently affirmed. *See* *id. at 565*.

On a writ of certiorari, the issue before the Supreme Court was whether **[**37]** ASME could be held liable "under the antitrust laws for the acts of its agents performed with apparent authority." *See* *id. at 559*. The Court answered in the affirmative, concluding that "ASME's liability under a theory of apparent authority is consistent with the intent behind the antitrust laws." *See* *id. at 570-71*. The Court reasoned that ASME's agents had the power to restrain competition because ASME was considered to be "an extra-governmental agency" based on the tremendous influence of its model code. *See id.* The Court also recognized that "a standard-setting organization like ASME can be rife with opportunity for anticompetitive activity" because many of ASME's officials were affiliated with members in competition. *See* id. at 571. Moreover, the Court determined that whether ASME's agents intended to benefit ASME was irrelevant because they had the ability to "exercise economic power." *See* id. at 573-74.

International argues that the facts in *Hydrolevel* are analogous to the facts at bar. Specifically, International asserts that one report which contributed to its eventual expulsion was inconsistent and generated by a competitor. (Pl.'s Mem. in Supp. at **[**38]** 9.) Initially, the court notes that Hydrolevel was primarily a case addressing the scope of agency under the Sherman Act. In any event, International's allegations are unsupported and insufficient in light of the substantial contravening evidence that suggests that International's overall performance received numerous complaints. International ignores those parts of the record and instead concludes that the problems incurred on the Project were all caused by conspirators seeking to eliminate competition. In fact, however, the record indicates that AABC repeatedly intervened on International's behalf in an effort to allow it to complete the Project. AABC's directive on the Project appeared to be three-fold: (1) to respond to O&P's complaints pursuant to the Guaranty; (2) to reach a resolution with O&P while acting in International's interests; and (3) to preserve the integrity of AABC. None of these aims are anticompetitive and there is no indication of covert activity by AABC in its investigation. Unlike the facts in *Hydrolevel*, there are no facts here suggesting: (1) that a competitor subverted any AABC procedure; or (2) that the act of expulsion by AABC **[*1046]** would effectively paralyze **[**39]** International's ability to compete or frustrate overall competition.

Based on the series of Supreme Court cases involving alleged antitrust violations by trade and professional associations, it is clear that the conduct of those organizations "has some potential to violate the antitrust laws." *See* Sanjuan, 40 F.3d at 251 (collecting cases). On that same note, however, "***HN8***[] a trade association is not by its nature a 'walking conspiracy,'" *Greater Rockford Energy and Tech. Group v. Shell Oil Co., 998 F.2d 391, 397 (7th Cir. 1993)* (citations and internal quotation marks omitted.), and "the antitrust laws are not 'panacea[s] for all business affronts which seem to fit nowhere else.'" *ECOS Electronics Corp. v. Underwriters Laboratories, 743 F.2d 498, 501 (7th Cir. 1984)* (*quoting* *Scranton Construction Co. v. Litton Industries Leasing Corp., 494 F.2d 778, 783 (5th Cir. 1974))*. "Animosity, even if rephrased as 'anticompetitive effect,' is not illegal without illegal anticompetitive effects." *Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 400 (7th Cir. 1989)*. It is injury to the market, not injury to an individual competitor, that violates the antitrust laws. **[**40]** *See* *Wigod v. Chicago Merc. Exchange, 981 F.2d 1510, 1515 (7th Cir. 1992)*; *see also* *Martin, 697 F. Supp. 997, 1003*; *Consolidated Metal Products, Inc. v. American Petroleum Institute, 846 F.2d 284, 293 (5th Cir. 1988)*.

International has not shown that its expulsion had an adverse impact on competition in the testing and balancing industry. *See* *Martin, 697 F. Supp. at 1004-05*. The expulsion of a noncomplying member is "the normal method by which a private association enforces its rules." *Vogel, 744 F.2d at 600*; *see also* Northwest Wholesale, 472 U.S. at 296 (An association "must establish and enforce reasonable rules in order to function effectively."). By preventing AABC from enforcing its bylaws, an injunction would only encourage members to ignore the association's standards. *See* *Gen'l Leaseways, 744 F.2d at 597*. The integrity of AABC would consequently suffer. *See* *Martin, 697 F. Supp. at 1004-05*. "It has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations." *Consolidated Metal Products, Inc., 846 F.2d at 294*. In light of these considerations, International has **[**41]** not shown the unreasonableness of AABC's action; it may yet be able to do so at trial. *See* *Vogel, 744 F.2d at 604* (emphasizing that the denial of a preliminary injunction does not serve to "prejudge the trial."). For now, however, the court concludes that International has not met its burden to show that it will likely succeed on the merits. Accordingly, the court need not reach the remaining elements necessary for a preliminary injunction to issue. *See* *Green River Bottling Co. v. Green River Corp., 997 F.2d 359, 361 (7th Cir. 1993)*. International's motion for a preliminary injunction is hence denied.

III. CONCLUSION

For the foregoing reasons, International's motion for a preliminary injunction is denied.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, SR., Judge

United States District Court

DATED: 7-15-98

Diaz v. Farley

United States District Court for the District of Utah, Central Division

July 16, 1998, Decided ; July 17, 1998, Opinion Filed

Civil No. 94-C-1184B

Reporter

15 F. Supp. 2d 1138 *; 1998 U.S. Dist. LEXIS 11851 **; 1998-2 Trade Cas. (CCH) P72,267

ANTHONY DIAZ, PAUL DIEHL, and ALLAN KAMINSKY, Plaintiffs, vs. MICHAEL FARLEY, MORRIS MATTHEWS, JOAN ABELE, COTTONWOOD OBSTETRICS & GYNECOLOGY, OLD FARM OBSTETRICS & GYNECOLOGY, and JOHN DOES I-X, Defendants.

Disposition: **[**1]** Plaintiffs first and second causes of action DISMISSED with prejudice and Defendants' motion for summary judgment GRANTED on plaintiffs' first and second claims.

Core Terms

gyn, anesthesiologist, labor and delivery, anesthesiology, anesthesia, rule of reason, defendants', plaintiffs', scheduling, patients, anticompetitive, boycott, shifts, cases, summary judgment, per se rule, obstetric, individual defendant, anti trust law, horizontal, group boycott, rotation, on call, privileges, concerted, market conditions, per se violation, staff privileges, Sherman Act, procompetitive

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The party seeking summary judgment bears the initial burden of demonstrating that there is an absence of evidence to support the non-moving party's case. The burden then shifts to the non-moving party to establish the existence of an essential element to the claims on which they bear the burden of proof at trial. To satisfy this burden, the non-moving party cannot rest on the pleadings, but must by affidavit or other appropriate means, set forth specific facts showing there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. The mere existence of a scintilla of evidence in support of the non-moving party's case is insufficient; there must be evidence on which the jury could reasonably find for the non-movant. In making this determination, the court must examine the pleadings, affidavits and other evidence in the record in the light most favorable to the non-moving party.

Antitrust & Trade Law > Sherman Act > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN2[] Antitrust & Trade Law, Sherman Act

The Sherman Act prohibits every contract, combination, or conspiracy, in restraint of trade or commerce. *15 U.S.C.S. § 1*. Whether an action violates *§ 1* of the Sherman Act depends on whether it is adjudged an unreasonable restraint. The U.S. Supreme Court has developed two methods of analysis for determining whether a concerted action is an unreasonable restraint of trade: Ordinarily, whether particular concerted action violates *§ 1* of the Sherman Act is determined through case by case application of the so-called Rule of Reason--that is, the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Certain categories of agreements, however, have been held to be per se illegal, dispensing with the need for case-by-case evaluation. Per se rules are appropriate only for conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Tying Arrangements, Defenses

The per se and the Rule of Reason analyses both examine whether the conduct alleged is an unreasonable restraint of trade, but the analyses carry different presumptions. The application of the per se rule is reserved for situations where the conduct almost always has an anticompetitive effect and virtually never has a procompetitive effect. If conduct falls into a per se category, the conduct is presumed illegal. For example, price-fixing, horizontal divisions of markets, bid rigging, tying arrangements, and horizontal refusals to deal have earned the per se label because experience has shown that these arrangements are almost always anticompetitive and rarely have any procompetitive justification. The per se analysis applies because the conduct is so certain to unreasonably displace the competitive process that it is presumed illegal.On the other hand, the Rule of Reason presumes that the conduct is legal, but the plaintiff may show that under all the relevant factors, the alleged conduct is illegal because it has unreasonably displaced the competitive process. The Rule of Reason applies unless the plaintiffs demonstrate that the conduct falls into one of the per se categories.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Recent cases decided by the United States Supreme Court caution against the expansion of the "group boycott label" and the imposition of per se liability. The Supreme Court has explicitly stated that unless the conspirators possess market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted. Finally, the Supreme Court has noted that in determining whether the per se rule applies, courts may look beyond the challenged conduct to the surrounding circumstances: There is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In sum, the per se rule requires a historically focused inquiry directed at ascertaining whether the behavior complained of is of the type that regularly poses anticompetitive consequences. Where prior cases have shown that a certain practice is of this type, a deleterious effect on the market will be presumed and no detailed market analysis is required. Where the anticompetitive effect of a practice is not historically clear, the practice may still be per se violative of antitrust laws if a preliminary examination of market conditions surrounding the alleged restraint at issue reveals such an impact absent any procompetitive justification.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The boycott cases that have merited per se review in the past deal with markets that were open and competitive until the concerted action closed off part of the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Per Se Rule & Rule of Reason, Per Se Violations**

The United States Supreme Court has cautioned that it is only after considerable experience with certain business relationships that courts classify them as per se violations.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

The United States Supreme Court has stated that per se treatment may be merited where the plaintiffs have shown that the defendants hold market power or unique access to a business element necessary for effective competition. As the Eleventh Circuit noted, the practice may still be per se violative of antitrust laws if a preliminary examination of market conditions surrounding the alleged restraint at issue reveals such an impact absent any procompetitive justification. While not mandated, a preliminary examination of market conditions is acceptable under a per se analysis.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN9[] **Sherman Act, Jurisdiction**

Under *28 U.S.C.S. § 1367(c)(3)* the district court may decline to exercise supplemental jurisdiction when it has dismissed all claims over which it has original jurisdiction.

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For COTTONWOOD, DEFENDANT(S): KENNETH YEATES, SLC, UT.

Judges: Dee Benson, United States District Judge.

Opinion by: Dee Benson

Opinion

[*1139] MEMORANDUM DECISION AND ORDER

This case arises out of a dispute between anesthesiologists at Cottonwood Hospital in Murray, Utah. The plaintiffs are three anesthesiologists, Drs. Anthony Diaz, Paul Diehl, and Allan Kaminsky, who have staff privileges at the Hospital. The individual defendants are three anesthesiologists, Drs. Michael Farley, Morris Matthews, and Joan Abele, also with staff privileges at Cottonwood Hospital. Also named as defendants are two entities, Cottonwood Obstetrics and Gynecology ("Cottonwood Ob/Gyn") and Old Farm Obstetrics **[**2]** and Gynecology ("Old Farm Ob/Gyn"), both of which are groups of Obstetricians/Gynecologists who regularly deliver babies in Cottonwood Hospital's Labor and Delivery room.

In February, 1994, one of the defendants, Dr. Matthews, entered into a contract with each of the two obstetric/gynecology entities. The contracts obligated Dr. Matthews himself or another anesthesiologist selected solely by him to provide anesthesiology services for the patients of these two entities who are admitted to Cottonwood Hospital's Labor and Delivery room. After the contracts were signed, with minor exceptions, the plaintiffs were not selected by Dr. Matthews to perform these anesthesiology services. The plaintiffs complain in this lawsuit that Dr. Matthews' contracts with the entities are part of a combination or conspiracy by the defendants in restraint of trade in violation of Section One of the Sherman Antitrust Act. The plaintiffs contend that the conduct of the individual anesthesiologist defendants amounts to a horizontal group boycott and therefore a *per se* violation of Section One. The defendants argue that their conduct is not in violation of the Sherman Act in any respect, and in any event, **[**3]** should be subject to a Rule of Reason, rather than a *per se*, analysis.

This case came on for hearing before the court on March 26, 1998 on the individual anesthesiologist defendants' motion for summary judgment. The plaintiffs were represented by Peggy Tomsic and Eliot M. Cohen. Defendants were represented by George A. Hunt, Randy T. Austin, Stephen Marshall, R. Brent Stephens, Kenneth W. Yeates, and Steven K. Gordon.

BACKGROUND FACTS

A. Cottonwood Hospital and the Anesthesia Department

Cottonwood Hospital is owned by a subsidiary of Intermountain Health Care ("IHC") which also owns two other hospitals in the same area. Cottonwood operates under an "open staff" policy which means that any medical practitioner may apply for staff privileges at the hospital. Staff privileges are defined as the permission granted to a medical practitioner to provide patient care at the hospital and includes access to hospital resources that are necessary to effectively provide that care.

Anesthesiology services at Cottonwood Hospital are provided by the members of the Department of Anesthesiology, all of whom are licensed anesthesiologists who practice medicine independently of each other. **[**4]** They are not considered employees of the hospital. The department's purpose is to schedule anesthesiologists to cover the hospital's needs. **[*1140]** Cottonwood Hospital requires anesthesiologists to cover four areas in the hospital: (1) the operating room ("OR"), (2) the orthopedic specialty hospital ("TOSH"), (3) the surgical center, and (4) the labor and delivery room. Each area requires a certain number of anesthesiologists each day. For example, prior to November of 1993, the labor and delivery needs were met by scheduling one anesthesiologist for a 24 hour shift beginning at 6 p.m. and running until 6 p.m. the next evening.

Historically, anesthesiologists regularly working in one of these four divisions have not been regularly scheduled in another division. The OR and labor and delivery (or "obstetric") divisions have each had a certain number of "slots," or physicians, who rotate in the schedule. Generally speaking, a new physician has been added to the rotation of either OR or obstetric anesthesia only when another physician left.

Until November, 1993, anesthesiology scheduling was done by two anesthesiologists in the department. After November, 1993, a single anesthesiologist has **[**5]** been selected as scheduler by a two-thirds majority vote of the Department members. Since November, 1993, defendant Dr. Farley has been the elected scheduler. As the scheduler, Dr. Farley is responsible for making certain that a sufficient number of anesthesiologists are assigned to cover labor and delivery, the OR, the surgical center, and TOSH at all times.

B. The Plaintiffs

Plaintiff Anthony Diaz became an active member of Cottonwood Hospital's Department of Anesthesiology in 1980. He practiced general anesthesiology, including obstetric ("ob/gyn") anesthesiology, at Cottonwood between 1980 and 1982. In 1982, Dr. Diaz left Cottonwood and practiced medicine in Alaska. In 1990 he returned to Utah and resumed working at Cottonwood. From 1990 to 1992, Dr. Diaz did some "fill in" anesthesiology work on the labor and delivery schedule at the rate of approximately two shifts per month. In 1993, Dr. Diaz requested significant additional labor and delivery shifts.

Plaintiff Paul Diehl joined Cottonwood's Anesthesiology Department in 1981, performing ob/gyn anesthesia there until 1985. In 1985, Dr. Diehl decided he no longer wanted to do ob/gyn anesthesia and voluntarily traded his **[**6]** labor and delivery shifts for shifts in the OR. In 1993, Dr. Diehl requested to again receive significant work in labor and delivery.

Plaintiff Allan Kaminsky joined Cottonwood's Anesthesiology Department in 1980 where he performed ob/gyn anesthesiology until 1983. In 1983, Dr. Kaminsky voluntarily traded his obstetric shifts at Cottonwood for shifts in the OR division. In 1993, Dr. Kaminsky asked to be included again in the labor and delivery schedule.

C. The Defendants

Defendants Michael Farley, Morris Matthews, and Joan Abele are all licensed anesthesiologists who hold active staff privileges at Cottonwood Hospital. Dr. Farley has been a member of Cottonwood's Anesthesia Department since 1986; Dr. Matthews has been a member since 1983; and Dr. Abele was a member from 1983 to 1996. All three individual defendants were part of a five physician rotation that regularly performed anesthesiology in labor and delivery for many years prior to 1993 when plaintiffs began demanding significant shifts in labor and delivery. In addition, as stated above, Dr. Farley has been the scheduler for the Anesthesia Department since November, 1993.

D. The Dispute Over Scheduling

As explained **[**7]** above, by late 1993, the three plaintiffs and at least one additional doctor, Dr. Welling, were requesting additional shifts in labor and delivery. [1] Although the record is not totally clear, it appears that prior to the plaintiffs' requests, five doctors, including **[*1141]** all three of the defendant doctors, were regularly rotating in the labor and delivery schedule. About the time plaintiffs began requesting labor and delivery shifts, one ob/gyn anesthesiologist left, creating one open slot in the rotation.

The defendants were wary about plaintiffs' sudden demands to return to labor and delivery and they have offered several reasons **[**8]** why they were hesitant to fully embrace the plaintiffs' requested return. First, the defendants were concerned that plaintiffs' ob/gyn anesthesiology skills had diminished during their extended absences from ob/gyn anesthesia. Second, the defendants were concerned that plaintiffs' entry into the labor and delivery schedule would disrupt the smoothly running ob/gyn system. The labor and delivery schedule had been separate from the OR schedule for approximately ten years and neither the OR nor the labor and delivery schedule had accepted new doctors unless a slot was open or the need required more doctors. The defendants also had their own interests at heart. Introducing the plaintiffs into the schedule would necessarily decrease the defendants' total number of shifts.

The friction between members of the Anesthesiology Department over scheduling led the members of the department to discuss the issue at a meeting on November 23, 1993. The record shows that at the meeting the members concluded that the plaintiffs would be scheduled for "some" labor and delivery shifts. Additionally, the minutes of the meeting indicate that plaintiff Diehl revealed to the other members of the department **[**9]** that he had retained legal counsel for the purpose of receiving privileges in ob/gyn and cardiovascular anesthesia.

The November meeting did not completely resolve the scheduling issue among the anesthesiologists. On December 6, 1993, the members of the Anesthesia Department met again to discuss whether the three plaintiffs should be given new "slots" so that eight doctors would work equally on the labor and delivery schedule or whether the three plaintiffs should be given one slot to share among the three of them. The minutes indicate the department members decided the ob/gyn anesthesiologists would meet separately to discuss the issue. The record does not indicate whether the ob/gyn anesthesiologists actually met on a later occasion. Apparently, the plaintiffs continued to work to some extent in labor and delivery, but with no definite resolution of the scheduling issue.

After the December 6 meeting, tension was running fairly high in the Anesthesia Department. As noted above, Dr. Diehl had retained legal counsel. Defendant Matthews wrote in his journal: "We have some problems in the department. About half of the people are easy to get along with and all the surgeons will work **[**10]** with them. The others have personality quirks or are slow, and some surgeons request not to have them." Morris Matthews' Journal, Dec. 18, 1993.). At some point, defendant Abele reportedly told another doctor that Dr. Diaz was slow, Dr. Kaminsky was hated, and that co-workers "had issues" with them. Like Dr. Diehl, Dr. Abele also contacted legal counsel for advice about privileges in anesthesia.

The disarray in the Anesthesia Department came to the attention of the ob/gyn physicians who worked with the anesthesiologists. This was especially apparent in January, 1994, when Dr. Ron Larkin of defendant Cottonwood Obstetrics and Gynecology asked IHC legal counsel if he and the other physicians in his medical group were free to work only with the anesthesiologists who met the quality, service availability and patient satisfaction standards Cottonwood Ob/Gyn desired. Dr. Larkin testified that he was concerned about the addition of the plaintiffs to the labor and delivery schedule because he had worked with all three plaintiffs previously when they were on the labor and delivery schedule in the 1980's. Dr. Larkin stated that he "did not want them taking care of our patients" because the **[**11]** plaintiffs had not performed to his satisfaction in the past. Deposition of Dr. Ronald M. Larkin at 34 and 31-35. On February 4, 1994, the physicians at Cottonwood Ob/Gyn requested that another anesthesiologist be scheduled for their patients whenever Dr. Kaminsky was on call.

E. The Agreement

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[1] It is uncertain why the plaintiffs so vigorously demanded to rejoin the labor and delivery schedule. Although the record is not clear whether labor and delivery shifts became more financially lucrative in 1993, the record does state that labor and delivery shifts are presently more lucrative than the OR shifts. Plaintiffs' Memorandum in Opposition to Summary Judgment at Iiv, P 173.

Soon after Cottonwood Ob/Gyn's request regarding Dr. Kaminsky, Cottonwood Ob/Gyn **[*1142]** and defendant Dr. Matthews reached an agreement. The agreement obligated Dr. Matthews to personally provide anesthesiology services to Cottonwood Ob/Gyn's patients admitted to Cottonwood Hospital's labor and delivery room, or to select another physician of his choosing to perform such services. The contract was signed on February 7, 1994. It provided that Dr. Matthews "shall have exclusive authority and control over all anesthesia services provided to patients of Cottonwood obstetrics for labor, cesarean section and D&C's performed in the labor suite at Cottonwood Hospital."

Upon being advised of this agreement between Dr. Matthews and Cottonwood Ob/Gyn, Dr. Farley, as anesthesiology scheduler for the hospital, accommodated the new arrangement by scheduling an additional anesthesiologist to be on call whenever **[**12]** an anesthesiologist not approved by Dr. Matthews was on call in the labor and delivery room. Dr. Farley acquiesced to this demand to honor the ob/gyn physicians' requests.

After the agreement was made, Dr. Matthews informed Dr. Kaminsky that he would be double covered, meaning that when Dr. Kaminsky was on the labor and delivery schedule, there would be another anesthesiologist (as selected by Dr. Matthews) scheduled for the purpose of providing anesthesiology services to the patients of Cottonwood Ob/Gyn. Dr. Matthews offered Dr. Diehl and Dr. Diaz two non double-covered shifts a month with a possibility for increased work for Cottonwood Ob/Gyn's patients in the future if their ob/gyn skills were deemed acceptable. Dr. Diaz accepted this offer, but Dr. Diehl declined. A short time after performing under this procedure, the Cottonwood Ob/Gyn physicians informed Dr. Matthews that Dr. Diaz's performance was poor and unacceptable to them. Since the beginning of the Matthews/Cottonwood Ob/Gyn agreement, Drs. Kaminsky and Diehl have not requested positions on the labor and delivery schedule.

After Dr. Matthews and Cottonwood Ob/Gyn entered into their agreement, Dr. Matthews entered into **[**13]** a similar agreement with defendant Old Farm Ob/Gyn.

Because of the agreements between Dr. Matthews and the two physician groups, the plaintiffs contend they have been limited in their ability to utilize their obstetrical anesthesiology skills. Specifically, the plaintiffs argue that they are excluded from treating certain patients in Cottonwood Hospital's labor and delivery suite.

F. The Suit

The plaintiffs brought suit under Section One of the Sherman Antitrust Act, alleging that the agreements between Dr. Matthews and Cottonwood Ob/Gyn and Old Farm Ob/Gyn and the conduct by the individual defendants constituted a combination that unreasonably restrained trade. The plaintiffs allege that individual defendants' conduct merits *per se* condemnation because the alleged conduct amounts to a horizontal group boycott involving a conspiracy between and among the three individual defendants. The plaintiffs contend that the only issue for a jury of this court to decide is whether the individual defendants actually conspired or combined to achieve this result. The plaintiffs acknowledge that their claim fails if the Rule of Reason applies to the agreements. The plaintiffs also bring **[**14]** pendent state claims under the Utah Antitrust Act with the same rationale as the Sherman Antitrust Act. The plaintiffs also state a claim for defamation based on Dr. Abele's alleged comments, and for tortious interference with economic relations based on the defendants' decisions regarding labor and delivery scheduling. The individual defendants now move for summary judgment on all the claims.

DISCUSSION

I. Summary Judgment

HN1[] Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*.

The party seeking summary judgment bears the initial burden of demonstrating **[*1143]** that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265,* 106 S. Ct. 2548 (1986). The burden then shifts to the non-moving party to establish the existence of an essential element to the claims on which they bear the burden of proof at trial. *Id.* To satisfy this burden, the non-moving **[**15]** party cannot rest on the pleadings, but must by affidavit or other appropriate means, set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The mere existence of a scintilla of evidence in support of the non-moving party's case is insufficient; there must be evidence on which the jury could reasonably find for the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In making this determination, the court must examine the pleadings, affidavits and other evidence in the record in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

II. The Sherman Act Section One Claims

The individual defendants argue that they are entitled to summary judgment because their conduct as alleged by the plaintiffs and based on an undisputed factual record does not amount to a *per se* violation of the Sherman Act.

A. *Per Se* Versus Rule of Reason Analysis

HN2[] The Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . .." 15 U.S.C. § 1. "Whether **[**16]** an action violates § 1 of the Sherman Act depends on whether it is adjudged an *unreasonable* restraint." Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985). The Supreme Court has developed two methods of analysis for determining whether a concerted action is an unreasonable restraint of trade:

> Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case by case application of the so-called Rule of Reason--that is, "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977). Certain categories of agreements, however, have been held to be *per se* illegal, dispensing with the need for case-by-case evaluation. We have said that *per se* rules are appropriate only for "conduct that is manifestly anticompetitive," id., at 50, 97 S. Ct. at 2557, that is, conduct "'that would always or almost always tend to restrict **[**17]** competition and decrease output,'" Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-290, 105 S. Ct. 2613, 2617, 86 L. Ed. 2d 202 (1985), quoting Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562, 60 L. Ed. 2d 1 (1979).

Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988).

HN3[] The *per se* and the Rule of Reason analyses both examine whether the conduct alleged is an unreasonable restraint of trade, but the analyses carry different presumptions. [2] The application of the *per se* rule is reserved for situations where the conduct **[*1144]** almost always has an anticompetitive effect and virtually never has a procompetitive effect. If conduct falls into a *per se* category, the conduct is presumed illegal. For example, price-fixing, horizontal divisions of markets, bid rigging, tying arrangements, and horizontal refusals to deal have earned the *per se* label because experience has shown that these arrangements are almost always anticompetitive

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[2] *See*, John J. Flynn, *Rethinking Sherman Act* Section 1 *Analysis: Three Proposals for Reducing the Chaos*, 49 ***Antitrust Law*** Journal 1593, 1613 (1980) ("From the history of Sherman Act litigation, it is apparent that reliance upon a presumption of illegality is likely to arise where the facts induce a conclusion that joint action is directly displacing the competitive process or some central goal of the competitive process. The more central the goal being displaced, (price competition as the mechanism for establishing price and allocating resources) the more likely a presumption of illegality and the more conclusive the presumption. The less clear the goals of antitrust policy involved or the more confused anticompetitive effects become with procompetitive effects as a result of the practice (vertical territorial restrains), the less conclusive the presumption allocating burdens of proof. Where no immediate impact on the goals of antitrust policy is perceived, no presumptions are created; and, a plaintiff must show under all the circumstances that there is a restraint which unreasonably displaces the competitive process as the rule of trade.")

and rarely have any procompetitive justification. The *per se* analysis applies because **[**18]** the conduct is so certain to unreasonably displace the competitive process that it is presumed illegal.

[19]** On the other hand, the Rule of Reason presumes that the conduct is legal, but the plaintiff may show that under all the relevant factors, the alleged conduct is illegal because it has unreasonably displaced the competitive process. The Rule of Reason applies unless the plaintiffs demonstrate that the conduct falls into one of the *per se* categories.

Plaintiffs contend that *per se* treatment is appropriate for conduct of the individual defendants because their conduct constitutes a concerted horizontal refusal to deal. The plaintiffs argue that all horizontal group boycotts are *per se* illegal and that this court need only find that a horizontal agreement existed among the individual defendants in order to condemn it as *per se* illegal. *See, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*.

Plaintiffs' proposition overstates the applicable legal rule. ***HN4***[] Recent cases decided by the United States Supreme Court caution against the expansion of the "group boycott label" and the imposition of *per se* liability. *F.T.C. v. Indiana Fed'n. of Dentists, 476 U.S. 447, 457-58, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* ("We have **[**20]** been slow . . . to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious . . .."), *see also, State Oil Co. v. Khan, __ U.S. __, 139 L. Ed. 2d 199, 118 S. Ct. 275, 279 (1997)* (overruling *per se* analysis for vertical maximum price fixing and expressing reluctance to impose *per se* rule). The Supreme Court has explicitly stated that unless the conspirators possess "market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." *Northwest Wholesale Stationers, 472 U.S. at 296*. Finally, the Supreme Court has noted that in determining whether the *per se* rule applies, courts may look beyond the challenged conduct to the surrounding circumstances: "There is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." *N.C.A.A. v. Bd. of Regents of Univ. of Okl., **[**21]** 468 U.S. 85, 104 n.26, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*.

The Eleventh Circuit recently addressed the applicability of the *per se* and Rule of Reason tests in a health care context and came to the following common sense rule:

> ***HN5***[] In sum, the *per se* rule requires a historically focused inquiry directed at ascertaining whether the behavior complained of is of the type that regularly poses anticompetitive consequences. Where prior cases have shown that a certain practice is of this type, a deleterious effect on the market will be presumed and no detailed market analysis is required. Where the anticompetitive effect of a practice is not historically clear, the practice may still be *per se* violative of antitrust laws if a preliminary examination of market conditions surrounding the alleged restraint at issue reveals such an impact absent any procompetitive justification.

Retina Assoc. v. So. Baptist Hosp. of Florida, 105 F.3d 1376, 1381 (11th Cir. 1997). In *Retina*, the plaintiff was a corporation of retinal ophthalmologists who alleged that the defendant hospital and individual ophthalmologists engaged in a concerted refusal to deal with the plaintiff. The defendants had formed a center **[**22]** for ophthalmological services with several non-specialized ophthalmologists, a few retina specialists, and a major local hospital. After the defendants had formed this center, the non-specialized ophthalmologists who had joined the center **[*1145]** discontinued referring their cases to the plaintiffs and instead referred them to the retina specialist located in the center. *Id. at 1379-80*. The plaintiffs argued that the situation merited *per se* treatment because the conduct was a horizontal group boycott. The Eleventh Circuit disagreed and found that the boycott alleged did not merit *per se* treatment because it was not the type of behavior that had been historically shown to adversely affect competition. *Id. at 1381*. The court found that it was not unusual for a multi-provider network such as the one formed by the defendants to affiliate with only one specialist group. Furthermore, the court found that the anticompetitive effect was not "immediately obvious." *Id. at 1382*. The court further noted that the anticompetitive effect of defendants' alleged refusal to refer patients to the plaintiffs was not fully understood and therefore should not be condemned out of hand by the **[**23]** *per se* rule. *Id.*

This court finds the recent pronouncements of the United States Supreme Court and the Eleventh Circuit's opinion instructive. This court is also faced with an allegation of a *per se* violation in circumstances that do not appear to reflect the concerns of *per se* treatment in traditional horizontal boycott cases. Although the present situation is different than the circumstances in *Retina*, the same reasoning applies. This court finds that *per se* treatment of any agreement between Dr. Matthews and the other individual defendants is inappropriate for three reasons: 1) The boycott alleged here is not the type that has been historically shown to always or almost always negatively affect competition; 2) a preliminary examination of market conditions does not reveal any anticompetitive impact; and 3) the defendants have offered procompetitive justifications for their actions.

1. The Historic *Per Se* Boycotts

A United States Supreme Court opinion frequently cited to explain and support a *per se* analysis for an alleged group boycott is *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*. In *Klor's*, **[**24]** the plaintiff San Francisco appliance store claimed that the defendant prohibited ten national appliance manufacturers and distributors from selling appliances to the plaintiff. The defendants did not deny or offer any justifications for their actions, but argued that there had been no effect on competition. *Id. at 209*. The district court granted summary judgment in favor of the defendants finding that the injury was not the "public wrong" that the antitrust laws had been enacted to protect. The Court of Appeals affirmed this decision. The Supreme Court found that the plaintiffs had alleged enough to maintain a cause of action under the antitrust laws because "group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category." *Id. at 212*. The Court found there were sufficient allegations in the complaint to support a boycott proscribed by the antitrust laws:

> This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at **[**25]** the same prices and conditions made available to Broadway-Hale and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its "nature" and "character," a "monopolistic tendency."

Id. at 213. The Court found that the plaintiff was entitled to prove its case of conspiracy and remanded the case to the District Court for trial.

More recently, in a case relied on by the plaintiffs, the Court held that a group boycott fell into the *per se* category. In *F.T.C. v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 107 L. Ed. 2d 851, 110 S. Ct. 768*, (1990), the Court found that the *per se* rule applied when the defendant organization staged a boycott for the purposes of raising the prices of court-appointed counsel for indigent defendants. The Court disregarded the defendant's claims that the boycott was justified because it was in the public's interest to obtain better legal representation. The Court held that the boycott had the anticompetitive **[*1146]** effect the antitrust laws were intended to protect against. *Id. at 424*. The Court described the situation:

> Prior **[**26]** to the boycott CJA lawyers were in competition with one another, each deciding independently whether and how often to offer to provide services to the District at CJA rates. The agreement among the CJA lawyers was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services, and indeed, the only customer in the market for the particular services that CJA regulars offered.

Id. at 422-423. The Court also found that the "undenied objective of their boycott was an economic advantage for those who agreed to participate." *Id. at 426*. The Court therefore found that despite the defendants' justifications, the boycott was "unquestionably a 'naked restraint' on price and output" and condemned it as *per se* illegal. *Id. at 423*.

HN6[] The boycott cases that have merited *per se* review in the past deal with markets that were open and competitive until the concerted action closed off part of the market. *Klor's, 359 U.S. at 213*. *See also, United States v. Topco Assoc., Inc., 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)* (food cooperative divided markets among its **[**27]** members); *United States v. Gen. Motors, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1965)* (General Motors prohibited its dealers from selling through discounters); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)* (gas association refused to approve defendant's product resulting in inability to supply gas for product); *Silver v. New York Stock Exch., 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)* (stock exchange refused to provide information access to nonmembers); *Associated Press v. United States Tribune, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1944)* (newspaper group denied information and membership to non-member newspapers). In other words, *per se* review was required when the defendants' joint action by its very nature unreasonably displaced the competitive process. The cases also demonstrate that *per se* analysis is appropriate when the boycott's only apparent purpose is to facilitate collusion. *F.T.C. v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990)*. On the other hand, the Supreme Court has refused to apply the *per se* rule in a **[**28]** wide variety of settings where the Court could not determine whether the action displaced the competitive process. *F.T.C. v. Indiana Fedn. of Dentists, 476 U.S. 447, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* (dentists withheld x-rays from insurance companies); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)* (expulsion of member from cooperative buying arrangement); *N.C.A.A. v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984)* (limiting number of televised college football games to NCAA members). *See also, All Care Nursing Service, Inc. v. High Tech Staffing Serv., Inc., 135 F.3d 740 (11th Cir. 1998)* (holding that preferred provider program was not *per se* illegal group boycott of non preferred agencies); *Betkurer v. Aultman Hosp. Ass'n., 78 F.3d 1079 (6th Cir. 1996)* (holding that decision of ob/gyn's to refer to plaintiff's neonatologist competitor did not merit *per se* review); *Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994)* (holding that exclusive contract between hospital and anesthesiologist group should not be considered *per se* illegal and confer standing on plaintiff); *BCB Anesthesia Care* ***[**29]*** *v. Passavant Mem'l. Hosp., 36 F.3d 664 (7th Cir. 1994)* (declining to apply *per se* rule to hospital staffing decision); *Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir. 1991)* (holding that agreement between physicians and hospital to allow only physicians to offer services in particular area was not *per se* violation).

The present situation is quite different from the Supreme Court cases meriting *per se* review. The structure of the anesthesia system at Cottonwood Hospital before 1994 as presented in the instant case is not the type of open or competitive market contemplated and sought to be protected by *per se* application of the Sherman Act. One staff anesthesiologist was scheduled for each 24 hour shift in the ob/gyn rotation. The anesthesiologist **[*1147]** on call was not chosen by the ob/gyn physicians or the ob/gyn patients. The only requirements for the anesthesiologist to be placed in the call rotation was that the anesthesiologist possess staff privileges at Cottonwood Hospital and be scheduled by the Anesthesiology Department's scheduler.

Such a system was not driven by price or consumer choice. Unlike the situation where a patient chooses an ob/gyn physician **[**30]** by shopping around for the best doctor, the ob/gyn doctor or patient had no realistic choice but to use the anesthesiologist on call when an obstetric case presented itself. [3] The ob/gyn doctor's lack of choice was limited by a number of logistic and economic factors. The ob/gyn must deliver babies or perform surgeries at a hospital, usually whenever the baby in question chooses to be delivered, and there was great pressure for a doctor practicing at the hospital to use the system in place. It would be logistically difficult for an ob/gyn to use the anesthesiologist of his or her choice every time the ob/gyn had a case come in or whenever the ob/gyn had some reservations about the anesthesiologist on call. Furthermore, it would likely be too expensive for ob/gyn patients to pay for the services of an anesthesiologist that would work solely for one ob/gyn doctor.

[31]** The "on call" system appears to have been established to address basic quality and staffing concerns. The hospital used the call system to make sure it approves of the doctors who perform anesthesia there through its privileging system. The call system also insures the availability of an anesthesiologist to assist the hospital's patients.

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[3] Plaintiffs acknowledge that this was the situation: "Prior to February 1994, Cottonwood OBGYN had used whichever anesthesiologist was on the OB schedule." Plaintiffs' Memorandum in Opposition at xxvii, P 78.

The agreement between Dr. Matthews and Cottonwood Ob/Gyn changed the call system somewhat, giving certain ob/gyn physicians a choice of anesthesiologist. The agreement allowed the Cottonwood Ob/Gyn physicians to designate which anesthesiologists they desired to work with. In this respect, the agreement may not have disrupted, but rather supplemented, the call system, as well as competition. No anesthesiologist lost a position on the call roster. The agreement also overcame the logistic and economic problems that prevented ob/gyn physicians from arranging for their own anesthesiologists. The agreement simply designated an agent who would organize the anesthesiologists of choice to cover all shifts. Finally, the agreement maintained the quality assurances built in by the privileging process.

The agreement between Dr. Matthews and Cottonwood Ob/Gyn **[**32]** is unlike any where boycotts have traditionally been accorded *per se* treatment. The call system is entirely different from appliance distributors who sell to a national market, or a defense attorney program that can hire any licensed attorney in the District of Columbia. In the cases that have merited *per se* treatment, the consumer or distributor had a great deal of choice on where to buy or with whom to distribute until the horizontal agreement among the defendants in those cases prevented or severely hampered that choice. In those cases, the defendants' joint action more clearly unreasonably displaced the competitive process. The Matthews' agreement is also unlike the cases where boycotts were accorded *per se* treatment because the agreement did not serve to increase the price of the anesthesiologist's services.

Furthermore, this case deals with a call system that appears to be common throughout the health care industry. The unique nature of the call system and the relative inexperience [4] of the courts in understanding and regulating internal hospital scheduling practices make it wholly inappropriate to justify condemning one type of scheduling practice as *per se* **[**33]** violative of the Sherman Act. ***HN7***[] The United States Supreme Court has cautioned that "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *Broadcast Music, Inc. v. Columbia Broad Sys., Inc., 441 U.S. 1, 9,* ***[*1148]*** *60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. It may be that this type of scheduling practice actually involved a combination or concerted action by the defendants and that it is anticompetitive, but such a conclusion should only be reached after an analysis of all relevant factors under the Rule of Reason. In sum, defendants' alleged practice is not the type that regularly poses anticompetitive consequences. Consequently, *per se* analysis is not appropriate.

2. A Preliminary Examination of the Market

[34]** The court's inquiry does not end with the historical analysis. Other factors may require *per se* review. ***HN8***[] The Supreme Court has stated that *per se* treatment may be merited where the plaintiffs have shown that the defendants hold "market power or unique access to a business element necessary for effective competition." *Northwest Wholesale Stationers, 472 U.S. at 298*. As the Eleventh Circuit noted, "the practice may still be *per se* violative of antitrust laws if a preliminary examination of market conditions surrounding the alleged restraint at issue reveals such an impact absent any procompetitive justification." *Retina Assoc., 105 F.3d at 1381*. While not mandated, a preliminary examination of market conditions is acceptable under a *per se* analysis. *See, N.C.A.A. v. Bd. of Regents of Univ. of Okl., 468 U.S. 85, 104 n.26 (1984)* ("There is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.")

In this case, the plaintiffs have not alleged market power on the part of the defendants. Indeed, the plaintiffs **[**35]** have not defined any relevant market. Accordingly, the court has no basis on which to determine the size of Cottonwood Ob/Gyn's and Old Farm Ob/Gyn's practices at Cottonwood Hospital compared to other ob/gyn groups or how significantly the agreement between Dr. Matthews and Cottonwood Ob/Gyn and Old Farm Ob/Gyn affects the plaintiffs' or other anesthesiologists' ability to practice ob/gyn anesthesia at Cottonwood Hospital or any other relevant geographic market.

[4] This court could only find one case that addressed on call scheduling in an antitrust context. The district court there applied the Rule of Reason. *Anesthesia Advantage, Inc. v. The Metz Group, 759 F. Supp. 638 (D. Colo. 1991)*.

In this connection, the plaintiffs also fail to allege or demonstrate that the defendants hold unique access to a business element necessary for effective competition. Again there is no evidence as to the relative size of Cottonwood Ob/Gyn's and Old Farm Ob/Gyn's practices at Cottonwood Hospital, the percentage of plaintiffs' anesthesiology work performed at Cottonwood Hospital, or any of the other factors relative to market power or unique access.

Because the plaintiffs have failed to show the defendants hold market power or unique access to a business element necessary for effective competition, plaintiffs' claim does not merit *per se* review based on market conditions.

3. Defendants' Procompetitive Justifications

[36]** Even if the plaintiffs had presented evidence to meet the threshold showing necessary for *per se* treatment, the defendants offer several procompetitive justifications for the agreement. The first is that the agreement actually enhances competition by creating a choice for the purchaser of anesthesia services. The agreement enables the patient or ob/gyn doctor performing a procedure to choose which anesthesiologist he or she will use rather than requiring the doctor to use whichever anesthesiologist happens to be on call.

The second justification offered by the defendants is the unique nature of the health care industry. While the health care industry is not awarded any special treatment under the antitrust laws, the nature of the industry is a consideration in determining whether a *per se* violation has occurred. As discussed previously in Section II.A.1, the unique nature of this industry is a persuasive factor for applying the Rule of Reason.

The third justification the defendants offer is that they were legitimately concerned about the level of the plaintiffs ob/gyn anesthesia skills. The defendants cite several cases that acknowledge that excluding doctors on the basis **[**37]** of professional competence does not violate the antitrust laws. Defendant **[*1149]** Matthews' Memorandum in Support of Summary Judgment at 17. [5] Although most of the cases the defendants cite discuss the peer review process, a procedure not at issue in this case, the reasoning carries some weight in this context. Plaintiffs vigorously dispute that defendants are concerned about the plaintiffs' professional competency. Plaintiffs contend that defendants only seek to protect their clientele bases. This court cannot determine which desire primarily motivated the agreement between Matthews and Cottonwood Ob/Gyn. However, this court is not prepared to hold that it is a *per se* violation of the antitrust laws when ob/gyn physicians allegedly decline to work with certain anesthesiologists based at least in part on professional competency issues. The issue of professional competency is yet another factor that a jury should be allowed to hear in deciding whether the agreement was primarily motivated by anticompetitive illegal intent or legitimate concerns.

[38]** B. The Plaintiff's Argument

The plaintiffs contend that Tenth Circuit law as expressed in *Tarabishi v. McAlester Hospital, 951 F.2d 1558 (10th Cir. 1991)*, mandates the application of a *per se* analysis. [6] In *Tarabishi*, the plaintiff was an ear, nose and throat physician who practiced at the defendant hospital. The plaintiff left the hospital's clinic to start his own practice, but retained privileges at the hospital. After the plaintiff had established a successful practice, the plaintiff began planning an outpatient surgical clinic. *Id. at 1561*. At first, the hospital did not have a response to plaintiff's plans.

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[5] The defendants cite to the following cases: *Tarabishi v. McAlester Reg. Hosp., 951 F.2d 1558, 1570 n.18 (10th Cir. 1991)*; *Weiss v. York Hosp., 745 F.2d 786, n.60 (3rd Cir. 1984)*; *Cogan v. Harford Memorial Hosp., 843 F. Supp. 1013, 1019 (D.Md. 1994)*; *Pontius v. Children's Hosp., 552 F. Supp. 1352, 1369-70 (W.D. Pa. 1982)*.

[6] The plaintiffs also cite *Brown v. Presbyterian Healthcare Services, 101 F.3d 1324 (10th Cir. 1996)*, and *Coffey v. HealthTrust, 955 F.2d 1388 (10th Cir. 1992)* as requiring a *per se* analysis. However, these two cases are largely irrelevant, and generally unhelpful, to the issue before the court. *Brown* does not discuss whether the court applied the *per se* or Rule of Reason analysis. *Coffey* is limited to the issue of conspiracy or combined action.

After a short time, however, the hospital decided to build its own outpatient surgical center and it began opposing the plaintiff's efforts to build his center. During this same time frame, the hospital initiated an investigation into alleged improper and inappropriate behavior by the plaintiff. This investigation resulted in the hospital's revoking the plaintiff's surgical and emergency room privileges. *Id. at 1562*.

[39]** Both outpatient centers eventually opened, but the plaintiff's center folded within a year. The plaintiff argued that the hospital's revocation of his privileges made it impossible for his clinic to be successful because he needed to have access to the hospital's emergency care facilities. The hospital contended that the center failed because the economic structure of the clinic was flawed from the beginning. *Id. 951 F.2d at 1562-63*.

The plaintiff sued the hospital, charging, among other things, that the defendants had conspired to boycott him and to stabilize prices. The plaintiff argued that *per se* analysis should apply, but the district court found the Rule of Reason was more appropriate. The Tenth Circuit upheld the district court's determination, stating: "Denying staff privileges to a physician through peer review on the basis that the physician's conduct is unprofessional and inappropriate is not an activity 'likely to have predominately anticompetitive effects' such that *per se* treatment is necessary." *Id. at 1571*. The plaintiffs contend *Tarabishi* stands for the proposition that "the Tenth Circuit in effect held conversely, that in the absence of a lack of professional **[**40]** competence or unprofessional conduct, the defendants' actions conduct would be judged by a *per se* analysis." Plaintiffs' Memorandum in Opposition to Summary Judgment at 5.

While it may be true that the defendants' alleged concern about the quality of the plaintiffs' anesthesiology services did not involve peer review proceedings, their concerns at least appear to raise genuine issues of material fact that are relevant to a full rule of reason analysis. Furthermore, while **[*1150]** plaintiffs make much of the fact that they have not been the subject of any official disciplinary proceedings, they fail to acknowledge that their ability to practice anesthesia, and even ob/gyn anesthesia, has not been hampered by the defendants' actions except with regard to the patients of two groups of ob/gyn practitioners at one local hospital. The plaintiffs may still be scheduled on the labor and delivery rotation and in other areas of the hospital their privileges have not been limited. This court is aware of no provision in the antitrust laws of this country that mandates on-call rotations at a given hospital for anesthesiologists, without first subjecting such an inquiry to a Rule of Reason analysis.

[41]** Based on the historical inquiry, the limited review of the market and surrounding circumstances, and the applicable case law, this court finds that the defendants' joint action should be reviewed under the Rule of Reason. Because the plaintiffs have conceded that they cannot support their case under the Rule of Reason, the plaintiffs' Sherman Antitrust Act claim is dismissed against defendants Matthews, Farley, and Abele. The Utah Antitrust claims are also dismissed for the same reasons because the Utah Antitrust statute follows the same analysis as the federal statute.

III. The Defamation and Tortious Interference with Economic Relations Claims

Defendants also move for summary judgment on plaintiffs' defamation and tortious interference with economic relations claims. ***HN9***[] Under *28 U.S.C. § 1367(c)(3)* this court may decline to exercise supplemental jurisdiction when it has "dismissed all claims over which it has original jurisdiction." The court has dismissed all of plaintiffs' claims over which it has original jurisdiction by dismissing plaintiffs' Sherman Act claims. The only remaining claims are plaintiffs' pendent state law defamation and tortious interference with economic relations **[**42]** claims. Because these claims deal solely with state law, they are better left to the jurisdiction of the state courts. Therefore, the court declines to exercise supplemental jurisdiction over these claims. These claims are dismissed without prejudice.

IV. Summary and Conclusion

For the reasons set forth, this court finds that the Rule of Reason must be applied to defendants' alleged agreement. Because the plaintiffs have conceded that their claim fails under the Rule of Reason, plaintiffs first and second causes of action are DISMISSED with prejudice and Defendants' motion for summary judgment is GRANTED on plaintiffs' first and second claims. Because this court declines to exercise supplemental jurisdiction over the defamation and tortious interference with economic relations claims, the defendants' motion for summary judgment with respect to those claims is DENIED and those claims are DISMISSED without prejudice.

DATED this 16th day of July, 1998.

BY THE COURT:

Dee Benson

United States District Judge

Caribbean Broad. Sys., v. Cable & Wireless PLC

United States Court of Appeals for the District of Columbia Circuit

September 5, 1997, Argued ; July 17, 1998, Decided

No. 96-7246

Reporter

148 F.3d 1080 *; 1998 U.S. App. LEXIS 16286 **; 331 U.S. App. D.C. 226; 1998-2 Trade Cas. (CCH) P72,209; 41 Fed. R. Serv. 3d (Callaghan) 49

CARIBBEAN BROADCASTING SYSTEM, LTD. AND ALVIN L. KORNGOLD, APPELLANTS v. CABLE & WIRELESS PLC, ET AL., APPELLEES

Prior History: **[**1]** Appeal from the United States District Court for the District of Columbia. (No. 93cv02050).

Disposition: Case remanded.

Core Terms

district court, allegations, discovery, advertising, commerce, subject matter jurisdiction, subsidiary, Sherman Act, facilities, broadcast, monopolization, competitor, argues, radio, Counts, amend, second amended complaint, personal jurisdiction, solicitation, antitrust, lack of personal jurisdiction, leave to amend, monopolist, export, import, cases, abuse of discretion, relevant market, deny leave, circumstances

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN1[] **Pleadings, Amendment of Pleadings**

Fed. R. Civ. P. 15(a) provides that a party may amend its pleading once as a matter of course and thereafter by leave of court, which leave shall be freely given when justice so requires.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN2[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Section 1 of the Foreign Trade Antitrust Improvements Act of 1982, codified at *15 U.S.C.S. 6a(1)* , makes the Sherman Act, specifically *15 U.S.C.S. §§ 1-2*, inapplicable to conduct involving trade or commerce, other than import trade or import commerce, with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States. *15 U.S.C.S.§ 6a*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3[] **Defenses, Demurrers & Objections, Defects of Form**

Under *Fed. R. Civ. P. 8*, all that is required is a short and plain statement of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. A complaint satisfies this criterion if it is not so vague or ambiguous that a party cannot reasonably be expected to frame a responsive pleading. *Fed. R. Civ. P. 12(e)*. In other words, a plaintiff need not allege all the facts necessary to prove its claim so long as it provides enough factual information to make clear the substance of that claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Appeals > Dismissal of Appeals > Involuntary Dismissals

HN4[] **Motions to Dismiss, Failure to State Claim**

Because a plaintiff is not required to plead facts sufficient to prove its allegations, a federal court should not dismiss a complaint either for lack of subject matter jurisdiction or for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. After all, the issue presented by a motion to dismiss is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Sherman Act, Claims**

A would-be monopolist or member of a conspiracy to monopolize comes within the condemnation of the Sherman Act, specifically *15 U.S.C.S. §§ 1-2*, when it engages in anticompetitive conduct. Anticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN6[] **Monopolies & Monopolization, Attempts to Monopolize**

A monopolist has no general duty to share his essential facility, although there are certain circumstances in which he must do so. In the special circumstances where there may be such an obligation, the elements of an antitrust claim for denial of access to an essential facility are (1) a monopolist who competes with the plaintiff controls an essential facility, (2) the plaintiff cannot duplicate that facility, (3) the monopolist denied the plaintiffs use of the facility, and (4) the monopolist could feasibly have granted the plaintiff use of the facility.

Mergers & Acquisitions Law > Merger Guidelines

HN7[] **Mergers & Acquisitions Law, Merger Guidelines**

One company's minority ownership interest in another company is not sufficient by itself to make the owner a competitor, for purposes of the antitrust laws, of the subsidiary's rivals. To be a competitor at the level of the subsidiary, the parent must have substantial control over the affairs and policies of the subsidiary.

Counsel: Whitney L. Ellenby argued the cause for appellants, with whom Robert A. Skitol and Philip J. Mause were on the briefs.

Theodore Case Whitehouse argued the cause for appellees and filed the brief for Cable & Wireless PLC, and Cable & Wireless (West Indies) Ltd. Terrence J. Leahy filed the brief for appellee Caribbean Communications Company Limited.

Judges: Before: WILLIAMS, GINSBURG, and HENDERSON, Circuit Judges. Opinion for the court filed by Circuit Judge GINSBURG.

Opinion by: GINSBURG

Opinion

[*1082] GINSBURG, *Circuit Judge*: Caribbean Broadcasting System appeals the judgment of the district court dismissing its antitrust complaint against Cable & Wireless, Cable & Wireless (West Indies), and Caribbean Communications Company. We reverse in part and affirm in part.

I. Background

Plaintiff CBS and defendant CCC own competing FM radio stations located in the Eastern Caribbean, which includes Puerto Rico and the Virgin Islands. Defendant C&W and its subsidiary C&W (West Indies), hereinafter jointly C&W, operate a worldwide telecommunications system and publish **[**2]** the local telephone directory in the Caribbean. During the mid-1980s C&W and CCC entered into a joint venture in which CCC was to develop a Caribbean-wide FM broadcasting system that C&W would then use to offer an FM paging service.

Beginning in 1984 CBS tried without success to sell advertising on its nascent FM broadcast station based in the British Virgin Islands. Attributing its failure to deception practiced by CCC and C&W as part of an attempt to gain and keep a monopoly for CCC's "Radio GEM," CBS sued them both in Florida state court. The defendants removed the case to a federal court, which dismissed it without prejudice; CBS appealed to the Eleventh Circuit, but later voluntarily dismissed the appeal and refiled its complaint in the United States District Court for the District of Columbia. CBS later sought and was granted leave to file a First Amended Complaint in order to correct a technical error in its description of the ownership of CBS.

The eleven counts of CBS's complaint fall into three basic categories. First, it charged that CCC, by falsely claiming that Radio GEM's signal reached the entire Eastern Caribbean, had led advertisers to believe they could fulfill their **[**3]** advertising needs by dealing only with Radio GEM, in violation of the prohibition of attempted and actual monopolization in the Sherman Act, *see* *15 U.S.C. §§ 1-2*, and the prohibition of false representations in the Lanham Act, *see* *15 U.S.C. § 1125(a)*. Second, CBS charged that CCC had conspired with C&W to maintain CCC's monopoly over radio broadcast in the Eastern Caribbean, in violation of the Sherman Act. In furtherance of the conspiracy (still according to CBS), C&W had filed sham objections to CBS's application for a broadcast license, thereby delaying CBS's entry into broadcasting for more than two years. Third, CBS charged that C&W had violated the Sherman Act by denying it access to essential facilities; specifically, CBS alleged that C&W had persistently published an incorrect telephone listing for CBS and denied CBS access to its microwave transmitters in order to prevent CBS from reaching the entire Eastern Caribbean.

[*1083] The district court dismissed the complaint in two stages. In its first opinion, dealing only with the claims against C&W, the court held that (1) it lacked subject matter jurisdiction over **[**4]** the claims of monopolization (in counts II-X) because "plaintiffs [did] not allege[] necessary facts to substantiate a claim of adverse effect on U.S. commerce arising out of Defendants' alleged misconduct"; and (2) CBS failed (in Count XI) to state a claim upon which relief could be granted because it did not "allege sufficient facts to establish that Defendants denied [CBS] use of an essential facility." *See* *Caribbean Broadcast System Ltd. v. Cable & Wireless Plc, 1995 U.S. Dist. LEXIS 19225, 1995 WL 767164 (D.D.C. 1995)*. The court explained that the complaint "never identifies any facility to which CBS was denied access nor a single instance in which access to a facility was actually requested or denied," and fails to establish that C&W had ever been a competitor of CBS. CBS sought reconsideration or, in the alternative, leave to file a second amended complaint. The district court denied reconsideration, clarified that its dismissal of Counts II-XI was with prejudice, and denied as both "untimely" and "futile" CBS's request to file a second amended complaint.

In its second opinion the district court dismissed the Lanham Act claim (in Count I) for lack of **[**5]** personal jurisdiction over CCC. The court stated that because CBS

> fails to allege any connection whatsoever between CCC and the District of Columbia.... [it appears that] CCC does not possess sufficient, minimum contacts with [the District] to satisfy the due process requirements of the Constitution and comport with 'traditional notions of fair play and substantial justice.'

Caribbean Broadcast System v. Cable and Wireless PLC, C.A. No. 93-2050, slip op. at 4-5 (D.D.C. Oct. 17, 1996). The district court also denied CBS's request for jurisdictional discovery, for three reasons: CBS had "not offered a scintilla of evidence to suggest that CCC has even the slightest connection with the District of Columbia"; CBS "well knew that CCC has contacts with, and therefore could appropriately be sued in ... Wisconsin or the Virgin Islands"; and "it is simply too late ... in the history of this litigation ... to now allow Plaintiff to conduct the investigation."

CBS now argues that the district court erred in dismissing its complaint for lack of subject matter jurisdiction and failure to state a claim, in denying jurisdictional discovery against CCC, and in dismissing its **[**6]** Lanham Act claim against CCC with, rather than without, prejudice.

II. Discussion

We hold first that the district court erred in denying CBS leave to file its proposed Second Amended Complaint, which properly alleged subject matter jurisdiction over the claims of monopolization. We agree with the district court, however, that CBS's complaint failed to allege that CCC and C&W had denied CBS the use of an essential facility. Finally, we hold that the district court did not abuse its discretion in denying jurisdictional discovery and did not dismiss the complaint against CCC with prejudice.

A. Denial of Leave to Amend the Complaint

As noted, the district court early on granted CBS leave to file a First Amended Complaint correcting the description of CBS's ownership. After the district court dismissed Counts II-XI for lack of subject matter jurisdiction, CBS sought to make a *second amendment*--in order to clarify the jurisdictional allegations in its complaint--but the district court denied leave to amend on the grounds that such an amendment would be both untimely and futile. CBS contests both points. For its part, C&W argues that the district court ruled correctly because **[**7]** CBS had already failed "in five attempts encompassing this case and others" to file a proper complaint.

HN1[] *Federal Rule of Civil Procedure 15(a)* provides that a party may amend its pleading once as a matter of course and thereafter by leave of court, which "leave shall be freely given when justice so requires." We have recently had occasion to point out that "it is an abuse of discretion to deny leave to amend [without giving a] sufficient reason." *Firestone v. Firestone, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1208 (1996)* **[*1084]** (citing *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962))*; *see also* *Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991)* (noting that district court's discretion to dismiss without leave to amend is "severely restricted" by command of *Rule 15(a)* that such leave be "freely given"). In this case we conclude that neither of the reasons given by the district court is sufficient.

First, the amendment would not have been "futile" because, as explained below, the allegations of the second amended complaint support subject matter jurisdiction. Second, there is no indication that the amendment **[**8]** was in any cognizable way "untimely." The statute of limitations had not run, nor was there any prejudice to the defendants by reason of the timing. *See, e.g., Confederate* *Memorial Ass'n v. Hines, 301 U.S. App. D.C. 395, 995 F.2d 295, 299 (D.C. Cir. 1993)* (noting that *Fed.R.Civ.P. 15(a)* gives court power to grant leave to amend complaint even after case is dismissed); Wright & Miller, Federal Practice & Procedure: Civil 2d § 1488, at 652, 659, 662-69 (1990 & Supp. 1997) ("*Rule 15(a)* does not prescribe any time limit within which a party may apply to the court for leave to amend?. In most cases delay alone is not a sufficient reason for denying leave…. If no prejudice [to the non-moving party] is found, the amendment will be allowed").

C&W makes much of the district court's statement that it was denying CBS leave to amend in view of the "entire lengthy record herein," but C&W's argument is not entirely clear. C&W could be arguing that the district court's mention of having considered the "entire lengthy record" indicates that the court, in concluding that amendment would be both untimely and futile, relied in part upon the overall history of the dispute, **[**9]** including the case CBS had previously initiated in Florida. Whether the court meant to encompass that history within the reason for its decision is not clear, however; the "lengthy record" in question may well refer only to the present litigation, which alone had been going on for more than three years at the time. In either event, the district court erred; the prolonged nature of a case does not itself affect whether the plaintiff may amend its complaint. *See, e.g.,* *Security Ins. Co. of Hartford v. Kevin Tucker & Assoc., Inc., 64 F.3d 1001 (6th Cir. 1995)* (holding district court abused discretion in denying leave to amend complaint to add claim when party opposing motion made no showing of prejudice from delay); *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 644 F.2d 690 (8th Cir. 1981)* (holding district court abused discretion in denying leave to amend complaint to add count when no prejudice resulted from two and one-half year delay and facts underlying new and old counts were similar). The length of a litigation is relevant only insofar as it suggests either bad faith on the part of the moving party or potential prejudice to the non-moving **[**10]** party should an amendment be allowed, *see* Wright & Miller, § 1487 (1990 & Supp. 1997); here the district court never intimated a concern either with bad faith or with prejudice.

Alternatively, C&W might be arguing that the district court's reference to the "entire lengthy record" is an allusion to our suggestion in *Firestone,* following *Foman, 371 U.S. at 182*, that a plaintiff's failure to cure a defect in its complaint after repeated amendments is at some point sufficient to warrant denying it leave to amend yet again. But we will not infer such an acute point from such an oblique reference--if it is a reference at all--particularly in light of the policy in favor of hearing cases on their merits. *See, e.g., Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery, 72 F.R.D. 556, 561 (S.D.N.Y. 1976)* (holding plaintiff's five previous attempts to state cognizable claim did not preclude amendment, because Federal Rules suggest "artless drafting of a complaint should not allow for the artful dodging of a claim"); *Rosen v. TRW, Inc., 979 F.2d 191, 194 (11th Cir. 1992)* (citing doctrine that "leave to amend is particularly appropriate **[**11]** following dismissal of a complaint for failure to state a claim"); *see also Conley v. Gibson, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* ("The Federal Rules … accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

[*1085] Because the reasons given by the district court did not justify denying the plaintiff leave to amend its complaint, we reverse the district court. To remand this case for the district court to consider the Second Amended Complaint would be a waste of judicial resources, however. In deciding that to amend the complaint would be futile, the district court acted in the belief that the fault it found with the First Amended Complaint--namely, that it did not allege an adverse effect upon the commerce of the United States sufficient to support subject matter jurisdiction over Counts II-XI [see JA at 129-131]--was not addressed by anything in the Second Amended Complaint, which more clearly alleged an effect upon U.S. commerce. In effect, then, the district court has already expressed its view that the Second Amended Complaint fails to show that it has subject matter jurisdiction (although **[**12]** it erred in so doing, as the next section explains).

B. Subject Matter Jurisdiction over Counts II-XI

With the Second Amended Complaint before us, then, we turn to CBS's argument that it made allegations sufficient to support subject matter jurisdiction. C&W argues in response that the complaint does not adequately allege either a harmful effect upon U.S. commerce or a relevant market, and that in any event it does not provide facts to support the allegations made. In our review of the complaint, which is *de novo,* we assume the truth of the allegations made and construe them favorably to the plaintiff. *See Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*.

CBS asserts that the district court has jurisdiction under the Sherman Act, *see* 15 U.S.C. § 1-2, and the Foreign Trade Antitrust Improvements Act of 1982, *see 15 U.S.C. § 6a*. Although the Sherman Act prohibits monopolization and attempted monopolization of any line of interstate or foreign commerce, ***HN2***[] *section 1* of the FTAIA makes the Sherman Act inapplicable to

> conduct involving trade or commerce (other than **[**13]** import trade or import commerce) with foreign nations unless--
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
> > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.

15 U.S.C. § 6a. A proviso establishes that if the FTAIA applies to conduct involving foreign trade based solely upon clause (B) quoted above, then the offender is subject to the Sherman Act "only for injury to export business in the United States." *Id.*

When a plaintiff brings a claim of attempted monopolization or conspiracy to monopolize in a market involving foreign trade, therefore, a court has subject matter jurisdiction only to the extent that the complaint alleges that the challenged conduct had a " 'direct, substantial, and reasonably foreseeable effect' on domestic or import commerce, or the export opportunities of a domestic person" (as required by the FTAIA). H.R. Rep. No. 97-686, at 3 (1982). The precise effect **[**14]** of the FTAIA is yet to be determined. See *Hartford Fire Insurance Co. v. California, 509 U.S. 764, 797* & n.23, *125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)* (It is "unclear … whether the [FTAIA's] 'direct, substantial, and reasonably foreseeable effect' standard amends … or merely codifies … [caselaw holding that the Sherman Act] applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"). It does seem clear, however, that we should use the standard set forth in the FTAIA to analyze whether conduct related to international trade has had an effect of the nature and magnitude necessary to provide us with subject matter jurisdiction. *See* H.R. Rep. No. 97-686, at 5. The complaint meets this standard.

For convenience we discuss first C&W's argument that CBS failed to allege specific facts to support the court's jurisdiction over CBS's claims. In the notice pleading system established by ***HN3***[] *Federal Rule of **[*1086]** Civil Procedure 8*, all that is required is a " 'short and plain statement of the claim' that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. **[**15]** " *Sinclair v. Kleindienst, 229 U.S. App. D.C. 13, 711 F.2d 291, 293 (D.C. Cir. 1983)*. A complaint satisfies this criterion if it is not "so vague or ambiguous that a party cannot reasonably be expected to frame a responsive pleading." *F.R.Civ.P. 12(e)*. In other words, a plaintiff need not allege all the facts necessary to prove its claim so long as it provides enough factual information to make clear the substance of that claim. *See* *Atchinson v. District of Columbia, 315 U.S. App. D.C. 318, 73 F.3d 418, 421-22 (1996)*.

HN4[] Because a plaintiff is not required to plead facts sufficient to prove its allegations, a federal court should not dismiss a complaint either for lack of subject matter jurisdiction or for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Kleindienst, 711 F.2d at 293* (quoting *Conley v. Gibson, 355 U.S. at 45-46*). After all, the issue presented by a motion to dismiss is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. **[**16]** " *Scheuer v. Rhodes, 416 U.S. at 236*.

The complaint filed by CBS is sufficient to survive a motion to dismiss, therefore, so long as it makes allegations that, if proven, would show that the challenged conduct had a "direct, substantial, and reasonably foreseeable effect" upon an aspect of commerce to which the Sherman Act, as qualified by the FTAIA, applies. The complaint does make such allegations. First, CBS alleges (PP 9-14) that there is a significant market for the sale of English-language radio advertising in the Eastern Caribbean, which includes Puerto Rico and the U.S. Virgin Islands. CBS also alleges (PP 9, 15-19, 48A) that many companies based in the United States are customers, and that CCC and CBS are competing sellers, in that market. Finally, CBS alleges (PP 20-26) that there are substantial barriers to entry into the market: both a broadcast license and a large capital investment are necessary; in addition, CCC has "locked up" the available advertising contracts. Under the circumstances it is quite plausible that the plaintiffs' alleged conduct would have a significant effect upon U.S. commerce.

CCC argues that because CBS is "merely [a] foreign **[**17]** supplier[]" it cannot establish the court's jurisdiction by " 'piggy-backing' on the alleged injury to U.S. purchasers of media advertising." CCC relies upon a district court holding that a foreign company had to show injury within the United States before the court would have subject matter jurisdiction under the Sherman Act, and that such a company could not do so merely by showing injury to an unrelated American firm. *See The 'In'* *Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494 (M.D.N.C. 1987)*. Even if we were bound by that court's holding, we would not think the case pertinent here because the foreign firm in that case did not sell to American consumers; rather, it attempted to show that the injury it incurred abroad ultimately injured American exporters, from which it purchased fewer goods for resale overseas. The district court held that, because the plaintiff's claimed injury was not an "injury to export business in the United States" within the meaning of the proviso to the FTAIA, the foreign firm did not have standing. Here, however, the alleged injury is to advertisers in the United States. Consequently, clause 1(A) rather than clause **[**18]** 1(B) of the FTAIA governs, and the location of the suppliers is not relevant to whether the plaintiff has alleged an effect upon U.S. domestic or import commerce. *See* Hartford, 509 U.S. at 796 (holding court had subject matter jurisdiction where plaintiff alleged conspiracy among foreign reinsurance companies had affected U.S. purchasers of reinsurance).

We now turn to C&W's primary argument, namely, that the complaint fails to allege either harm to U.S. commerce or a relevant market. We find neither part of this argument persuasive. The complaint both describes a relevant market--the market for English-language radio broadcast advertising in the Eastern Caribbean--and alleges that CCC and C&W engaged in intentional conduct that gave them "monopoly **[*1087]** power" and injured consumers in this market. (PP 12-14) According to CBS, CCC and C&W misrepresented to advertisers that they could reach the "entire Caribbean" over CCC's station--which in fact reached only a fraction of that area--and therefore that they did not need to advertise with CBS as well. (PP 30-34) The complaint also alleges that CCC and C&W made sham technical objections to CBS's application for **[**19]** a broadcast license for the purpose of defeating that application and thereby ensuring that CCC would continue to enjoy a monopoly. (PP 35-40)

Contrary to the arguments of C&W, such allegations do support the district court's subject matter jurisdiction. ***HN5***[] A would-be monopolist or member of a conspiracy to monopolize comes within the condemnation of the Sherman Act when it engages in "anticompetitive conduct." *See, e.g.,* *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)* (holding elements of attempted monopolization claim under § 2 of Sherman Act are intent, anticompetitive conduct, and dangerous probability of success in a relevant market). "Anticompetitive conduct" can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties. It is a fair inference from the case law, however, that the allegations made here--namely, that the defendants made fraudulent misrepresentations to advertisers and sham objections to a government licensing agency in order to protect their monopoly--bring the defendants' conduct well within that concept. *See,* **[**20]** *e.g.,* *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)* (holding that complaint alleging conspiracy to misuse state legal and regulatory processes in order to deprive competitors of meaningful access stated claim under Clayton Act); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 15 L. Ed. 2d 247, 86 S. Ct. 347*, (1965) (holding that complaint alleging defendant attempted to monopolize by threatening to and pursuing legal enforcement of patent procured by fraud on Patent Office stated claim under § 2 of Sherman Act).

Moreover, the complaint alleges specifically that U.S. customers in the relevant market suffered antitrust injury, to wit, they paid excessive prices for advertising because of the unlawful actions of CCC and C&W. (P 48A) It also alleges that CBS was and remains foreclosed from selling advertising to many of those U.S. companies that had purchased advertising time from CCC. (P 47)

Paying higher prices is certainly a direct harm to customers. The allegations that CBS was delayed in obtaining its broadcast license and was foreclosed from soliciting **[**21]** many potential advertisers also describe actual, albeit indirect, harms to customers. In this context it appears that antitrust injury to CBS is ultimately a harm to U.S. purchasers of radio advertising. By keeping CBS out of the market, CCC and C&W denied such purchasers the benefit of competition.

Construing the complaint liberally, then, we understand it to say that CCC and C&W intentionally and successfully, by means of fraud and deceit, secured monopoly power in the relevant market, used this power to raise prices, and thereby hurt U.S. advertisers. Indeed, C&W virtually admits that CBS's complaint alleges antitrust injury when it argues that "CBS described markets so narrowly configured that any commercial harm to CBS [is], *ipso facto,* harm to competition" in those markets and hence has a substantial effect upon U.S. commerce. Be that as it may, we hold that CBS made sufficient allegations to support the subject matter jurisdiction of the district court.

C. The Essential Facilities Claim: Count XI

C&W owned microwave facilities described by CBS as "unique" in the Eastern Caribbean (P 42) and published the only telephone directory in the British Virgin Islands. **[**22]** (P 41) C&W also owned a 27% stake in CCC's radio station and was planning a joint venture with CCC to provide paging services. CBS alleged that C & W denied CBS access to its microwave facilities and directory, and that both such facilities were essential for it to compete with CCC's Radio GEM.

[*1088] ***HN6***[] A monopolist has no general duty to share his essential facility, although there are certain circumstances in which he must do so. *See* Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** 815-864 (1992 Supp.) (proposing narrow interpretation of essential facilities doctrine). In the special circumstances where there may be such an obligation, the elements of an antitrust claim for denial of access to an essential facility are (1) a monopolist who competes with the plaintiff controls an essential facility, (2) the plaintiff cannot duplicate that facility, (3) the monopolist denied the plaintiffs use of the facility, and (4) the monopolist could feasibly have granted the plaintiff use of the facility. *See* *MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983)*; Philip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles,* **[**23]** 58 Antitrust L.J. 841, 853 n.21 (1989) (noting that "*MCI Communications* … is probably correct [in holding that] a monopolist must, when feasible, make its essential facility available to a competitor who is unable to duplicate it"). Because the appellees have not argued to the contrary, we assume that the essential facilities doctrine is applicable to their circumstances.

The district court held that CBS had failed adequately to allege an essential facilities claim for two reasons: first, CBS did not allege that it competed with C&W, and second, CBS did not allege any specific instance in which C&W had denied CBS access to a particular facility. We uphold the district court on the former ground and therefore do not reach the latter.

CCC does not dispute that it competed with CBS, but because--as the district court held and we affirm--the court does not have personal jurisdiction over CCC, *see* Part II.D below, the allegations against that company cannot support the essential facilities claim. As for C&W, the district court held that its 27% ownership interest in CCC did not make C&W itself a competitor of CBS. CBS argues that whether the parties are "in **[**24]** fact" competitors should not have been resolved on a motion to dismiss the complaint, which "alleged that C&W acted for the benefit of CCC in denying plaintiffs access to their microwave and long-distance facilities." According to CBS, "C&W's equity interest in CCC and its corresponding financial stake in the exclusive provision of broadcasting services by CCC …. raise a factual issue as to whether C&W and plaintiffs [are] competitors." C&W counters that CBS alleges no facts even hinting that C&W might itself be a competitor of CBS except for C&W's 27% investment in CCC, and that as a matter of law such an investment alone cannot vicariously make C&W a competitor of CBS's.

As the district court recognized, ***HN7***[] one company's minority ownership interest in another company is not sufficient by itself to make the owner a competitor, for purposes of the antitrust laws, of the subsidiary's rivals. To be a competitor at the level of the subsidiary, the parent must have substantial control over the affairs and policies of the subsidiary. *See, e.g.,* *Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1205 (2d Cir. 1978)* (finding no violation of *§ 8* of Clayton **[**25]** Act where interlocked parent corporations had competing subsidiaries, but reserving issue whether statute would cover "parent corporation that closely controls and dictates the policies of its subsidiary"); *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 658 F. Supp. 1061, 1084-85 (D.Del. 1987)* (holding that parent is liable for acts of subsidiary under agency theory only if parent "dominates" subsidiary; parent of wholly-owned subsidiary that had seats on board, took part in financing, and approved major policy decisions was not liable because parent did not have day-to-day control); *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc., 1988 Del. Super. LEXIS 116, 1988 WL 32012 (Del. Super. 1988)* (citing cases holding day-to-day control required before court will pierce corporate veil or find parent liable); *Outokumpu Engineering Enterprises, Inc. v. Kvaerner Enviropower, Inc., 685 A.2d 724, 729 n.21 (Del. Super. 1996)* (noting test for parent's liability for act of subsidiary is whether parent had "exclusive domination and control to the point that the subsidiary no longer has legal or independent significance of its own"); *cf.* *Tiger Trash v. Browning Ferris Indus., Inc., 560 F.2d 818 (7th Cir. 1977)* **[**26]** (holding that in order to prevent parent from carrying out anticompetitive activity through subsidiary, test for venue is **[*1089]** whether parent's control over subsidiary caused parent to "transact business" in state within venue provision of Clayton Act); *Phone Directories Co. v. Contel Corp., 786 F. Supp. 930 (D.Utah 1992)* (test for venue under Clayton Act is whether parent had sufficient control to influence and control acts of subsidiary of type that might violate antitrust laws); *cf. also* *United States v. USX Corp., 68 F.3d 811, 823 n.23 (3d Cir. 1995)* (citing cases holding, variously, that parent is liable under CERCLA for actions of a subsidiary or controlled company when parent has actual and pervasive control or, at least, authority to control subsidiary's decisions leading to CERCLA violation.)

CBS does not allege that C&W had such control. The complaint states only that C&W and CCC were involved in a "joint project"; they had "engaged in discussions and negotiations regarding their planned relationship"; and "a C&W representative was a member of CCC's Board of Directors." (P 44) Only the last point indicates that C&W had any influence **[**27]** in the affairs of CCC, and even it does not suggest the type of day-to-day control we think necessary to identify an investor so closely with the company in which it has invested as to make it a competitor of that company's rivals.

In sum, CBS does not allege that C&W had substantial control over CCC. Therefore, Count XI of the complaint fails to state a claim against C&W for denial of access to an essential facility.

D. Jurisdictional Discovery and Dismissal with Prejudice

CBS's last two points on appeal go to rulings of the district court relevant only to CBS's action against CCC. CBS asserts that the district court erroneously denied CBS's request for jurisdictional discovery and dismissed its claim with rather than without prejudice.

1. Jurisdictional discovery

CBS argues that the district court abused its discretion in dismissing its case against CCC for lack of personal jurisdiction without giving CBS an opportunity to discover evidence that would support such jurisdiction. *See, e.g.,* *El-Fadl v. Central Bank of Jordan, 316 U.S. App. D.C. 86, 75 F.3d 668, 675-76 (D.C. Cir. 1996)*. CCC defends the district court's denial of discovery on the **[**28]** ground that CBS had failed to dispute CCC's affidavit that it did not solicit business in the District of Columbia and had never made any telephone calls into the District. Because there was no indication before the court that CCC had any contacts at all with the District of Columbia, let alone the minimum contacts necessary for the court, consonant with due process, to exercise personal jurisdiction over it, CCC argues that any discovery would have been inappropriate.

We hold that the district court did not abuse its discretion in denying CBS jurisdictional discovery. The District's longarm statute is as far-reaching as due process allows, *see* *Hummel v. Koehler, 458 A.2d 1187, 1190 (D.C. App. 1983)*, meaning that only minimum contacts with the District are necessary to sustain jurisdiction here. *See* *International Shoe Co. v. State of Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*; Wright & Miller, § 1067-1067.1 (1988 & Supp. 1997). CBS, however, has alleged absolutely nothing, upon either information or belief, to indicate that a court in the District of Columbia might constitutionally assert jurisdiction over CCC, which is incorporated **[**29]** in Montserrat, British West Indies, and has its U.S. operations in Wisconsin. The closest the complaint comes is to say that "CCC sells … advertising time, primarily to U.S. companies," and that CCC "made sales calls to U.S. companies nationally" and "disseminated … brochures by hand and by the U.S. mail." (PP 8, 33) At the oral argument of this appeal counsel for CBS represented that CCC sold advertising to more than 500 companies and argued that the odds were therefore good that it had solicited at least one company located in the District; but CBS did not make even this cursory (and by no means self-evident) allegation before the district court. These statements are too bare to support even the inference that CCC solicited any companies located in the District of Columbia, much less that it actually did any business in the District--and minimal solicitation does not **[*1090]** generally support jurisdiction anyway. *See Volkswagen de Mexico v. Germanischer Lloyd, 768 F. Supp. 1023 (S.D.N.Y. 1991)* (solicitation of business through advertisements in publications distributed in district does not support jurisdiction under N.Y. long-arm statute); *see also* **[**30]** *Gatewood v. Fiat, S.p.A., 199 U.S. App. D.C. 238, 617 F.2d 820 (D.C. Cir. 1980)* (solicitation of business must be "regular" in order to support jurisdiction); *McFarlane v. Esquire Magazine, 316 U.S. App. D.C. 35, 74 F.3d 1296 (D.C. Cir. 1996)* (writing article for national publication obtainable in D.C. did not subject writer to personal jurisdiction in District). *But see* *United States Golf Ass'n v. U.S. Amateur Golf Ass'n, 690 F. Supp. 317 (D.C.N.J. 1988)* (direct mail solicitation in New Jersey confers personal jurisdiction). In light of CCC's uncontested affidavit, therefore, the court was justified in denying further discovery.

CBS argues that it could not have made more specific allegations without jurisdictional discovery and that it never had the opportunity to take such discovery. Further, CBS points to cases in this circuit suggesting that a district court abuses its discretion when it dismisses a case for lack of personal jurisdiction before the plaintiff has had an opportunity for jurisdictional discovery. *See, e.g.,* Edmond v. United States Postal Serv. Gen. Counsel, 292 U.S. App. D.C. 240, 949 F.2d 415 (D.C. Cir. 1991). **[**31]** As CCC rejoins, however, in order to get jurisdictional discovery a plaintiff must have at least a good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant. *See, e.g.,* Hansen v. Neumueller GmbH, 163 F.R.D. 471, 476 (D.Del. 1995) (concluding, after analysis of Rules 26 and 8, that plaintiff who responded to defendant's affidavit with "a complete absence of jurisdictional facts" had not made threshold showing necessary to get jurisdictional discovery); *Poe v. Babcock Int'l, plc,* 662 F. Supp. 4, 7 (M.D. Pa. 1985) (holding that because "plaintiff has met defendants' affidavit evidence with mere speculation, plaintiff's request for … [jurisdictional] discovery … must be denied"); *see also* Ellis v. Fortune Seas, Ltd, 175 F.R.D. 308, 312 (S.D. Ind. 1997) (citing cases and holding "it is reasonable for a court … to expect the plaintiff to show a colorable basis for jurisdiction before subjecting the defendant to intrusive and burdensome discovery"); International Terminal Operating Co., Inc., v. Skibs A/S Hidlefjord, 63 F.R.D. 85 (S.D.N.Y. 1973) **[**32]** (holding jurisdictional discovery not appropriate when plaintiff merely hopes to find statements in defendant's affidavit not accurate but has not made counter-allegations in its own affidavit).

To be sure, CBS had no obligation to make specific allegations relevant to personal jurisdiction in its complaint because lack of personal jurisdiction is an affirmative defense and so must be raised by the defendant. *See* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982); Fed. R. Civ. P. 12(b)(2). CBS's obligation to make some allegations relating to personal jurisdiction arose, therefore, only after CCC had filed its motion to dismiss and supporting affidavit. Even in its response to that motion, however, CBS did not allege any facts remotely suggesting that CCC had any connection to the District of Columbia.

On appeal CBS belatedly offers two facts that it claims support the inference that the district court has personal jurisdiction over the defendant: CCC advertises in *Caribbean Week,* "a publication which has Washington, D.C. subscribers," and maintains a Web site accessible to residents **[**33]** of the District (as well as the rest of the world, we assume). Although these facts were not timely pled, CBS argues that the court should take cognizance of them precisely because CBS did not have the benefit of jurisdictional discovery. To do so, however, would be to retry the case upon appeal and then to fault the district court for reaching a different result based upon the different allegations before it. Good order and common sense protest. Therefore, without intimating anything about the legal significance, if any, of CBS's belated factual proffer, we conclude that the district court did not abuse its discretion when it dismissed CBS's claim against CCC without first granting CBS's request for jurisdictional discovery.

2. Dismissal of Count I with prejudice

Although the district court did not state whether its dismissal of Count I (for **[*1091]** lack of personal jurisdiction over CCC) was with or without prejudice, both parties assume on appeal that, like the court's earlier dismissal of Counts II-XI, it was with prejudice. CBS sees this as an abuse of discretion; CCC denies the same. Neither party is correct because their shared assumption is mistaken.

While **[**34]** an involuntary dismissal ordinarily "operates as an adjudication upon the merits" unless the court "otherwise specifies," a dismissal for lack of jurisdiction is specifically exempted from this general rule. Fed.R.Civ.P. 41(b); *see also* Wright & Miller, § 2373 at 406 (1995) (noting that "dismissals that do not reach the merits because of a lack of jurisdiction … must be considered to be without prejudice"); Costello v. United States, 365 U.S. 265, 285, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961) (noting that Rule 41(b) provides that dismissal is adjudication on merits unless for lack of personal jurisdiction, among other reasons). In rare circumstances, a district court may use its inherent power to dismiss with prejudice (as a sanction for misconduct) even a case over which it lacks jurisdiction, and its decision to do so is reviewed for abuse of discretion. *See* Wright & Miller, § 2369 (1995 & Supp. 1997). We cannot infer from the district court's mere silence, however, that it intended to impose such a drastic sanction; nor did the district court advert to any misconduct for which it might have intended such a sanction. We therefore conclude that dismissal **[**35]** of Count I of the complaint was without prejudice.

III. Conclusion

The district court erred in dismissing Counts II-XI (the attempted monopolization claims) for lack of subject matter jurisdiction, but correctly dismissed Count XI (the essential facilities claim) for failure to state a claim and Count I (the Lanham Act claim) for lack of personal jurisdiction over CCC. The district court did not abuse its discretion in denying jurisdictional discovery before dismissing Count I, which it did without prejudice. The case is remanded to the district court for further proceedings consistent with this opinion.

So ordered.

FTC v. MTK Mktg.

United States Court of Appeals for the Ninth Circuit

June 5, 1998, Argued, Submitted, Pasadena, California ; July 20, 1998, Filed

No. 97-55280

Reporter

149 F.3d 1036 *; 1998 U.S. App. LEXIS 16426 **; 1998-2 Trade Cas. (CCH) P72,223; 98 Daily Journal DAR 7853

FEDERAL TRADE COMMISSION, Plaintiff-Appellant, v. MTK MARKETING, INC., d/b/a District Supply Center and Central Supply Center; NATIONWIDE TRANSPORT, INC., d/b/a District Supply Center, COPY RESOURCE CENTER, INC., d/b/a District Supply Center and Central Supply Center; INTEL MARKETING OF CALIFORNIA, INC., d/b/a District Supply Center; TELCO MARKETING, INC., d/b/a Central Supply Center; PARAGON SHIPPING, INC., d/b/a National Supply Center; ACACIA PROPERTIES, INC., d/b/a National Supply Center; SAM JUNE; ERICK GRAZIANO, a/k/a Eric Knight; DONALD N. RYAN; DONNA GREEN; COLLEEN MCCULLOUGH; JEANINE DORA; JAMES REM, d/b/a Central Supply Center and JR Associates, Defendants-Appellees.

Subsequent History: [1]** Certiorari Denied February 22, 1999, Reported at: *1999 U.S. LEXIS 1044*.

Prior History: Appeal from the United States District Court for the Central District of California. D.C. No. CV-96-00230-LHM. Linda H. McLaughlin, District Judge, Presiding.

Disposition: REVERSED AND REMANDED.

Core Terms

telephonic, consumer, seller, redress, federal government, restitution

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Civil Procedure > Judgments > Enforcement & Execution > General Overview

HN1[] **Consumer Protection, Deceptive & Unfair Trade Practices**

The Act provides that bonds may be enforced by the Attorney General, district attorney, city attorney, or any other person who obtained a judgment for restitution against the seller. § 17511.12(c)(2).

Governments > Legislation > Interpretation

HN2[] **Legislation, Interpretation**

The doctrine of ejusdem generis should not be applied to defeat legislative intent.

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Jeffrey D. Horowitz, Andrew B. Holmes, Dubois, Billig, Loughlin, Conaty & Weisman, Los Angeles, California, for the defendants-appellees.

Judges: Before: Betty B. Fletcher, Dorothy W. Nelson, and Barry G. Silverman, Circuit Judges. Opinion by Judge D.W. Nelson.

Opinion by: DOROTHY W. NELSON

Opinion

D.W. NELSON, Circuit Judge:

To resolve the instant appeal, we must determine whether the Federal Trade Commission ("FTC") is a "person" entitled to enforce liability on a surety bond. We conclude that it is.

FACTUAL AND PROCEDURAL BACKGROUND

This case calls upon us to interpret Article 1.4 of California's Telephone Sellers Act ("Act"), which regulates the practices of telephone solicitors. *Cal. Bus. & Prof. Code §§ 17511-17511.12.* The Act provides:

> It is the intent of the Legislature in enacting this article to (1) provide each prospective telephonic sales purchaser with information necessary to make an intelligent decision regarding the offer made, (2) safeguard the public against deceit and financial hardship, (3) insure, foster, and encourage competition and fair dealings among telephonic sellers by requiring adequate disclosure, and (4) prohibit representations that tend to mislead. This article shall be construed liberally in order to achieve these purposes.

§ 17511(b).

The Act requires all telephonic sellers to maintain a surety bond in the amount of $ 100,000 "for the benefit of any person suffering pecuniary loss in a transaction commenced during the period of bond coverage with a telephonic seller who violated" the Act. *§ 17511.12(a)*. The bond is to "include coverage for the payment of the portion of any judgment, including a judgment entered pursuant to *Section 17203* or *17535*, that provides for restitution to any person suffering pecuniary **[**2]** loss, notwithstanding whether the surety is joined or served in the action or proceeding." Id.

As telephonic sellers engaged in telemarketing in California MTK Marketing, Inc. ("MTK") and Copy Resource Center, Inc. ("CRC") were required to post a bond pursuant to *section 17511.12*. On November 13, 1992, Defendant Erick Graziano purchased from the Ranger Insurance Company a $ 50,000 bond, which was later increased to $ 100,000. Frontier substituted as surety on November 14, 1994, and the bond was amended on July 3, 1995, to cover Graziano, CRC, and MTK (collectively, "bondholders").

The FTC initiated the underlying action on March 7, 1996, by filing a complaint seeking injunctive relief and redress for consumers against seven corporate defendants and eight individual defendants (collectively, "defendants"), including the bondholders. The complaint alleged that the defendants had been involved in a variety of unfair and deceptive acts and practices in violation of Section 5 of the FTC Act, *15 U.S.C. § 45*, in connection with efforts to sell photocopier toner to the customers of other suppliers. The FTC submitted evidence showing that defendants had defrauded consumers **[**3]** of millions of dollars.

On August 5, 1996, the court entered stipulated final judgments against all eight individual defendants and against one corporate defendant, Intel Marketing of California. The court granted injunctive relief, and the defendants agreed to pay consumer redress. On September 18, 1996, a default judgment was entered against the remaining six corporate defendants, who were permanently enjoined from engaging in any telemarketing activities. In addition, MTK was ordered to pay consumer redress in the amount of $ 1,335,093. The remaining five corporations also were required to pay redress, totaling over $ 13 million.

Because the FTC had obtained a judgment in the underlying action for approximately $ 1.8 million, and because CRC and MTK had assets amounting to less than $ 131,000, the FTC filed a motion to enforce liability on the bond. Frontier opposed the FTC's motion on a variety of grounds. On December 6, 1996, the district court entered a minute order holding that, because the FTC was not a "person" under the Act, it could not enforce liability on the bond. The district court denied the FTC's motion "without prejudice to a proper party bringing a separate action **[**4]** in a court with proper jurisdiction." The FTC timely appeals. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we reverse and remand.

STANDARD OF REVIEW

The district court's decision involves the interpretation of state law, which we review de novo. *Mastro v. Witt, 39 F.3d 238, 241 (9th Cir. 1994)*.

DISCUSSION

I. The FTC is a proper party to enforce liability on the bond.

HN1[] The Act provides that bonds may be enforced by "the Attorney General, district attorney, city attorney, or any other person who obtained a judgment for restitution against the seller . . . ." *§ 17511.12(c)(2)*. The FTC argues that the definition of "person" should be read expansively, thereby conferring standing upon the FTC to enforce liability. Based upon our review of the applicable case law, statutory language, and legislative history, we agree.

[*1039] *A. Case law*

Supreme Court precedent does not support the notion that a governmental agency can never be a "person." In *United States v. Cooper Corp., 312 U.S. 600, 85 L. Ed. 1071, 61 S. Ct. 742 (1941)*, the Supreme Court was called upon to interpret the meaning of **[**5]** "person" under the Sherman Act, which defined "person" to include corporations and associations. To resolve the issue, the Court considered "the purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute." *Id. at 605*. The Court concluded that under ***antitrust law***, a federal governmental agency could not qualify as a "person" entitled to treble damages. *Id. at 606*. The very next year, however, the Court applied the same analytical framework to hold that a state could constitute a "person" entitled to collect treble damages under the Sherman Act. *See Georgia v. Evans, 316 U.S. 159, 162, 86 L. Ed. 1346, 62 S. Ct. 972 (1942)*. More recently, in *Pfizer, Inc. v. Government of India, 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978)*, the Court noted that the definition of "person" was "inclusive rather than exclusive," *id. at 312 n.9*, and concluded that the State of India was a person under the Clayton Act, *id. at 313*.

Applying the analysis outlined in *Cooper,* we have held that under *section 1755 of the California Unemployment* ***[**6]*** *Insurance Code*, the postal service is a "person," on whom the Employment Development Department could serve a notice of levy, despite the fact that section 1758 of the insurance code defines "person" to "include[] this State and any county, city and county, municipality, district or other political subdivision thereof." *Employment Develop. Dep't. v. United States Postal Serv., 698 F.2d 1029, 1032-33 (9th Cir. 1983)* (per curiam) *rev'd on other grounds in Franchise Tax Bd. v. United States Postal Serv., 467 U.S. 512, 81 L. Ed. 2d 446, 104 S. Ct. 2549 (1984)*. We reasoned that because there was no requirement that the statute explicitly include the United States or its agencies within the definition of "person," we should not interpret the statute in a manner that treated the federal government differently from the state government absent some indication of legislative intent. *Id.*; *see also People v. Crow, 6 Cal. 4th 952, 864 P.2d 80, 84-85 (Cal. 1993)* (holding that defrauded state government agency was a "person" entitled to seek restitution from wrongdoer); *City of Los Angeles v. City of San Fernando, 14*

Cal. 3d 199, 537 P.2d 1250, 1306-07, 123 Cal. Rptr. 1 (Cal. 1975) **[**7]** (holding that statute prohibiting possession of city property "by any person, firm or corporation" could preclude possession by a government agency); *Flournoy v. State, 57 Cal. 2d 497, 370 P.2d 331, 332, 20 Cal. Rptr. 627 (Cal. 1962)* (applying to a state government a wrongful death statute attaching liability to any 'person' responsible for another's death); *Gomes v. County of Mendocino, 37 Cal. App. 4th 977, 44 Cal. Rptr. 2d 93, 96 (Cal. Ct. App. 1995)* (statute covering "a person, firm, corporation, partnership or association" included federal government). Thus, although the case at bar presents an issue of first impression, ample precedent supports the position that the term "person" may include a governmental agency.

B. Statutory Language

The Act states explicitly that "It is the intent of the Legislature in enacting this article to . . . safeguard the public against deceit . . . This article shall be construed liberally in order to achieve [this] purpose[]." *§ 17511(b)*. We conclude that treating the FTC as a person would be consistent with the Act's purpose by furthering the goal of consumer redress. Indeed, if the FTC were not **[**8]** able to enforce liability, it is unclear whether the bond would serve its intended purpose of consumer protection: Neither the State of California nor any individual consumer has sought enforcement. As such, an interpretation of "person" precluding FTC enforcement would provide Frontier with a windfall and undermine the purpose of the Act. Moreover, evidence in the record indicates that the Attorney General of California believes that FTC enforcement would serve the Act's purpose; his interpretation is entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)* (holding that considerable weight should be accorded executive department's **[*1040]** construction of statutory scheme it is entrusted to administer).

Frontier does not dispute that the Act was intended to protect consumers. Rather, it argues that the Act was intended to benefit only the citizens of California and, consequently, may not be enforced by the federal government to provide redress for out-of-state residents. Frontier's position is not persuasive. Although the bond must be written "in favor of the **[**9]** State of California," *see § 17511.12(a)*, this drafting requirement does not restrict who may enforce the bond. Rather, the bond exists "for the benefit of *any* person suffering pecuniary loss in a transaction commenced during the period of bond coverage with a telephonic seller who violated" the Act. *§ 17511.12(a)* (emphasis added). Accordingly, we reject Frontier's *ejusdem generis* argument, because it is settled law that ***HN2***[] the doctrine of *ejusdem generis* should not be applied to defeat legislative intent. *See, e.g., Leslie Salt Co. v. United States, 896 F.2d 354, 359 (9th Cir. 1990)*; *Walker v. Meehan, 194 Cal. App. 3d 1290, 240 Cal. Rptr. 171, 175 (Cal. Ct. App. 1987)*.

Frontier insists that *section 17511.2(d)* explicitly limits the parties who may enforce liability on the bond. It is true that section *17511.2(d)* provides that "'Person' includes an individual, firm, association, corporation, partnership, joint venture, or any other business entity." Nonetheless, Frontier's argument is without merit because "in terms of statutory construction, use of the word 'includes' does not connote limitation. In definitive provisions of statutes **[**10]** and other writings, 'include' is frequently, if not generally used as a word of extension or enlargement rather than as one of limitation or enumeration." *In re Yochum, 89 F.3d 661, 668 (9th Cir. 1996)* (citations and internal quotations omitted). As such, the Act merely provides examples of who may enforce the bond.

C. Legislative history

Legislative history also supports the position that the FTC may enforce liability on the bond. Prior to 1993, telephonic sellers were required to post a $ 50,000 bond, which could be enforced only by the Attorney General, a district attorney, or a city attorney. In 1993, the Act was amended to increase the bond requirement to $ 100,000 and to permit enforcement actions by "any other person who obtained a judgment for restitution against the seller." The Legislature indicated that the change was intended to "expand the situations under which, the parties to whom and the procedures whereby, the bond may be reached for payment of consumer losses or for violations of the law's requirements." Senate Rules Committee Report for California Assembly Bill No. 1421 (1993). We conclude that permitting the FTC to enforce the bond will **[**11]** expand opportunities for redress, as well as the group of people entitled to benefit from the bond.

II. Allowing the FTC to enforce the bond would not violate the Tenth Amendment.

Frontier argues that allowing the federal government to use legislation enacted by the State of California to accomplish its goals violates the *Tenth Amendment*. Frontier cites two cases; neither supports its argument, as both cases involve whether treating a governmental entity as a person would diminish its own sovereignty. See *Community Memorial Hosp. of San Buena Ventura v. County of Ventura, 49 Cal. App. 4th 527, 56 Cal. Rptr. 2d 732, 739 (Cal. Ct. App. 1996)* (allowing county to be sued would infringe on county's sovereignty); *Churchill v. Parnell, 170 Cal. App. 3d 1094, 216 Cal. Rptr. 876, 878-79 (Cal. Ct. App. 1985)* (including state in definition of person would infringe on state's sovereignty by restricting its ability to protect fish and wildlife). Here, allowing FTC enforcement would not compromise the State of California's sovereignty in any way. In fact, FTC enforcement would assist the State of California in furthering the policy interests the Act was **[**12]** designed to serve. Moreover, although the *Tenth Amendment* precludes the federal government from commandeering a state by forcing it to enact or enforce a federal regulatory program, *New York v. United States, 505 U.S. 144, 161, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)*, no such conduct occurred here.

[*1041] *III. The FTC has the necessary statutory authority to seek enforcement of the judgment.*

Finally, Frontier suggests that the FTC can take action to collect a judgment only if the authority is specifically provided by statute. This argument is without merit. The Ninth Circuit has held that "the authority granted by [the Act] is not limited to the power to issue an injunction; rather, it includes the authority to grant any ancillary relief necessary to accomplish complete justice," including the power to "order restitution." *FTC v. Pantron I, Corp., 33 F.3d 1088, 1102 (9th Cir. 1994)* (citations and internal quotations omitted). We see no reason why the FTC should not be permitted to grant ancillary relief by enforcing liability on the bond.

CONCLUSION

For the reasons stated above, we find that the FTC is a "person" within the **[**13]** meaning of the Act.

REVERSED AND REMANDED.

Blue Cross & Blue Shield United v. Marshfield Clinic

United States Court of Appeals for the Seventh Circuit

June 5, 1998, Argued ; July 30, 1998, Decided

Nos. 97-3219, 97-3847

Reporter
152 F.3d 588 *; 1998 U.S. App. LEXIS 17601 **; 1998-2 Trade Cas. (CCH) P72,220

Blue Cross and Blue Shield United of Wisconsin and Compcare Health Services Insurance Corporation, Plaintiffs-Appellants, v. Marshfield Clinic, et al., Defendants-Appellees.

Subsequent History: [1]** Certiorari Denied January 11, 1999, Reported at: 1999 U.S. LEXIS 168.

Prior History: Appeals from the United States District Court for the Western District of Wisconsin. No. 94-C-0137-C. Barbara B. Crabb, Judge.

Disposition: Affirmed in Part, Vacated in Part, and Remanded.

Core Terms

Clinic, damages, markets, prices, injunction, estimate, patient, Clayton Act, conspiracy, costs, attorney's fees, district judge, price charged, market share, antitrust, customers, providers, output, competitors, percent

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN1[] **Remedies, Damages**

Inadequacy of a plaintiff's remedy at law, that is, his damages remedy, is normally a prerequisite to the entry of an injunction. And a common reason why the damages remedy is inadequate is that the plaintiff is unable to quantify the harm that the defendant's practice has inflicted or will inflict on him.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN2[] **Remedies, Damages**

A private suit under the antitrust laws is a suit seeking relief against a statutory tort, and the principle that there is no tort without an injury is applicable to it. Clayton Act, *15 U.S.C.S. § 15(a)*. But all that this implies, so far as equitable relief is concerned, is that a plaintiff has to prove that he is likely to be harmed by the defendant's wrongful conduct unless that conduct is enjoined. This is clear from the text of the Clayton Act, which, evoking traditional principles of equity, requires proof only of threatened loss or damage. Clayton Act, *15 U.S.C.S. § 26*.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN3[] **Private Actions, Remedies**

Statistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment.

Civil Procedure > Appeals > Record on Appeal

HN4[] **Appeals, Record on Appeal**

The omission to cite a specific item of evidence to an appellate court is ordinarily not a waiver of anything; parties have no obligation to bombard the appellate court with record citations. But it is not clear that a party's approach to calculating damages should be treated as evidence, rather than as theory or argument and hence as waived unless mentioned. And in any event silence about a critical piece of evidence can be and here is eloquent.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN5[] **Summary Judgment, Supporting Materials**

A party can, in resisting summary judgment, rely on his opponent's evidence, theories, or arguments.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

HN6[] **Costs & Attorney Fees, Clayton Act**

The Clayton Act entitles a prevailing plaintiff only to a reasonable attorney's fee. *15 U.S.C.S. §§ 15(a)* and *26*.

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Judges: Before Posner, Chief Judge, and Bauer and Kanne, Circuit Judges.

Opinion by: POSNER

Opinion

[*590] Posner, *Chief Judge.* This is the second round of appeals in an antitrust case brought by a health insurer against a medical clinic. See *65 F.3d 1406 (7th Cir. 1995)*. The defendant, the Marshfield Clinic in rural Wisconsin, is the dominant provider of medical services in the north-central part of that **[**3]** state; indeed, despite its remote location, it is one of the largest medical clinics in the nation, comparable in size to the Mayo and Cleveland clinics. Blue Cross of Wisconsin (together with its HMO) sued the Marshfield Clinic (and its HMO), alleging a variety of antitrust violations centered on the contention that the Clinic had illegally monopolized the provision of certain medical services in its region, enabling it to jack up its prices for those services above competitive levels to the detriment of Blue Cross, which pays the Clinic to treat patients insured by Blue Cross. The plaintiffs won a $ 20 million damages judgment (most of it in favor of Blue Cross's HMO rather than Blue Cross itself) and an injunction. The Clinic appealed, and we threw out all but one of the charges. That was the charge that the Clinic had divided markets with some of its competitors, that is, had agreed with them to keep out of each other's service areas. *Id. at 1415-16*. The **[*591]** evidence in support of this charge was sufficient for us to "conclude that the jury verdict on liability must stand insofar as the charge of a division of markets is concerned," to direct that the **[**4]** district court revise the injunction to confine it to that practice, and to order "a new trial limited to damages for dividing markets." *Id. at 1416. (Neither HMO is involved in the division of markets charge, so we shall not refer to them any more.)* We explained that at the new trial the "burden will be on Blue Cross to show how much less it would have paid the Clinic had the Clinic refrained from that illegal practice." *Id.*

On remand, following additional discovery, the district judge granted summary judgment for the Clinic on the ground that Blue Cross had produced no evidence that it had suffered any injury as a result of the division of markets. *980 F. Supp. 1298 (W.D. Wis. 1997)*. In the same order she ruled that Blue Cross was not entitled to an award of attorneys' fees, since it was not the prevailing party; and later she awarded the Clinic its court costs of some $ 220,000. So this time Blue Cross has appealed. It argues that it is entitled to an injunction even if it cannot prove damages; that it can prove damages; and that it should be adjudged a prevailing plaintiff and hence awarded a reasonable attorney's fee and court costs (see **[**5]** Clayton Act, § 4, *15 U.S.C. § 15(a)*) and not have to pay its opponent's costs.

Blue Cross is clearly right with regard to the injunction. We held when this case was last before us that the jury's finding on liability for dividing up the market with its competitors must be upheld and that Blue Cross was entitled to an injunction against that practice. This holding established the law of the case, binding the district judge on remand and us on this subsequent appeal unless we have good reasons to depart from the previous decision. *Agostini v. Felton, 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997, 2017 (1997)*; *Messenger v. Anderson, 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912)* (Holmes, J.); *Best v. Shell Oil Co., 107 F.3d 544, 546 (7th Cir. 1997)*. We don't. Even though, as we shall see, the district judge was correct that Blue Cross has failed to come up with evidence that would authorize an award of damages for the division of markets, this does not justify withholding an injunction--rather the contrary. ***HN1***[] Inadequacy of a plaintiff's remedy at law, that is, his damages remedy, is normally (and **[**6]** so under section 16 of the Clayton Act, see *15 U.S.C. § 26*, which authorizes an injunction in a private antitrust suit "when and under the same conditions" in which it would be granted by "courts of equity") a prerequisite to the entry of an injunction. *Walgreen Co. v. Sara Creek Property Co., 966 F.2d 273, 274 (7th Cir. 1992)*. And a common reason why the damages remedy is inadequate is that the plaintiff is unable to quantify the harm that the defendant's practice has inflicted or will inflict on him. *Miller v. LeSea Broadcasting, Inc., 87 F.3d 224, 230 (7th Cir. 1996)*; *Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 383 (7th Cir. 1984)*.

The jury found on sufficient evidence that the Marshfield Clinic entered into agreements with competitors to stay out of each other's territories. The purpose was to enable each of the firms, prominently including the Clinic, to charge higher prices to its customers. It is true that a by-product of such an agreement might be to reduce the advertising and other marketing expenses of the conspirators, and the reduction might even be so great that the optimal **[**7]** monopoly price of each of the noncompetitors would be lower than the former competitive price, since a monopolist will charge a lower price the lower his costs are. The agreement would still be illegal; divisions of markets are per se illegal, just like price-fixing agreements, *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)*; but as it would be harmless, there would be no basis for a consumer's seeking an injunction. Indeed, a rational consumer would not seek an injunction that would lead to his having to pay *higher* prices.

Blue Cross was not, however, required to negate the remote possibility that the division of markets was a form of benign cartel (especially since the point was not argued by the defendant). And if this possibility is therefore set to one side, we have a major customer of the Clinic that is likely to **[*592]** have to pay higher prices unless the division of markets is enjoined. It is also possible, of course, that the defendant has abandoned the unlawful practice, perhaps induced to do so by the filing of the lawsuit; and in that event Blue Cross wouldn't need an injunction. But this possibility **[**8]** would not justify the withholding of the injunction without a degree of proof (of abandonment with no likelihood of resumption), see, e.g., *United States v. Oregon State Medical Society, 343 U.S. 326, 333, 96 L. Ed. 978, 72 S. Ct. 690 (1952)*; *Wilk v. American Medical Ass'n, 895 F.2d 352, 367 (7th Cir. 1990)*, that the Clinic has not attempted.

What is true and misled the district judge is the principle that there is no tort without an injury. E.g., *Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997)*; *Rozenfeld v. Medical Protective Co., 73 F.3d 154, 156 (7th Cir. 1996)*. ***HN2***[] A private suit under the antitrust laws is a suit seeking relief against a statutory tort, and the principle that there is no tort without an injury is applicable to it. See Clayton Act, § 4, *15 U.S.C. § 15(a)*. But all that this implies, so far as equitable relief is concerned, is that a plaintiff has to prove that he is likely to be harmed by the defendant's wrongful conduct unless that conduct is enjoined. This is clear from the text of the Clayton Act, which, evoking traditional principles of equity, *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*, **[**9]** requires proof only of "threatened loss or damage." Clayton Act, § 16, *15*

U.S.C. § 26 (emphasis added); see California v. American Stores Co., 495 U.S. 271, 282 n. 8, 109 L. Ed. 2d 240, 110 S. Ct. 1853 (1990); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 844 (7th Cir. 1978). There is sufficient evidence of that here. Blue Cross bought services from a seller that had agreed with other sellers to refrain from competing for customers, and it is likely, whether or not provable with the degree of precision required to ground an award of damages, that unless the defendant is enjoined Blue Cross will have to pay Marshfield Clinic more than if the Clinic were not a member of an anticompetitive conspiracy directed in part against the plaintiff, the conspiracy that the suit seeks to destroy.

A more difficult question is whether the judge was right to conclude that Blue Cross could not prove what damages it had sustained as a result of the division of markets. The usual way to measure damages in such a case would be to compare the prices that the Marshfield Clinic charged Blue Cross before and during the conspiracy, or **[**10]** inside and outside the region covered by the conspiracy, or during the conspiracy and after it ended (if it has ended--the injunction issued by the district court before the first appeal was in effect for less than six weeks before we stayed it pending the appeal), correcting by various statistical techniques for any nonconspiratorial factors that might have caused the prices that are being compared to be different from each other. See Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1165 (7th Cir. 1987); New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1078 (2d Cir. 1988); Home Placement Service, Inc. v. Providence Journal Co., 819 F.2d 1199, 1205 n. 7 (1st Cir. 1987); Phillips v. Crown Central Petroleum Corp., 602 F.2d 616, 632 (4th Cir. 1979); 1 American Bar Association Section of ***Antitrust Law***, ***Antitrust Law*** *Developments (Fourth)* 787 (4th ed. 1997). This method or congeries of methods was unavailable to Blue Cross, however, because the division of markets embraced the entire period and region in which the necessary data are obtainable; at least Blue Cross made no effort to show otherwise. Instead it **[**11]** compared the Marshfield Clinic's prices for medical services between 1988 and 1995 with the prices charged by other providers of medical care for the same services during the same period elsewhere in Wisconsin, on the theory that those other prices, properly adjusted, are what Blue Cross would have had to pay the Clinic and the Clinic's competitors had it not been for the conspiracy.

This--the so-called "yardstick" method of computing antitrust damages--was not improper. In re Nasdaq Market-Makers Antitrust Litigation, 169 F.R.D. 493, 521 (S.D.N.Y. 1996). But the qualification "properly adjusted" is at least as vital as when the plaintiff is trying to prove damages by comparing the defendant's prices at one period **[*593]** or in one area with its prices in another period or another area rather than (as under the yardstick approach) comparing the defendant's prices with the prices of other sellers. See, e.g., Package Shop, Inc. v. Anheuser-Busch, Inc., 675 F. Supp. 894, 947-52 (D.N.J. 1987). Any nonconspiratorial factors likely to have made the prices charged by the Marshfield Clinic higher than the prices charged by other health-care providers **[**12]** had to be taken into account in order to make a responsible estimate of the prices that Blue Cross would have paid had it not been for the conspiracy. Isaksen v. Vermont Castings, Inc., supra, 825 F.2d at 1165.

The most important factors were the amount and quality of the Marshfield Clinic's service and its market share. The significance of market share is that even though the Marshfield Clinic was not proved to have monopoly power, it does have a large market share throughout north-central Wisconsin, which might confer enough market power on it to enable it all by itself, without dividing markets with its competitors, to charge a price somewhat above the average for the state. The larger a firm's market share is, the larger is the percentage increase that the other firms in the market must make in their output in order to offset the effect of the firm's curtailing its output in order to drive the market price above the competitive level. For example, if a firm has 50 percent of the market and as a corollary to jacking its price above the existing, competitive level reduces its output by 20 percent (say from 1,000 to 800 units), the other firms will have to increase **[**13]** their output by an average of 20 percent (from 1,000 to 1,200 units) in order to offset completely the reduction in the output of the dominant firm. This may be difficult for them to do, at least in the near term, and so the dominant firm, though not a monopolist, will be able to get away, at least for a time, with its price hike. See George J. Stigler, "The Dominant Firm and the Inverted Umbrella," in Stigler, *The Organization of Industry* 108 (1968). That may have been the situation of the Marshfield Clinic.

To make the necessary corrections and thus establish that there was enough evidence to enable a jury to make a responsible estimate of damages, Blue Cross submitted to the district court multiple reports by two economic experts, John Beyer and Thomas McGuire. Beyer's two reports, which compute a range of damages exceeding $ 7 million from the division of markets, are worthless. They attribute the entire difference between the prices of the Marshfield Clinic and the prices of other Wisconsin providers of medical services to the division of markets, with no correction for any other factor except differences in the treatment mix. ***HN3***[] Statistical studies that fail to correct for **[**14]** salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment. *Milwaukee Branch of NAACP v. Thompson, 116 F.3d 1194, 1198 (7th Cir. 1997)*; *Kuhn v. Ball State University, 78 F.3d 330, 332-33 (7th Cir. 1996)*; *Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 415-16 (7th Cir. 1992)*; *Tagatz v. Marquette University, 861 F.2d 1040, 1044-45 (7th Cir. 1988)*; *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1164-65 (7th Cir. 1983)*; cf. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*; *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 563-67, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*; *Navarro v. Fuji Heavy Industries, Ltd., 117 F.3d 1027, 1031 (7th Cir. 1997)*.

McGuire's reports are more promising, though as his bottom line is a damages figure only $ 11,000 below the lower of Beyer's highest two estimates, it is a little hard to take **[**15]** seriously. For how is it that after making the subtractions that Beyer failed to make, McGuire came up with essentially the same figure? And is it purely a coincidence that this number, after trebling, would give Blue Cross the same $ 20 million judgment (actually a little more) that it won in the first trial, even though the division of markets was among the least important of the many antitrust violations charged in this suit? Of course it is possible that the alleged violations were redundant; like the assassins of Rasputin, who drowned him after poisoning him in order to make sure he was really dead, the Marshfield Clinic may **[*594]** have stacked the division of markets on top of other practices any one of which would have had the same effect on its customers' prices. But this observation cannot help Blue Cross. For only one of the practices was illegal, the division of markets. If it added nothing to the price effects of the legal practices, it did not cause Blue Cross any harm.

The main reason that McGuire came up with such a high estimate of his client's damages from the division of markets is that he compared the prices charged by the Marshfield Clinic with the prices **[**16]** charged by other providers on the basis of price per patient (correcting for differences in the treatment mix), rather than price per service. The result of this procedure was that if Marshfield Clinic provided on average more treatment per patient than other providers, the difference was attributed to the division of markets. This is a strange inversion of the usual logic of cartelization, which is that cartelists drive up the market price by (or with the effect of) restricting their output, as in our numerical example. In defense of his procedure, McGuire pointed out that one way in which the Marshfield Clinic may be exploiting market power conferred upon it by the conspiratorial division of markets is by inducing patients to undergo unnecessary procedures paid for by Blue Cross. This is a possibility, but there is no evidence of it, and so it cannot provide the basis for calculating the damages due to the division of markets. To see this, imagine that in a suit for the breach of a building contract the plaintiff proved that the defendant had substituted an inferior grade of roofing. The plaintiff could not obtain damages for the defendant's having installed an inferior grade of **[**17]** plumbing, on the ground that the defendant *might* have done that as well. The plaintiff would have to present evidence that the defendant *did* do it. It is not as if fraud were a conventional method of exploiting monopoly power and so could be presumed; and if Blue Cross's real gripe is that the Marshfield Clinic defrauded it, why isn't there a fraud count in the complaint?

McGuire did try to correct for differences in the quality of the services rendered by the Marshfield Clinic compared to the statewide average; but quality and quantity are not the same. If the Clinic because of its reputation (emphasized by Blue Cross itself) for high quality gets referred to it patients who are sicker than average and so require longer treatment, the average price per patient will be higher simply as a function of the more extensive or protracted care required on average by a sicker patient. As far as the record discloses, this is all there is to the higher average price per patient charged by the Marshfield Clinic. McGuire also failed to correct for the effect of market share on the Clinic's prices. In sum, no reasonable jury could estimate the plaintiff's damages from the reports of the **[**18]** plaintiff's experts.

In addition to those reports, there is some nonexpert evidence of damages, consisting of discounts of 15 or 20 percent that the Clinic gave to some of its coconspirators. But this evidence would not enable a reasonable jury to estimate the plaintiff's damages either. The discounts were given in exchange for bulk referrals, and there is no evidence that customers of the Marshfield Clinic, even so large a customer as Blue Cross, would have gotten equivalent discounts had the clinic been competing rather than conspiring. They might have, but no evidence was presented that they probably would have.

We are not saying that Blue Cross did not in fact lose any money as a result of the division of markets. It may well have, as we suggested in discussing the issue of the injunction. (But remember that there is a difference between an actual and a threatened harm. And there is also, and here critically, a difference between an actual and a quantifiable harm and also between a quantifiable and a quantified harm--and only the last supports an award of damages.) The Clinic's own economic experts estimated that the division of markets may have caused the Clinic's prices to **[**19]** be between .4 and .9 percent higher than they would otherwise have been. Blue Cross, however, did not cite that estimate in its briefs to us, and this raises an interesting question of waiver or forfeiture.

HN4[] The omission to cite a specific item of evidence to an appellate court is ordinarily not a waiver of anything; parties have no **[*595]** obligation to bombard us with record citations. But it is not clear that a party's approach to calculating damages should be treated as evidence, rather than as theory or argument and hence as waived unless mentioned. And in any event silence about a critical piece of evidence can be and here is eloquent. Blue Cross vigorously defends its own experts. It does not say or imply that if the judge was right to throw out their reports (a possibility it seems to think unthinkable), it is nevertheless entitled to go to trial on the basis of the methodology used and results produced by its opponent's experts. ***HN5***[] A party can, in resisting summary judgment, rely on his opponent's evidence, theories, or arguments. The question is whether Blue Cross wants to. Apparently it does not; it is represented by sophisticated lawyers who would not keep mum if they **[**20]** thought the Clinic's own method of computing damages gave their client a fair shot at substantial damages. The bottom of the .4 to .9 percent range computes to less than $ 200,000. Maybe Blue Cross doesn't think this amount is worth further litigation, despite the prospect of trebling. Maybe it doesn't want to have a modest fallback position, but would rather go for broke. Maybe it thinks that to acknowledge any merit in its opponent's experts would fatally undermine the credibility of its own experts, of whom the Clinic's were, naturally, critical. And bear in mind that while we have been treating the defendants' experts' reports as if they were evidence, they are not. They are merely discovery materials. See *Kirk v. Raymark Industries, Inc., 61 F.3d 147, 164 (3d Cir. 1995)*; *Bryan v. John Bean Division of FMC Corp., 566 F.2d 541, 544-47 (5th Cir. 1978)*. To get them into evidence, Blue Cross would probably have to subpoena the experts (though conceivably the reports could come into evidence directly under the catch-all exception to the hearsay rule, *Fed. R. Evid. 807*). It could subpoena these experts, *Kaufman v. Edelstein, 539 F.2d 811, 821 (2d Cir. 1976)* **[**21]** (Friendly, J.), but of course they might be reluctant to testify in a way damaging to their client and might be able to squirm out of doing so. Their depositions, as distinct from their reports, do not acknowledge that Blue Cross sustained damages from the division of markets.

All this is speculation; for whatever reason, Blue Cross has waived the right to seek damages on the basis of its opponent's expert reports. And the clincher is what its lawyer told the district judge: that those reports had found "that the market shares of the coconspirators did *not* affect the price charged" (emphasis added). This was a misinterpretation; but by telling the judge not to rely on the defendant's experts for evidence concerning Blue Cross's damages, the plaintiff waived reliance on such evidence should its own evidence fail, as it has done.

So the district judge was right to throw out the damages claim on summary judgment but wrong to throw out the injunction as well and therefore premature in pronouncing the defendant the winner of this lawsuit. The plaintiff has prevailed on a part, although only a small part, of its claim, and this gives it a prima facie entitlement to an award of some **[**22]** of the attorneys' fees and court costs that it incurred, *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc., 776 F.2d 646, 650-53 (7th Cir. 1985)*; *Sciambra v. Graham News, 892 F.2d 411, 415 (5th Cir. 1990)*; *Royal Crown Cola Co. v. Coca-Cola Co., 887 F.2d 1480, 1485-86 (11th Cir. 1989)*; *United States Football League v. National Football League, 887 F.2d 408, 411-12 (2d Cir. 1989)*; *Home Placement Service, Inc. v. Providence Journal Co., supra, 819 F.2d at 1209-12*. The contrary suggestion in *In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 130 n. 12 (9th Cir. 1973)*, is not persuasive. For it makes no difference that the only relief that Blue Cross has obtained is equitable; the statute is explicit in allowing for an award of attorney's fees when only injunctive relief is sought or awarded. Clayton Act, § 16, *15 U.S.C. § 26*; *Home Placement Service, Inc. v. Providence Journal Co., supra, 819 F.2d at 1210*. Blue Cross is not, however, entitled to fees and costs allocable to claims and theories that neither succeeded, nor contributed to the **[**23]** limited victory that it has obtained. *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc., supra, 776 F.2d at 652-53*; *H.J., Inc. v. Flygt Corp., 925 F.2d 257, 260-61 (8th Cir. 1991)*; see also *Reazin v. Blue Cross & Blue Shield of Kansas, 899 F.2d 951, 980 (10th Cir. 1990)*. That would be unreasonable, **[*596]** and ***HN6***[] the Clayton Act entitles a prevailing plaintiff only to "a reasonable attorney's fee." Clayton Act, §§ 4, 16, *15 U.S.C. §§ 15(a)*, *26*; cf. *Hensley v. Eckerhart, 461 U.S. 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)*.

We vacate the district court's decision relating to attorneys' fees and to costs, as well as its denial of injunctive relief, but we affirm the denial of damages, and we remand the case to the district court for further proceedings consistent with this opinion.

Affirmed in Part, Vacated in Part, and Remanded.

End of Document

SMS Sys. Maintenance Servs. v. Digital Equip. Corp.

United States District Court for the District of Massachusetts

July 30, 1998, Decided

CIVIL ACTION NO.: 96-10429-EFH

Reporter

11 F. Supp. 2d 166 *; 1998 U.S. Dist. LEXIS 11844 **; 1998-2 Trade Cas. (CCH) P72,366

SMS SYSTEMS MAINTENANCE SERVICES, INC., Plaintiff v. DIGITAL EQUIPMENT CORP., Defendant.

Disposition: [1]** Summary judgment for the defendant on the plaintiff's federal antitrust claim granted. All state law claims dismissed without prejudice.

Core Terms

customers, relevant market, antitrust, warranty, aftermarket, computer equipment, extended warranty, Sherman Act, derivative, mandatory, monopoly, bundling, products, purposes, copiers

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN1[] **Attempts to Monopolize, Elements**

The elements of monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, are (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN2[] **Tying Arrangements, Clayton Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different, or tied, product. Such an arrangement is violative of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, if the seller has appreciable economic power in the tying market and if the arrangement affects a substantial volume of commerce in the tied market.

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For DIGITAL EQUIPMENT CORP., Defendant: Jesseca R. Bernanke, Beatie, King & Abate, New York, NY.

Judges: EDWARD F. HARRINGTON, United States District Judge.

Opinion by: EDWARD F. HARRINGTON

Opinion

[*166] ***MEMORANDUM AND ORDER***

July 30, 1998

HARRINGTON, D.J.

Plaintiff SMS Systems Maintenance Services, Inc. ("SMS") has charged Defendant **[*167]** Digital Equipment Company ("Digital") with attempting to monopolize the market for repair and maintenance of Digital computers, in violation of the Sherman Act, *15 U.S.C. § 2*. SMS has also alleged state law claims for Tortious Interference with Prospective **[**2]** Contractual Relations (Count II), Tortious Interference with Contractual Relations (Count III), Unfair and Deceptive Trade Practices in violation of *Mass.Gen.L. ch. 93A, § 11* (Count IV), and Injunctive Relief (Count Five).

The case arises out of Defendant Digital's decision to offer extended warranties covering maintenance and service on certain lines of Digital computers. Digital manufactures and sells a variety of computer lines and computer products. Digital also provides maintenance and service on its computer products. Prior to 1994, Digital provided many customers with maintenance service under an optional one-year warranty offered with the computer products it sold. In 1994, Digital amended its warranty policy on certain computers. In order to promote sales of its new Alpha computers, Digital offered an extended three-year warranty on those computers. Digital embedded the costs associated with the warranty into the price of the Alpha computers. Digital also made the three-year warranty mandatory, refusing to offer a reduction in price to customers who asked to purchase the computer equipment without the extended warranty. In 1995, Digital broadened the extended warranty program **[**3]** by offering a mandatory three-year warranty on certain VAX computer products.

Plaintiff SMS is an independent service organization which specializes in the repair and maintenance of Digital computers. SMS provides maintenance and service to corporations and agencies that own Digital computers. SMS contends that Digital's new mandatory extended warranty violates federal ***antitrust law*** by making it difficult for SMS and other independent service organizations to compete with Digital in the market for service and maintenance of Digital computers.

SMS' theory of liability on its antitrust claim is that Digital violated *Section 2* of the Sherman Act, *15 U.S.C. § 2*, by attempting to monopolize the market for servicing and maintaining Digital computers. ***HN1***[] The elements of monopolization under *Section 2* are well settled:

> The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power.

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 480, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992).

The key issue in dispute in this case is the definition **[**4]** of the relevant market. SMS asserts that the relevant market is the derivative aftermarket for servicing and maintaining Digital computers. Digital has approximately 91 percent of this narrow service market. If this service market is the relevant market, SMS will have satisfied the "monopoly power" element of its *Section 2* claim. In support of its position that the aftermarket is the relevant market, SMS relies on the Supreme Court decision in *Kodak. Id*. In *Kodak*, the Supreme Court held that, in certain circumstances, the derivative aftermarket for services could be the relevant market for antitrust purposes. *Id. at 476-477*.

Defendant Digital opposes this narrow definition of the relevant market. Digital argues that, as a matter of law, the relevant market for antitrust purposes is the primary market for the sale of computer equipment. Digital accounts for less than 30 percent of the computer equipment market. If the computer equipment market is determined to be the relevant market, SMS has conceded that it will be unable to satisfy the monopoly power requirement for a claim under *Section 2*. [1] In support of its position that the primary equipment market is the relevant **[**5]** market, **[*168]** Digital distinguishes *Kodak* from the case at bar and cites a number of circuit court decisions which have rejected attempts by plaintiffs "to shoehorn their allegations into [the] *Kodak* 'derivative aftermarket' model." *Lee v. Life Ins. Co. of North America, 23 F.3d 14, 18 (1st Cir. 1994)*. The Court is persuaded by the defendant's argument.

Kodak is distinguishable from the case at bar because in *Kodak* the manufacturer announced a restrictive change in its replacement parts policy which had a direct impact on "locked in" customers who had already purchased Kodak copiers. *Kodak, 504 U.S. at 476-477*. **[**6]** Kodak's changed policy was to limit the availability of replacement parts for copiers by selling replacement parts "only to buyers of Kodak equipment who use Kodak service or repair on their machines." *Id. at 458*. This new policy effectively limited the service and maintenance options available to customers who had purchased Kodak copiers in the past. The instant case is inapposite. Digital's new extended warranty did not limit the options available to customers who had purchased Digital computers in the past. In fact, the new warranty had no direct impact upon Digital's relationship with customers who had purchased Digital computer equipment prior to the implementation of the new warranty policy. Since Digital's new warranty policy affected only future customers, there is no Kodak-type "lock-in" in this case.

Moreover, in *Kodak*, the Supreme Court itself acknowledged that the bundling of products and services promotes competition and does not violate the antitrust laws. [2] In particular, the court stated that:

> It is undisputed that competition is enhanced when a firm is able to offer various marketing options, including bundling of support and maintenance service with **[**7]** the sale of equipment. Nor do such actions run afoul of the antitrust laws.

Kodak, 504 U.S. at 478-479 (*citing* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984))*.

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[1] "Thirty percent of the computer market is not enough to confer substantial market power unless there are high barriers to competition. Rapid and continuing entry into the computer business, and the ease with which existing firms increase output, dispel any concerns about barriers to entry." *Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756, 761 (7th Cir. 1996)*.

[2] In 1992, both Compaq and IBM, two of Digital's competitors in the market for the sale of computer equipment, began to offer three-year warranties on certain computers. Compaq's warranty was mandatory and the costs associated with the warranty were included in the price of the computer equipment.

All of the circuit courts which have addressed the issue agree with this language in *Kodak*. In *Lee v. Life Ins. Co. of North America, 23 F.3d 14 (1st Cir. 1994)*, the Court of Appeals for the First Circuit rejected plaintiffs' attempt to assert that the relevant market for an antitrust claim was the narrow aftermarket for health care services for undergraduate students enrolled at the University of Rhode Island. Instead, the Court ruled that the relevant market for antitrust purposes **[**8]** was the primary (university education) market. *Id. at 20*. The critical question according to the Court was whether the relevant policy and pricing information was available to customers before they made the initial purchase. In *Lee*, the Court of Appeals analyzed *Kodak* and noted that:

> Had previous customers known, at the time they bought their Kodak copiers, that Kodak would implement its restrictive parts-servicing policy, Kodak's "market power," i.e. its leverage to induce customers to purchase Kodak servicing could only have been as significant as its AEP [appreciable economic power] in the copier market.

Id.

The determinative factor for the Court of Appeals in *Lee* was that, unlike the customers in *Kodak*, all of the potential customers in *Lee* knew in advance about the allegedly restrictive health care services policy prior to purchasing the primary product; university education. The Court of Appeals stated:

> In the instant case, however, students know before their matriculation that they are buying a URI 'package' that includes at least two 'tied' products -- a URI education and on-campus health care service and insurances. As **[**9]** appellant failed to assert a colorable claim that URI had [market power] in the primary (university education) market, no Kodak-type 'lock-in' **[*169]** could have occurred in subsequent semesters.

Id.

The Court of Appeals for the Seventh Circuit used the same reasoning in affirming summary judgment for Digital which defended an antitrust counterclaim in *Digital Equipment Corporation v. Uniq Digital Technologies, 73 F.3d 756 (7th Cir. 1996)*. In that case, Uniq's counterclaim alleged that Digital was attempting to monopolize the market for the sale of operating systems used with Digital computers by bundling its operating system with all Digital computers it sold. The Court of Appeals for the Seventh Circuit held that since purchasers knew in advance about the bundling, the relevant market for antitrust purposes was the primary equipment market, not the derivative aftermarket. *Id. at 761-763*. Interestingly, in dicta, the *Digital* Court directly addressed the issue faced by the Court in this case:

> Suppose DEC [Digital] includes extensive manuals, or "free" support services, or operating systems, that consumers do not want . . . "Free" tech support is not free; customers **[**10]** pay for it in the price of the product, and a marginal cost of zero for calling means that it will be overused, and hence can add quite a bit to the price of a computer or a software package. Instead of paying DEC for something they do not want, customers will turn elsewhere - for other firms can increase their profit by satisfying users' demands . . . In a competitive market, pig-headed refusal to satisfy customers' preferences, or an attempt to charge for unwanted items, does not lead to monopoly prices; instead it leads to ruin as rivals step in to take the business. Preserving that market process, rather than regulating through the judicial system, is the objective of the antitrust laws.

Id. at 762.

The Court of Appeals for the Sixth Circuit agrees with this reasoning. In *PSI Repair Services, Inc. v. Honeywell, 104 F.3d 811 (6th Cir. 1997)*, the Court of Appeals ruled that a manufacturer was free to bundle products and service so long as the relevant pricing information was available to customers prior to the sale. *Id*. At 820. The Court specifically held that an antitrust plaintiff cannot succeed on a Kodak-type theory when the defendant has been otherwise forthcoming **[**11]** about its pricing structure and service policies and has not changed its policies so as to affect the service options available to prior purchasers. *Id*. The Court of Appeals ruled, as a matter of law, that where the allegedly restrictive policy did not affect customers who had already purchased the primary product, the relevant market was the primary equipment market, not the derivative aftermarket. *Id*. The Third Circuit and Fifth

Circuit have also accepted this interpretation of *Kodak. See* *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997)*; *United Farmers Agents Ass'n v. Farmers Ins. Exch., 89 F.3d 233 (5th Cir. 1996)*.

The Court is persuaded by this great weight of authority. Since Digital's warranty policy was prospective and since information about Digital's mandatory three-year warranty has always been available to potential customers in advance, there is no Kodak-type lock-in in this case. The relevant market for antitrust purposes is the primary equipment market not the derivative aftermarket for service and maintenance of Digital computers. Since Digital does not have monopoly power in the market for sale of computer equipment, SMS has **[**12]** failed to meet an essential element of its *Section 2* antitrust claim.

The Court's determination that SMS has failed to meet its burden under *Section 2* of the Sherman Act is not necessarily dispositive. During oral argument, the plaintiff articulated for the first time a supplemental tying theory of liability, alleging that the mandatory nature of the extended warranty constituted an illegal tying. Although plaintiff claimed that it had not filed and was not making a typing claim, the issue was raised at oral argument. Therefore, the Court will address the tying issue.

HN2[] "A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Kodak, 504 U.S. at 461*. Such an arrangement is violative of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, if the seller has **[*170]** appreciable economic power in the tying market and if the arrangement affects a substantial volume of commerce in the tied market. *Id*.

In the instant case, there has been no illegal tying. The tying market in these circumstances is the computer equipment market. As noted above, Digital does not have appreciable economic power in that **[**13]** market. Hence, Digital's policy of tying a mandatory warranty with its equipment cannot be found in violation of *Section 1* of the Sherman Act.

For the foregoing reasons, the Court grants summary judgment for the defendant on the plaintiff's federal antitrust claim.

In the absence of any federal question, this Court declines to exercise supplemental jurisdiction over the remaining state law claims involving two Massachusetts corporations. All state law claims are dismissed without prejudice.

SO ORDERED.

EDWARD F. HARRINGTON

United States District Judge

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Theme Promotions, Inc. v. News Am. FSI. Inc.

United States District Court for the Northern District of California

August 7, 1998, Decided ; August 7, 1998, Filed

No. C-97-4617-VRW

Reporter
1998 U.S. Dist. LEXIS 23561 *

THEME PROMOTIONS, INC, a California Corporation, dba THEME CO-OP PROMOTIONS, Plaintiff, v. NEWS AMERICA FSI, INC, a Delaware Corporation, Defendant.

Subsequent History: Summary judgment denied by *Theme Co-Op Promotions v. News Am. FSI, Inc., 2000 U.S. Dist. LEXIS 22745 (N.D. Cal., Mar. 10, 2000)*

Prior History: *Theme Promotions, Inc. v. News Am. FSI, Inc., 1998 U.S. Dist. LEXIS 23560 (N.D. Cal., May 29, 1998)*

Core Terms

advertising, packaged goods, allegations, relevant market, coupons, antitrust, provide a service, conjunction, consumers, contracts, related items, placement, distributing, monopoly, publish, space, prospective economic advantage, motion to dismiss, anti trust law, anticompetitive, interchangeable, leveraging, newspapers, products, harmed, contractual relationship, exclusive contract, antitrust claim, Sherman Act, substitutes

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

An *FRCP 12(b)(6)* motion to dismiss tests the legal sufficiency of the claim or claims stated in the complaint. The complaint must be construed in the light most favorable to plaintiff. The court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from these facts. Material allegations must be accepted as true no matter how improbable they may seem and without regard to any potential difficulties in proof. The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice, that are conclusory or mere legal conclusions, that are unwarranted deductions of fact or unreasonable inferences, or that are contradicted by exhibits to the complaint.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

An *FRCP 12(b)(6)* motion to dismiss may not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

In considering a motion to dismiss for lack of subject matter jurisdiction under *FRCP 12(b)(1)*, a court will ordinarily address the jurisdictional issues prior to considering other claims. The party asserting subject matter jurisdiction in federal court bears the burden of establishing that jurisdiction.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Burdens of Proof > Allocation

HN4[] **Regulated Practices, Market Definition**

Because lack of antitrust injury or the failure to plead relevant market will defeat the court's subject matter jurisdiction, plaintiff bears the burden of demonstrating such injury and pleading an appropriate relevant market. Although plaintiff is indulged all favorable inferences on a motion under *FRCP 12(b)(6)*, such inferences do not extend to certain allegations in a complaint alleging violations of the antitrust statutes.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN5[] **Sherman Act, Claims**

Mere conclusory allegations couched in factual allegations are not sufficient to state a cause of action, particularly in complex litigation such as alleged violations of the Sherman Act. Conclusory allegations which merely recite the litany of antitrust will not suffice.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] **Sherman Act, Claims**

An antitrust complaint must allege a relevant market in which the anticompetitive effect of a challenged activity can be assessed. The relevant product market includes all products reasonably interchangeable, the determination of which requires consideration of the cross-elasticity of demand. he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN7[] **Sherman Act, Claims**

An antitrust plaintiff is not precluded from arguing that a particular product is unique. In some instances one brand of a product can constitute a separate market. Of course, a plaintiff cannot survive a motion to dismiss simply by baldly asserting that a particular product is unique. Rather, the complaint in an antitrust case must explain why the market it alleges is the relevant, economically significant product market.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN8[] **Sherman Act, Claims**

A plaintiff must allege antitrust injury, or injury to competition, before proceeding with an antitrust claim under either § 1 or 2 of the Sherman Act. Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful.

Antitrust & Trade Law > Sherman Act > Claims

HN9[] **Sherman Act, Claims**

In determining whether a plaintiff was injured by an anticompetitive aspect or effect of a defendant's behavior, care must be taken in defining competition. Although competition that eliminates rivals reduces competition, exclusion of a competitor is not a sufficient condition for finding antitrust injury because reduction of competition does not invoke the Sherman Act until it harms consumer welfare. he antitrust laws were enacted for the protection of competition, not competitors.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] **Sherman Act, Claims**

An act is deemed anticompetitive under the Sherman Act only if it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality. Injury to competition requires showing proof of actual detrimental competitive effects such as output decreases or price increases even on a motion to dismiss.

Antitrust & Trade Law > Sherman Act > Claims

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN11[] **Sherman Act, Claims**

Removal of one or a few competitors need not equate with injury to competition. This privilege applies with equal force to claims for interference with prospective economic advantage.

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN12[] **Intentional Interference, Defenses**

If a defendant has a present, existing economic interest to protect, such as a prior contract of his own, he is privileged to prevent performance of the contract of another which threatens it. Once plaintiff establishes an intent to interfere, defendant may prevail by proving the affirmative defense of privilege or justification to secure business for himself.

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN13[] **Commercial Interference, Contracts**

Alleged losses of speculative business opportunities do not make out claims for interference with contractual relations or prospective economic advantage.

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For Theme Promotions, Inc., Counter-defendant: Eugene Crew, Theodore T. Herhold, Byron W. Cooper, Daniel J. Furniss, Rebecca E Perez-Platt, Townsend & Townsend & Crew LLP, Palo Alto, CA.

Judges: VAUGHN R. WALKER, United States District Judge.

Opinion by: VAUGHN R. WALKER

Opinion

ORDER

Since its inception in 1979, plaintiff Theme Co-op Promotions ("Theme") has provided its customers, **[*2]** packaged goods companies, with advertising, promotional and trade support services aimed at securing more in-store ads through so-called "related item merchandising." Related item merchandising offers consumers a coupon for the purchase of two or more "related" products, e.g., diet soda with low-calorie frozen entrees. See Amended Compl at P 11. Theme's FSI Plus program includes securing the tie-in partners, creating a joint coupon offer and using free standing inserts, in-store instant redeemable coupons, other in-store materials, retailer taggable television and radio ads and other performance incentives. See Amended Compl at P 5. An important, and Theme argues, a unique part of the promotional program that Theme offers its clients is the purchase of space in cooperative free standing inserts ("FSI"). An FSI is a multi-color advertising booklet inserted into Sunday newspapers; such newspapers account for 85% of all coupons distributed. FSIs are deemed "cooperative" if more than one packaged goods manufacturer advertises in the booklet and "solo" if the entire booklet is devoted to one product or advertiser.

According to Theme, standard industry practice calls for an FSI publisher **[*3]** to refrain from running competing products in the same FSI. This practice is known as "category exclusivity." See Amended Compl at P 8. Frequently, packaged goods companies will enter into long term exclusive contracts with one of the two FSI publishing companies. Id at P 10.

When a packaged goods company employs Theme to promote it and use related item advertisements, these exclusivity contracts have the potential to create problems if the related products have such contracts with different publishers. According to Theme, FSI publishers have historically allowed Theme to place its related item advertisements irrespective of the contractual arrangements that Theme's clients have with the FSI publishers.

In June 1995, Theme entered into a "right of first refusal" contract concerning its related item advertising business with defendant News America FSI, Inc ("News America"), a print media company involved in sales promotion and advertising primarily through the publication and distribution of coupons in FSIs. See Amended Compl at P 12. In early 1996, a dispute arose between plaintiff and defendant over the conditions of that contract. Theme contends that this dispute led News America **[*4]** to declare the contract null and void. Because the contract had been voided and Theme had pressing business needs, it entered into a "right of first refusal" contract with the other FSI publisher, Valassis Communications, Inc. On October 31, 1996, News America filed suit in San Francisco superior court against Theme and Valassis for intentional interference with contractual relations.

News America took the position that any related item advertising involving a packaged goods company with an exclusive contract with it had to be placed with News America. Theme maintains that News America stated that it no longer wished to do business with Theme; thus, while News America allows other Valassis clients to advertise with it if Valassis cannot provide them space, News America does not afford the same consideration to Valassis clients who also employ Theme. News America also allegedly disparages Theme within the industry by spreading rumors that Theme does not pay its bills and cannot otherwise be trusted.

Theme contends that News America's actions have interfered with its commitment contracts with packaged goods companies such as Benevia, Van DeKamps and Smuckers by forcing Theme to allow **[*5]** the packaged goods companies to purchase their own FSI space directly from News America instead of buying that space through Theme. See Amended Compl at P 33. Theme also asserts that News America's actions have interfered with its prospective business relationships with companies such as Benevia [1] and Gillette because these companies have refrained from doing business with Theme as a result of News America's policy. See id.

On December 18, 1997, Theme filed the instant action alleging that News America's conduct: (1) violates federal and state antitrust laws as well as the common law which prohibits unfair competition; (2) amounts to false advertising under the Lanham **[*6]** Act; (3) is an unfair business practice; (4) constitutes intentional interference with contractual relations as well as intentional and negligent interference with prospective economic advantage;' and (5) states a cause of action for trade libel.

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[1] The court notes that it is impossible for Theme to claim that News America has disrupted both Benevia's contract with Theme and those parties' prospective economic relationship. Either Theme has a contract with Benevia or it has an economic relationship with Benevia that purportedly failed to flourish due to News America's actions toward Theme.

On May 29, 1998, the court issued an order that dismissed all of Theme's claims without prejudice save its claims for negligent interference with prospective economic advantage and trade libel. In finding that Theme's antitrust claims must be dismissed for failure to plead a relevant market, the court stated that because it appeared that coupons, television and radio ads could be substituted for FSIs, Theme would have to take account of those apparent substitutes in defining its relevant market. See May 29, 1998, order at 8-9. In its amended complaint, however, Theme alleges that "there are no meaningful substitutes, other promotional vehicles and/or general advertising tools such as television and radio advertising" which are "reasonably interchangeable alternatives to FSI couponing." Amended Compl at P 6. According to Theme, FSIs "enhance product sales through the use of discount coupons which a consumer can use to obtain discounts on the **[*7]** purchase of packaged goods * * *." See id.

Arguing that Theme's definition of the relevant market is once again inadequate, News America moves to dismiss the antitrust claims in the first amended complaint; News America also moves to dismiss Theme's claims for interference with prospective economic advantage and for intentional interference with contractual relations.

I

A

HN1[] An *FRCP 12(b)(6)* motion to dismiss tests the legal sufficiency of the claim or claims stated in the complaint. The complaint must be construed in the light most favorable to plaintiff. *Russell v Landrieu, 621 F.2d 1037, 1039 (9th Cir 1980)*. The court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from these facts. *NL Indus, Inc v Kaplan, 792 F.2d 896, 898 (9th Cir 1986)*. Material allegations must be accepted as true no matter how improbable they may seem and without regard to any potential difficulties in proof. *Allison v California Adult Authority, 419 F.2d 822, 823 (9th Cir 1969)*. The court need not, however, accept as true allegations that contradict **[*8]** matters properly subject to judicial notice, *Mullis v United States Bankruptcy Court, 828 F.2d 1385, 1388 (9th Cir 1987)*, cert denied, *486 U.S. 1040, 108 S. Ct. 2031, 100 L. Ed. 2d 616 (1988)*, that are conclusory or mere legal conclusions, that are unwarranted deductions of fact or unreasonable inferences, *Clegg v Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir 1994)*; *Western Mining Council v Watt, 643 F.2d 618, 624 (9th Cir)*, cert denied, *454 U.S. 1031, 102 S. Ct. 567, 70 L. Ed. 2d 474 (1981)*, or that are contradicted by exhibits to the complaint, *Durning v First Boston Corp, 815 F.2d 1265, 1267 (9th Cir)*, cert denied, *484 U.S. 944, 108 S. Ct. 330, 98 L. Ed. 2d 358 (1987)*. Even so, ***HN2***[] the motion may not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Moore v City of Costa Mesa, 886 F.2d 260, 262 (9th Cir 1989)*, cert denied, *496 U.S. 906, 110 S. Ct. 2588, 110 L. Ed. 2d 269 (1990)*.

B

HN3[] In considering a motion to dismiss for lack of subject matter jurisdiction under *FRCP 12(b)(1)*, a court will ordinarily **[*9]** address the jurisdictional issues prior to considering other claims. *Thornhill Publishing Co v General Tel & Electronics, 594 F.2d 730, 733-34 (9th Cir 1979)*. The party asserting subject matter jurisdiction in federal court bears the burden of establishing that jurisdiction. *Kokkonen v Guardian Life Ins Co of America, 511 U.S. 375, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391 (1994)*. ***HN4***[] Because lack of antitrust injury or the failure to plead relevant market will defeat the court's subject matter jurisdiction, plaintiff bears the burden of demonstrating such injury and pleading an appropriate relevant market. Although plaintiff is indulged all favorable inferences on a motion under *FRCP 12(b)(6)*, such inferences do not extend to certain allegations in a complaint alleging violations of the antitrust statutes. See e.g., *Letica Corp v Sweetheart Cup Co, 790 F. Supp. 702, 704 (ED Mich 1992)****HN5***[] ("[M]ere conclusory allegations couched in factual allegations are not sufficient to state a cause of action, particularly in complex litigation such as alleged violations of the Sherman Act"); *HRM, Inc v Tele-Communications, Inc, 653 F. Supp. 645, 647 (D Colo 1987)* **[*10]** ("[C]onclusory allegations which merely recite the litany of antitrust will not suffice").

II

A

As noted above, News America argues that Theme's proffered relevant product markets of the (1) market for advertising and promotional services provided in conjunction with the placement, publication and distribution of FSIs in newspapers and (2) market for publishing and distributing FSIs are deficient because Theme fails to explain why its market should not include other promotional services such as television or radio ads. Theme maintains that it has adequately explained why FSIs must be distinguished from other promotional tools and that any other inquiry into how the relevant product market should be defined is a question of fact which cannot be decided at this stage of the litigation.

HN6[] An antitrust complaint must allege a relevant market in which the anticompetitive effect of a challenged activity can be assessed. See *Re-Alco Industries, Inc v Natl Ctr for Health Educ, 812 F. Supp. 387, 391 (SDNY 1993)*(citing *Jefferson Parish Hosp Dist No 2 v Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984))*. The relevant product market includes all products reasonably interchangeable, **[*11]** the determination of which requires consideration of the cross-elasticity of demand. See id (citing *United States v E.I. DuPont de Nemours & Co, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. See also *Brown Shoe Co v United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it").

This is not to say that ***HN7***[] an antitrust plaintiff is precluded from arguing that a particular product is unique. See e.g., *Eastman Kodak Co v Image Technical Services, Inc, 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*("This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market"). Of course, plaintiff cannot survive a motion to dismiss simply by baldly asserting that a particular product is unique. See e.g., *B.V. Optische Industrie de Oude Delft v Hologic, Inc, 909 F. Supp. 162, 171 (SDNY 1995)*. Rather, the complaint in an antitrust case must explain why the market it alleges is the relevant, economically significant product market. See id (citing *Re-Alco, 812 F. Supp. at 391*). **[*12]**

In the present case, the court concludes that plaintiff has met its burden of setting forth a theory why services the court initially thought could be substituted for FSIs are not reasonably interchangeable with FSIs. At P 6 of the amended complaint, Theme has done more than merely use the lingo of antitrust to conclude that FSIs have no substitutes; Theme has alleged that "FSIs, as distinguished from other forms of product promotion or general advertising, enhance product sales through the use of discount coupons which a consumer can use to obtain discounts on the purchase of packaged goods * * *." See Amended Compl at P 6. By so distinguishing other products which seem at first glance to have interchangeability or cross-elasticity of demand with FSIs, Theme has taken those other products into account, thereby rendering its relevant market legally sufficient. Compare *Queen City Pizza, Inc v Dominos Pizza, Inc, 124 F.3d 430, 436 (3d Cir 1997)*, cert denied, *523 U.S. 1059, 118 S. Ct. 1385, 140 L. Ed. 2d 645 (1998)*("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed **[*13]** relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted"). In the case at bar, plaintiff has alleged that FSIs are unique because they are a combination of general advertising and discount coupon. See Amended Compl at P 6. Whether this combination does in reality make FSIs different from a coupon sent to a customer by mail or different from broadcast advertising and the like may be a factual question which can only be resolved on a motion for summary judgment or by a jury. See *Oltz v St Peter's Community Hosp, 861 F.2d 1440, 1446 (9th Cir 1988)*. No such inquiry is appropriate in this case, however, for another reason to be explained presently.

B

News America next contends that because the first amended complaint does not contain any independent allegations with respect to the market for advertising and promotional services provided in conjunction with the placement, publication and distribution of FSIs, the court must dismiss all antitrust claims relating to that market. Specifically, **[*14]** News America argues that in the absence of some allegation that News America's enforcement of its exclusivity contracts with packaged goods companies raised prices or reduced output in the market for advertising and promotional services provided in conjunction with FSIs, Theme's antitrust claims must be dismissed. Theme responds that it has properly stated a claim that News America is using its alleged market power in the market for publishing and distributing FSIs to drive Theme out of the market for advertising and promotional services provided in conjunction with the placement, publication and distribution of FSIs. Theme concedes that it has not alleged that News America's policy affects the output of FSIs or increases their prices but argues that by its allegation that Valassis has been harmed by the arrangement (in that if a packaged goods company must publish its "related item" advertisements with News America, it cannot publish with Valassis), it has properly pled that the challenged actions affect competition and not simply competitors.

First, the court must reject Theme's argument that it need not plead that News America has market power in the market for advertising and **[*15]** promotional services. Theme alleges that News America is attempting to monopolize the market for advertising and promotional services through its alleged monopoly in the market for publication and distribution of FSIs. Theme asserts that "monopoly leveraging" is a "well-recognized theory of recovery under the antitrust laws," citing *Alaska Airlines, Inc v United Airlines, Inc, 948 F.2d 536 (9th Cir 1991)*, cert denied, *503 U.S. 977, 112 S. Ct. 1603, 118 L. Ed. 2d 316 (1992)*. This assertion is plainly misleading.

In *Catlin v Washington Energy Co, 791 F.2d 1343, 1346 (9th Cir 1986)*, the Ninth Circuit declined "any invitation to adopt the monopoly leveraging theory [] as a basis for *Section 2* liability independent of any proof of actual or attempted monopolization" and reserved the question whether leveraging is an independent *Section 2* violation. In Alaska Airlines, the very case which Theme suggests recognizes "monopoly leveraging" as a theory of ***antitrust law*** recovery, the court discussed the Second Circuit's decision in *Berkey Photo, Inc v Eastman Kodak Co, 603 F.2d 263 (2d Cir 1979)*, cert denied, *444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)*, rejected "Berkey's **[*16]** monopoly leveraging doctrine as an independent theory of liability under *Section 2*," decided that Berkey "misapplied the elements of *Section 2* by concluding that a firm violates *Section 2* merely by obtaining a competitive advantage in the second market, even in the absence of an attempt to monopolize the leveraged market" and held that the "anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in the second market." *Alaska Airlines, 948 F.2d at 547-548*. Theme's astonishing reliance on Alaska Airlines to suggest that "monopoly leveraging" is a "well-recognized" theory of recovery in the Ninth Circuit and bootstrap its contentions regarding News America's alleged market share and monopoly power in the market for publication and distribution of FSIs into claims that News America monopolized or attempted to monopolize the market for promotional services provided in conjunction with the placement, publication and distribution of FSIs without allegation of independent actual or attempted monopolization in the latter market borders on a contention **[*17]** unwarranted by existing law and is bereft of a nonfrivolous argument for extension, modification or reversal of existing law or the establishment of new law.

Second, ***HN8***[] a plaintiff must allege antitrust injury, or injury to competition, before proceeding with an antitrust claim under either *Section 1* or *2* of the Sherman Act. *McGlinchy v Shell Chemical Co, 845 F.2d 802, 811 (9th Cir 1988)*. Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant['s] acts unlawful." *Brunswick Corp v Pueblo Bowl-O-Mat, Inc, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. ***HN9***[] In determining whether a plaintiff was injured by an anticompetitive aspect or effect of a defendant's behavior, care must be taken in defining competition. See *Rebel Oil v Atlantic Richfield Co, 51 F.3d 1421, 1433 (9th Cir)*, cert denied, *516 U.S. 987, 116 S. Ct. 515, 133 L. Ed. 2d 424 (1995)*. Although competition that eliminates rivals reduces competition, exclusion of a competitor is not a sufficient condition for finding antitrust injury because reduction of competition does not invoke the Sherman Act until it harms consumer welfare. See id; *Legal Economic Evaluations v Metropolitan Life Ins Co, 39 F.3d 951, 954 (9th Cir 1994),* **[*18]** cert denied, *514 U.S. 1044, 115 S. Ct. 1420, 131 L. Ed. 2d 304 (1995)*. The antitrust laws were enacted for the "'protection of *competition,* not *competitors*.'" *Brown Shoe Co, 370 U.S. at 320*. Thus, ***HN10***[] an act is deemed anticompetitive under the Sherman Act only if it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality. See *Rebel Oil, 51 F.3d at 1421*. See also *Les Shockley Racing v National Hot Rod Assn, 884 F.2d 504, 508 (9th Cir 1989)*(injury to competition requires showing "proof of actual detrimental competitive effects such as output decreases or price increases" even on a motion to dismiss).

Under the heading "HARM TO COMPETITION," Amended Compl at P 36-37, Theme alleges the following:

> 36. Defendant's anticompetitive behavior as herein alleged has harmed competition in the market for advertising and promotional services provided in conjunction with the placement, publication and distribution of FSIs in newspapers nationally. Not only has [Theme], as one of only three market participants and the direct target of [News America's] actions, been severely damaged as a result of Defendant's **[*19]** conduct, but [Valassis'] interests have also been negatively affected by [Theme's] inability to freely choose which FSI company publishes and distributes its FSI[s]. Defendant's unlawful conduct has therefore lessened competition in the relevant markets to the detriment of not only the two market participants but, as alleged below, to the detriment of packaged goods companies and consumers as well. Competition is also harmed in the market for publishing and distributing FSIs nationally by virtue of Defendant's predatory and anticompetitive behavior as herein alleged. Defendant's calculated effort to eliminate [Theme] as a market competitor and to assert and maintain its market power in the market for advertising and promotional services provided in conjunction with the placement, publication and distribution of FSIs in newspapers nationally and the market for publishing and distributing FSIs nationally was and is the type of conduct the antitrust laws were intended to prevent.

> 37. Defendant's actions have also caused significant harm to competition in the FSI marketplace and to consumers generally. Packaged goods companies who have [exclusive] contracts with Defendant **[*20]** are no longer able to use, or are severely restricted from using, TCP's [Theme's] unique and cost-effective services. Additionally, packaged goods companies who [sic] do not have exclusive contracts with Defendant are precluded from running joint promotional campaigns through TCP with any company who [sic] has an [exclusive] contract with Defendant. This has resulted in a decrease in the number of overall FSI pages and an increase in the cost of advertising per unit sold. Consumers are also harmed in that their ability to take advantage of TCP's related item and special events programs, and the freedom of choice such programs provide, has been restricted. Unless restrained by this Court, Defendant's anticompetitive conduct will continue to harm competition in the relevant markets by restricting output and raising prices.

In its May 29, 1998, order at 8, the court noted that the language of these paragraphs defines, at most, a harm to Theme, but not to competition. ***HN11***[] "[R]emoval of one or a few competitors need not equate with injury to competition." *Les Shockley Racing, 884 F.2d at 508*. Although the Les Shockley Racing case dealt only with *Section 1* of **[*21]** the Sherman Act, its logic applies with equal force to a claim under *Section 2*. Theme argues that in light of its new allegation that the market for advertising and promotional services provided in conjunction with the market for placement, publication and distribution of FSIs has only three players, the court should find that an injury to Theme is an injury to competition. While "convergence of injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discrete and the market participants are few," id, the court cannot find an injury to competition in the absence of evidence that News America's policy decreases output, raises prices, harms the quality of goods or otherwise affects allocative efficiency in the market for advertising and promotional services provided in conjunction with the placement, publication and distribution of FSIs in newspapers. The first amended complaint alleges no such facts.

Valassis' alleged harm by News America's decision to enforce its exclusivity contracts does not change the analysis. First, although Theme does allege that Valassis participates in the market for advertising and promotional services **[*22]** provided in conjunction with the placement, publication and distribution of FSIs, Theme merely claims that "Valassis' interests have also been negatively affected by [Theme's] inability to freely choose which FSI company publishes and distributes its FSI[s]." See Amended Compl at P 36. Any such injury to Valassis affects only the market for publishing and distributing FSIs and is, thus, besides the point. Second, simply because Valassis does not have the opportunity to publish certain FSIs does not equate with an injury to competition; what is essential is that there be some allegation that either the total number of FSIs published in newspapers nationally has been reduced or made more expensive or that the overall quality of FSIs published has been lessened. See id. While Theme does allege that consumers have been severely restricted from using Theme's cost effective services, see Amended Compl at P 37, this does not mean that consumers are receiving fewer or lesser quality FSIs at a higher price. Although the court has found that Theme has properly pled that FSIs may in some sense be unique, Theme continues to allege that its services consist of the FSI Plus program which in **[*23]** turn includes not just FSI advertising but also securing the tie-in partners, creating a joint coupon offer and using free standing inserts, in-store instant redeemable coupons, other in-store materials, retailer taggable television and radio ads and other performance incentives. See Amended Compl at P 5. Thus, alleging that consumers are restricted from using Theme's cost effective services does not enable the court to infer that there has been a price increase, output reduction or lessening of quality in FSIs.

Theme has now had two opportunities to allege antitrust injury and has failed to do so. It, therefore, appears that there is no set of facts that will render News America's simple enforcement of its exclusivity contracts the type of injury the antitrust laws were intended to prevent. Accordingly, the court DISMISSES Theme's antitrust claims with prejudice.

III

Theme attempts to state claims against News America for intentional interference with contractual relations and interference with prospective economic advantage. Specifically, Theme claims that News America's decision to enforce its exclusivity contracts with packaged goods companies even when they place "related **[*24]** item" advertising interferes with Theme's commitment contracts and business prospects with certain specified packaged goods companies. Of course, News America may be privileged to enforce its exclusive contracts. See *Richardson v La Rancherita, 98 Cal. App. 3d 73, 81, 159 Cal. Rptr. 285 (1979)* ***HN12***[] ("If [defendant] has a present, existing economic interest to protect, such as * * * a prior contract of his own * * * he is privileged to prevent performance of the contract of another which threatens it")(citing Prosser on Torts (4th ed 1971) § 129 at 944-45). This privilege applies with equal force to claims for interference with prospective economic advantage. *Della Penna v Toyota Motor Sales, U.S.A., Inc, 11 Cal. 4th 376, 389, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995)*(noting that once plaintiff establishes an intent to interfere, defendant may prevail by proving the affirmative defense of privilege or justification to secure business for himself).

This affirmative defense aside, plaintiff points to paragraphs 32-34 as containing the facts underlying its intentional interference with contractual relations and prospective economic advantage claims. [2] But these paragraphs merely allege that Theme has been compelled **[*25]** "to relinquish its right under its commitment contracts with [certain] packaged goods companies to purchase the FSI space on their behalf and instead has been compelled to permit these companies to purchase the FSI space directly from Defendant." See Amended Compl at P 33. It is plain that News America's alleged refusal to deal with Theme does not affect the consideration given for Theme's commitment contracts. Simply because News America purportedly will not deal with Theme does not mean that Theme no longer has the option to buy advertising space on behalf of the packaged goods companies; Theme simply chooses not to exercise that right to purchase FSI space if a packaged goods company agrees to purchase services from Theme and also has an exclusivity contract with News America. Paragraph 33, thus, alleges nothing more than a loss of business Theme hoped it might realize if packaged goods companies chose to place FSI advertisements through Theme. ***HN13***[] Alleged losses of speculative business opportunities do not make out claims for interference with contractual relations or prospective economic advantage. See *Youst v Longo, 43 Cal. 3d 64, 71, 233 Cal. Rptr. 294, 729 P.2d 728 (1987)*

[*26] IV

Pursuant to the foregoing, the court GRANTS defendant's motion to dismiss first, second, third, eighth and tenth claims (Doc # 28, pt 1) with prejudice.

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[2] The first amended complaint exhibits an unfortunately rather common and wholly unsatisfactory style of pleading. The first 38 paragraphs contain an undigested recital of facts followed by cursory allegation of the eleven causes of action completely disconnected from the facts incorporating all 38 paragraphs by reference. With rare exceptions, see paragraphs 78 and 91, the reader is left to guess which of the alleged facts apply to which cause of action. Fortunately, defendant's previous motion to dismiss forced plaintiff to link alleged facts which claims alleged. Short of that, the pleading would have been totally indefinite.

IT IS SO ORDERED.

August 7, 1998

VAUGHN R. WALKER

United States District Judge

Lloyd Design Corp. v. Mercedes-Benz of N. Am.

Court of Appeal of California, Second Appellate District, Division Two

August 10, 1998, Decided

No. B110185.

Reporter

66 Cal. App. 4th 716 *; 78 Cal. Rptr. 2d 185 **; 1998 Cal. App. LEXIS 768 ***; 98 Cal. Daily Op. Service 7089; 98 Daily Journal DAR 9761; 1998-2 Trade Cas. (CCH) P72,268

LLOYD DESIGN CORPORATION, Plaintiff and Appellant, v. MERCEDES-BENZ OF NORTH AMERICA, INC., et al., Defendants and Respondents.

Subsequent History: [*1]** Rehearing Denied September 1, 19998. The Publication Status of this Document has been Changed by the Court from Unpublished to Published September 9, 1998. Review Denied November 18, 1998, Reported at: *1998 Cal. LEXIS 7470*.

Prior History: APPEAL from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. BC135028. Aviva K. Bobb, Judge.

Disposition: The judgment is affirmed.

Core Terms

floor mat, consumers, manufacturers, dealers, standard equipment, mats, Cartwright Act, dealerships, tying arrangement, new car, competitors, antitrust, customers, supplier, package, sound system, products, percent, luxury, color

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

Cal. Bus. & Prof. Code § 16727, is an antitrust statute falling within the Cartwright Act. The purpose of the Cartwright Act is to protect and foster competition by preventing combinations and conspiracies which unreasonably restrain trade.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

Cal. Bus. & Prof. Code § 16727 is based on a federal equivalent, hence federal decisions are applicable when interpreting the Cartwright Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] Price Fixing & Restraints of Trade, Tying Arrangements

See Bus. & Prof. Code § 16727.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN4[] Price Fixing & Restraints of Trade, Tying Arrangements

Cal. Bus. & Prof. Code § 16727 prohibits illegal tying arrangements. A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed tying arrangements serve hardly any purpose beyond the suppression of competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

HN5[] Price Fixing & Restraints of Trade, Tying Arrangements

Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act, Cal. Bus. & Prof. Code § 16727, if it unreasonably restrains trade. On the other hand, the Cartwright Act is not intended to dictate what price a company might charge for its goods: the problem arises when the company is conditioning the consumer's access to a product or service on his or her relinquishment of the freedom to choose whether to purchase another product or service. In other words, the seller cannot force its customers to accept one product or service in order to obtain another.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN6[] Regulated Practices, Price Fixing & Restraints of Trade

The antitrust laws are intended to protect the competitive process, not to protect individual competitors.

Civil Procedure > Pretrial Matters > Continuances

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN7[] **Pretrial Matters, Continuances**

A party's failure to file a motion for a continuance supported by the necessary declarations and proof waives the right to claim that it was deprived of the opportunity to oppose the motion for summary judgment.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted summary judgment for a luxury car distributor in an action against it by an automobile floor mat manufacturer that alleged defendant's decision to include floor mats as standard equipment in its vehicles constituted an illegal tying arrangement between its vehicles and floor mats in violation of the Cartwright Act (*Bus. & Prof. Code, § 16727*). (Superior Court of Los Angeles County, No. BC135028, Aviva K. Bobb, Judge.)

The Court of Appeal affirmed. The court held that there was no illegal tying arrangement. Consumers were not forced to purchase defendant's vehicle with standard floor mats any more than they were forced to purchase one with a standard antitheft device or with standard side-impact air bags. This was especially true given that defendant controlled less than 1 percent of the total car and light truck market in the United States, and only 10 percent of the luxury car market. There was no restraint of commerce in floor mats. The competition continued, only floor mat manufacturers were competing against each other to supply defendant instead of competing to supply individual dealerships. Moreover, no illegality resulted from the dealers being forced to accept the standard floor mats. A franchisor's ability to coerce its franchisee does not show market power and does not invoke antitrust concerns. Franchisees are able to lock in results from a business relationship of their choosing through the franchise, whose terms were freely entered into by both parties. (Opinion by Boren, P. J., with Fukuto and Zebrowski, JJ., concurring.)

Headnotes

CA(1)[] **(1)**

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Purpose.

--The purpose of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) is to protect and foster competition by preventing combinations and conspiracies which unreasonably restrain trade, and federal decisions are applicable when interpreting it.

CA(2)[] **(2)**

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements.

--Under *Bus. & Prof. Code, § 16727*, which prohibits illegal tying arrangements, a tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he or she will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed tying arrangements serve hardly any purpose beyond the suppression of competition. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price, but because of the power of leverage in another market. At the same time buyers are forced to forgo their free choice between competing products. Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade. On the other hand, the Cartwright Act is not intended to dictate what price a company might charge for its goods: The problem arises when the company is conditioning the consumer's access to a product or service on the relinquishment of the freedom to choose whether to purchase another product or service. In other words, the seller cannot force its customers to accept one product or service in order to obtain another.

CA(3a)[] **(3a)** *CA(3b)*[] **(3b)**

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements—Floor Mats as Standard Equipment in Vehicles.

--The trial court properly granted summary judgment for a luxury car distributor in an action against it by an automobile floor mat manufacturer that alleged defendant's decision to include floor mats as standard equipment in its vehicles constituted an illegal tying arrangement between its vehicles and floor mats in violation of the Cartwright Act (*Bus. & Prof. Code, § 16727*). There was no illegal tying arrangement. Consumers were not forced to purchase defendant's vehicle with standard floor mats any more than they were forced to purchase one with a standard antitheft device or with standard side-impact air bags. This is especially true given that defendant controlled less than 1 percent of the total car and light truck market in the United States, and only 10 percent of the luxury car market. There was no restraint of commerce in floor mats. The competition continued, only floor mat manufacturers were competing against each other to supply defendant instead of competing to supply individual dealerships. Moreover, no illegality resulted from the dealers being forced to accept the standard floor mats. A franchisor's ability to coerce its franchisee does not show market power and does not invoke antitrust concerns. The franchisees are able to lock in results from a business relationship of their choosing through the franchise, whose terms were freely entered into by both parties.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 589.]

CA(4)[] **(4)**

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements.

--Not every refusal to sell two products separately can be said to restrain competition under the Cartwright Act (*Bus. & Prof. Code, § 16727*). If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively.

CA(5)[] **(5)**

Summary Judgment § 27—Appellate Review—Reserving Objections—Discovery.

--Plaintiff in a civil action, which failed to file a motion for a continuance supported by the necessary declarations and proof, waived its right to claim on appeal that it was deprived of the opportunity to oppose a motion for summary judgment because of defendant's alleged failure to timely provide discovery.

Counsel: Ervin, Cohen & Jessup and Eliot G. Disner for Plaintiff and Appellant.

Brobeck, Phleger & Harrison, George A. Cumming, Jr., and Kent M. Roger for Defendants and Respondents.

Judges: Opinion by Boren, P. J., with Fukuto and Zebrowski, JJ., concurring.

Opinion by: BOREN

Opinion

[*719] [186] BOREN, P. J.**

A distributor in one of this state's most competitive fields --automobile sales--decided to include floor mats as standard equipment in its vehicles to compete with other car manufacturers which offer standard floor mats and to satisfy a perceived consumer demand for increasing levels of comfort and convenience in new automobiles. A floor mat manufacturer sued under the Cartwright Act, claiming that it was financially damaged because floor mats did not remain an optional accessory. We find no violation of **[***2]** California ***antitrust law*** and affirm the judgment in favor of the car distributor.

FACTS

Respondent Mercedes-Benz of North America, Inc. (Mercedes) sells luxury vehicles in the United States. Its sales represent less than 1 percent of all automobile sales in this country. Among luxury cars, Mercedes holds about a 10 percent market share.

Appellant Lloyd Design Corporation (Lloyd) manufactures and sells accessory floor mats for vehicles. Lloyd makes about 3,000,000 different combinations of floor mats. Lloyd sells floor mats to some Mercedes dealerships which, in turn, sell the mats to consumers. Because floor mats were optional accessories in Mercedes vehicles until 1995, there was a competitive business amounting to some $ 250,000 in new car floor mat sales to Mercedes dealerships in California. [1]

Beginning in model year 1996, Mercedes decided to make **[***3]** floor mats standard equipment after the Mercedes National Dealer Council met and urged the company to make this change because "luxury car customers expect this" and because a growing number of competitors offer this standard feature. [2] The cars are delivered by Mercedes to the dealerships with the mats already in the car trunk, ready for placement.

Mercedes does not manufacture floor mats itself. Rather, it purchases mats from suppliers which compete with each other to manufacture and sell mats to Mercedes. Lloyd is not precluded from bidding for a floor mat contract **[*720]** with Mercedes. Mercedes chose not to use Lloyd as a supplier because Lloyd's mats lack a **[***4]** heel pad, no price advantage was offered, and Lloyd uses a cutting process that is too slow for Mercedes's needs. Mercedes has not received a bid proposal from Lloyd since 1991. Mercedes dealerships continue to purchase floor mats from Lloyd for customers who need to replace their car mats.

The cost of floor mats is included in the base price of Mercedes vehicles. Mercedes dealerships are not charged separately for the mats. Mercedes's decision to include the car mats did not cause the base price of their vehicles to rise. On the contrary, Mercedes decreased the sticker price on most models while including extra standard equipment such as floor mats and cupholders. Now that the mats are in the car when it is delivered, the dealers are relieved of the cost of stocking a large inventory of floor mats and need not be concerned that a new car customer will demand a mat which is out of stock.

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[1] According to Lloyd, six different companies in the United States compete with each other to manufacture and sell floor mats for Mercedes vehicles.

[2] A 1994 study by Mercedes showed that among "select" (i.e., premium) car manufacturers floor mats are standard equipment on Audis, Cadillacs, Infinitis, Jaguars (some models), Lincolns, Saabs and Volvos. Mats are "dealer installed" on Acuras, BMW's and Lexuses. Only Porsche still treats mats as optional equipment, among luxury carmakers.

In September of 1995, Lloyd filed suit against Mercedes claiming that the decision to deliver the cars with floor mats constituted an illegal tying arrangement between Mercedes automobiles and floor mats in violation **[**187]** of the Cartwright Act. [3] Mercedes brought a motion for summary judgment. The **[***5]** trial court granted the motion and entered judgment in favor of Mercedes and codefendant Caliber Motors, Inc. Lloyd appeals from the judgment.

DISCUSSION

I. *Cartwright Act Claim*

Lloyd alleges a violation of ***HN1***[] *Business and Professions Code section 16727*, an antitrust statute falling within the Cartwright Act. [4] ***CA(1)***[] **(1)** "The purpose of the Cartwright Act is to protect and foster competition by preventing combinations and conspiracies which unreasonably restrain trade." (*Morrison v. Viacom, Inc. (1997) 52 Cal. App. 4th 1514, 1524 [61 Cal. Rptr. 2d 544]*.) ***HN2***[] **[*721]** *Section 16727* is based on a federal equivalent, hence federal decisions are applicable when interpreting the Cartwright Act. (*Chicago Title Ins. Co. v. Great Western Financial Corp* ***[***6]*** *. (1968) 69 Cal. 2d 305, 315 [70 Cal. Rptr. 849, 444 P.2d 481]*; *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal. 3d 842, 853 [94 Cal. Rptr. 785, 484 P.2d 953]*.)

CA(2)[] **(2)** ***HN4***[] *Business and Professions Code section 16727* prohibits illegal **[***7]** tying arrangements. A tying arrangement is " 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying arrangements serve hardly any purpose beyond the suppression of competition." [Citation.] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power of leverage in another market. At the same time buyers are forced to forego their free choice between competing products. . . .' " (*Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal. 3d at p. 856*; *Eastman Kodak Co. v. Image Technical Services, Inc. (1992) 504 U.S. 451, 464, fn. 9 [112 S. Ct. 2072, 2081, 119 L. Ed. 2d 265]*.)

"***HN5***[] Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. [Citation.] Even **[***8]** when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrison v. Viacom, Inc., supra, 52 Cal. App. 4th at p. 1524*.) On the other hand, the Cartwright Act is not intended to dictate what price a company might charge for its goods: the problem arises when the company is "conditioning the consumer's *access* to a product or service on his or her relinquishment of the freedom to choose *whether* to purchase another product or service." (*Id. at p. 1525*.) In other words, the seller cannot force its customers to accept one product or service in order to obtain another. (*Ibid*.)

CA(3a)[] **(3a)** We see no illegal tying arrangement in this case. Consumers are not "forced" to purchase a Mercedes with standard floor mats any more than they are "forced" to purchase a Lexus with a standard antitheft device or a Volvo with standard side-impact air bags. This is especially true given that Mercedes controls less than 1 percent of the total car/light truck market in the United States, and only 10 percent of the luxury car market. A wide variety of car makes, models **[**188]** and price is available to consumers with an equally wide variety of standard **[***9]** equipment.

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[3] Lloyd later added as a defendant one Mercedes dealership, respondent Caliber Motors, Inc. Lloyd makes no argument on appeal with respect to its claims against Caliber Motors, thereby waiving any claim of error in the trial court's judgment in favor of Caliber.

[4] ***HN3***[] *Business and Professions Code section 16727* reads, "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State."

[*722] Nor can it be said that Mercedes is making a gambit to dominate the floor mat business: Mercedes is a *purchaser* of floor mats, not a manufacturer of floor mats. The company's economic self-interest lies in encouraging competition among floor mat manufacturers in order to obtain a better product at a lower price. Thus, Lloyd's entire premise that "competition in floor mats for new Mercedes vehicles has been eliminated" is fallacious. There is no restraint of commerce in floor mats. The competition continues, only now floor mat manufacturers are competing against each other to supply Mercedes instead of competing to supply individual Mercedes dealerships.

Once the floor mats are placed in the car by the manufacturer or its distributor, they become part of the car, just as the seats, stereo system, antitheft device and so on become part of the car once they are installed. [5] If we accept Lloyd's argument that the floor mats and the car are two separate products, the only "standard" equipment on cars would be the chassis, engine and body: Car seat, vanity mirror and steering wheel manufacturers (among others) would be claiming that their products come in **[***10]** all different shapes, sizes and colors and should therefore be separate product options left up to the consumer. Such a scenario--far from benefiting consumers--would make car buying a more exasperating experience than it already is.

Acknowledging that consumers are no more forced to buy Mercedes vehicles with standard floor mats than they are to buy Cadillacs or Infinitis with floor mats, Lloyd has recast the scenario by claiming that Mercedes *dealers* as opposed to actual consumers are "forced" to accept delivery of Mercedes vehicles with standard floor mats or risk losing their dealerships if they refuse to accept the cars as delivered. The dealerships would **[***11]** prefer, Lloyd insists, to choose their own floor mats. This is absurd. Mercedes dealers must also accept all the other standard equipment and aspects of the vehicles manufactured by the company whose product they have chosen to sell, from the colors the company chooses to paint its cars, to the climate-control system, to the design of the headlights, to the placement of the parking brake (hand brake versus foot brake), and so on. [6] If each dealership were entitled to dictate to Mercedes how to manufacture and equip its cars, the company would promptly go out of business.

[*12]** **[*723]** Thus, Lloyd's focus on the plight of Mercedes dealers who are forced to sell cars with standard floor mats is misplaced. "[A] franchisor's ability to 'coerce' its franchisee does not show market power and does not invoke antitrust concerns. . . . [P] The franchisees' 'lock in' . . . results from a business relationship of their choosing, the franchise, whose terms were freely entered into by both parties." (*Exxon Corp. v. Superior Court, supra, 51 Cal. App. 4th at p. 1686*.)

A Mercedes purchaser who is dissatisfied with the quality of nonessential standard items (such as the paint color, or the sound system, or the tire rims, or the floor mats) can easily arrange to have the car customized at the consumer's own expense or attempt to negotiate a credit or a price reduction from the dealer. Most consumers, however, would prefer to have as much standard equipment as possible on the car: it is well known that "options" drive up the price of a new car substantially. We do not see why consumers should be deprived of a complete standard **[**189]** equipment package just because a handful of dealers wished that the equipment were of better quality or a different color.

CA(4)[] **(4)** As the **[***13]** Supreme Court has observed, "not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. . . . Buyers often find package

[5] There is no basis in law or reason to conclude that one part of a new car is a separate product merely because that part is easier to remove than another part of the car. With varying degrees of facility, all parts of a car may be removed or replaced. Nevertheless, when all the parts are packaged together to form a new car, it is one product.

[6] "To MBNA it is crucial that a dealer operating under a franchise distribution arrangement offer standardized products. Only then can customers confidently rely on the Mercedes name." (*Mozart Co. v. Mercedes-Benz of North America, Inc. (9th Cir. 1987) 833 F.2d 1342, 1349*.) "In a franchise relationship, the franchisee presumably accepts the burdens of the arrangement to reap some benefits" such as institutional advertising, marketing support, and so on. (*Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1684 [60 Cal. Rptr. 2d 195]*.)

sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively . . . ." (Jefferson Parish Hospital Dist. No. 2 v. Hyde (1984) 466 U.S. 2, 11-12 [104 S. Ct. 1551, 1558, 80 L. Ed. 2d 2].)

The restraint of trade argument advanced by Lloyd has been thoroughly considered and rejected by the Third Circuit Court of Appeals, en banc, in a case involving Chrysler's decision to make auto sound systems standard equipment. (Town Sound and Custom Tops v. Chrysler Motors (3d Cir. 1992) 959 F.2d 468.) [7] Before the 1980's, sound systems were an option on Chrysler vehicles. After Chrysler decided to provide sound systems as **[*724]** standard equipment included in its vehicles' base price, it was sued by a group **[***14]** of independent auto sound dealers, claiming that this was an illegal restraint of trade and tie-in which forced consumers to accept inferior and over-priced Chrysler-supplied stereos. (Id. at p. 471.)

[*15]** The Third Circuit disposed of the two theories advanced by the auto sound dealers, observing that the relevant antitrust consideration was whether *consumers* were hurt, *not* whether independent auto sound dealers would eventually be "doomed to competitive oblivion." (959 F.2d at p. 495, fn. 40.) [8] First, the court found there was no violation "per se" of the antitrust laws because Chrysler--with 10 to 12 percent of the new car market--lacks sufficient market power to force or coerce the objected-to tied-in sale. (Id. at pp. 475-481.) The court rejected the notion that the relevant tying product market consisted only of new Chrysler cars manufactured for sale in this country and instead concluded that "[t]he relevant product market includes Chrysler cars *and* cars that are reasonably interchangeable with Chrysler cars." (Id. at p. 480.) Second, the court concluded that under the "rule of reason," the auto sound dealers could not prevail because there was no injury of the type the antitrust laws were designed to prevent. The court reasoned that the market for automobiles is so competitive that any manufacturer with a substandard package of performance, color, styling, **[***16]** sound system, etc., will find consumers either buying their cars from competitors or demanding a lower price for the car given its less desirable features. (Id. at pp. 481-494.)

CA(3b)[] **(3b)** The same reasoning applies here. Mercedes--with a minuscule share of the total new car market and only a small share of the new luxury car market--does not have sufficient market power to force a tie-in arrangement. Lloyd's attempt to avoid defeat by pleading that the relevant product market is "custom floor mats sold to Mercedes dealers for new cars" is unavailing. The product market is not confined to Mercedes or floor mats, as neither product is unique but rather is one choice among many. (See Exxon Corp. v. Superior Court, supra, 51 Cal. App. 4th at p. 1686, fn. 7; **[***17]** **[**190]** Muenster Butane, Inc. v. Stewart Co. (5th Cir. 1981) 651 F.2d 292, 296.) "Put more **[*725]** simply, a market . . . includes actual or potential competitors who may take business away from each other." (Town Sound and Custom Tops v. Chrysler Motors, supra, 959 F.2d at p. 480.) There is significant competition in cars and car floor mats that is not substantially lessened or otherwise restrained by Mercedes's decision to purchase floor mats from suppliers rather than leaving that decision up to car buyers. [9] The continued

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[7] Evidently aware that the *Town Sound* opinion is fatal to its claims, Lloyd argues that the opinion has been supplanted by Eastman Kodak Co. v. Image Technical Services, Inc., supra, 504 U.S. 451. The facts of the *Kodak* case are entirely distinguishable from *Town Sound* and the case at bench. Kodak, which controlled 100 percent of the parts market for its photocopiers, attempted to monopolize photocopier repairs by refusing to supply replacement parts to independent copier repair companies, thereby forcing consumers who were already "locked in" to have their broken copiers serviced by Kodak and Kodak alone. An analogy to *Kodak* might be drawn if Mercedes were refusing to supply otherwise unobtainable Mercedes replacement parts to independent car repair shops in order to force consumers to have their cars repaired at Mercedes dealerships. That is not remotely what this case is about. Consumers factor in the quality of the standard floor mats *before* they purchase the car or are "locked in."

[8] Otherwise stated, ***HN6***[] the antitrust laws are intended to protect the competitive process, not to protect individual competitors. (Atlantic Richfield Co. v. USA Petroleum Co. (1990) 495 U.S. 328, 342-345 [110 S. Ct. 1884, 1893-1895, 109 L. Ed. 2d 333].)

[9] See Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc. (1980) 101 Cal. App. 3d 532, 549 [161 Cal. Rptr. 811], suggesting that the existence of a tying arrangement may be established "if a not insubstantial volume of commerce in the tied

competitiveness of the automobile industry has protected and benefited consumers who can take advantage of the profusion of car choices to bargain for better designed, standard equipment-filled vehicles at optimum prices.

[*18]** At base, the problem here is not that consumers or dealers are forced to accept Mercedes vehicles with standard floor mats. On the contrary, the evidence shows that consumers and retailers benefited when Mercedes began to include floor mats as standard equipment at a *lower* base price than was previously charged. Rather, the "problem" which Lloyd refuses to acknowledge is that Mercedes is presently using one or more of Lloyd's competitors as its floor mat supplier. This is not a "problem"; it is the marketplace in action. If Lloyd devises a way to manufacture a floor mat which is of better quality and a lower price than its competitors' mats, it will be able to sell Mercedes floor mats on a more substantial scale than ever before. Lloyd's present inability to offer Mercedes better service, product and price than other floor mat manufacturers cannot be resolved by invoking the Cartwright Act or resorting to the courts.

There is, in short, no evidence to support a claim that Mercedes's decision to include floor mats as standard equipment in its new vehicles "substantially lessen[s] competition or tend[s] to create a monopoly" in this state's commerce. (*Bus. & Prof. Code, §* ***[***19]*** *16727*.) Summary judgment was properly granted as a matter of law. (*Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 1368-1369 [61 Cal. Rptr. 2d 326]*.)

II. *Discovery Issue*

CA(5)[] **(5)** Lloyd argues that the judgment below should be reversed because Mercedes failed to timely provide discovery. Lloyd failed, however, to make a showing that a continuance of the summary judgment motion was needed in order to compel production of the information it now claims was central to its case. (*Code Civ. Proc., § 437c, subd. (h)*; Super. Ct. L.A. County Rules, rule 9.21(g).) ***HN7***[]

[*726] Lloyd failed to file a motion for a continuance supported by the necessary declarations and proof and thus waives its right to claim now that it was deprived of the opportunity to oppose the motion for summary judgment. (*Lewinter v. Genmar Industries, Inc. (1994) 26 Cal. App. 4th 1214, 1224 [32 Cal. Rptr. 2d 305]*.) Indeed, Lloyd's opposition to the motion for summary judgment informed the trial court that "The showing made by Lloyd here should be more than enough to permit it to now proceed to trial, even without it now having the significant discovery that defendants still cavalierly deny it." By indicating **[***20]** that the court had "more than enough" evidence before it to sustain a ruling in Lloyd's favor, Lloyd gave the trial court sufficient reason not to continue the motion for the purposes of allowing further discovery.

DISPOSITION

The judgment is affirmed.

Fukuto, J., and Zebrowski, J., concurred.

A petition for a rehearing was denied September 1, 1998, and appellant's petition for review by the Supreme Court was denied November 18, 1998.

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product is restrained." We need not analyze the correctness of the dicta in *Suburban* in light of our conclusion that there are not two separate tied products in the present case.

National Parcel Servs. v. J.B. Hunt Logistics

United States Court of Appeals for the Eighth Circuit

June 10, 1998, Submitted ; August 10, 1998, Filed

No. 97-4284

Reporter

150 F.3d 970 *; 1998 U.S. App. LEXIS 18346 **; 1998-2 Trade Cas. (CCH) P72,228

National Parcel Services, Incorporated, Plaintiff - Appellant, v. J. B. Hunt Logistics, Incorporated; J. B. Hunt Transport, Incorporated, Defendants - Appellees.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Iowa. 4:95-cv-90765. Honorable Robert W. Pratt, District Judge.

Disposition: Affirmed.

Core Terms

prices, predominant purpose, district court, competitor, injure

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Sherman Act, Claims**

To establish competitive injury for a predatory pricing claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must prove that the prices complained of are below an appropriate measure of its rival's costs, and that the competitor had a dangerous probability of recouping its investment in below-cost prices.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN2[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Unfair pricing antitrust claims should be viewed with "great caution and a skeptical eye."

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN3[] **Intentional Interference, Elements**

Following the Restatement (Second) of Torts for competitive torts, Iowa law requires proof of improper interference. In determining what is improper, the Restatement recognizes that vigorous competition is desirable, not tortious. See *Restatement (2d) Torts § 768*. Reflecting that principle, the Supreme Court of Iowa has held that intentional interference with prospective advantage requires proof of a predominant purpose to injure or destroy the plaintiff.

Counsel: Counsel who presented argument on behalf of the appellant was Thomas S. Reavely of Des Moines, Iowa. Appearing on the brief was J. Campbell Helton.

Counsel who presented argument on behalf of the appellees was Mark Howard Allison of Little Rock, Arkansas. Appearing on the brief was Garland W. Binns, Jr.

Judges: Before LOKEN and HEANEY, Circuit Judges, and JONES, * District Judge. EANEY, Circuit Judge, concurring in part and dissenting in part.

Opinion by: LOKEN

Opinion

[*970] LOKEN, Circuit Judge.

National Parcel Service is a "zone skipper," a shipping company that receives packages from mail order and retail catalog merchants and delivers them in bulk to United States Postal Service (USPS) bulk mail distribution centers. This enables NPS to **[*971]** charge lower prices than United Parcel Service (UPS), because UPS charges a premium for residential deliveries, and to offer faster service **[**2]** than USPS.

J.B. Hunt Transport is a large interstate trucking company. In mid-1994, a J.B. Hunt subsidiary entered the zone skipping business, targeting the customers of NPS and a third zone skipper, CTC, with low prices. J.B. Hunt's early strategy was to make "whatever price concessions you need to give or whatever, get us in the business quickly." At a meeting between representatives of J.B. Hunt and NPS, an NPS principal asked the J.B. Hunt representative why he had suggested the meeting. The answer was, "Well, I'm not going to buy you. Why would I buy you? I'd just take you out." J.B. Hunt's revenues grew quickly at its competitors' expense. Not surprisingly, NPS lost business and J.B. Hunt lost money. NPS responded with this lawsuit, seeking damages for predatory pricing under the federal antitrust laws and the Iowa law of interference with prospective advantage. The district court [1] granted summary judgment in favor of the J.B. Hunt defendants, and NPS appeals. We affirm.

[3]** *HN1*[] To establish competitive injury for a predatory pricing claim under *§ 2* of the Sherman Act, *15 U.S.C. § 2*, plaintiff must prove "that the prices complained of are below an appropriate measure of its rival's costs," *and* "that the competitor had . . . a dangerous probability of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24, 125 L. Ed. 2d 168, 113 S. Ct. 2578*

* The HONORABLE JOHN B. JONES, United States District Judge for the District of South Dakota, sitting by designation.

[1] The HONORABLE ROBERT W. PRATT, United States District Judge for the Southern District of Iowa.

(1993). Here, NPS cannot show a dangerous probability of recoupment because UPS and USPS can always take over or eliminate the zone skipping "niche" market should a competitor like J.B. Hunt or NPS begin charging supracompetitive prices and reaping monopoly profits. ***HN2***[] Unfair pricing antitrust claims should be viewed with "great caution and a skeptical eye." *Bathke v. Casey's General Stores, Inc., 64 F.3d 340, 343 (8th Cir. 1995)*. The district court properly dismissed this claim.

NPS's state law tort claim is for interference with its relations with one customer who succumbed to J.B. Hunt's better prices. ***HN3***[] Following the Restatement (Second) of Torts for competitive torts, Iowa law requires proof **[**4]** of "improper" interference. See *Nesler v. Fisher & Co., 452 N.W.2d 191, 196-99 (Iowa 1990)*. In determining what is improper, the Restatement recognizes that vigorous competition is desirable, not tortious. See *Restatement (2d) Torts § 768*. Reflecting that principle, the Supreme Court of Iowa has held that intentional interference with prospective advantage requires proof of a "predominant purpose" to injure or destroy the plaintiff. See *Berger v. Cas' Feed Store, Inc., 543 N.W.2d 597, 599 (Iowa 1996)*; *Wilkin Elevator v. Bennett State Bank, 522 N.W.2d 57, 62 (Iowa 1994)*. NPS argues it has sufficient evidence of such a purpose -- the statement by J.B. Hunt that it could "take you out." One court has persuasively suggested that intent is not a useful standard for distinguishing between actionable predatory pricing and healthy price competition because hard competition necessarily entails injuring unsuccessful competitors, and "you cannot be a sensible business executive without understanding the link among prices, your firm's success, and other firms' distress." *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401-02 (7th Cir. 1989)*, **[**5]** cert. denied, *494 U.S. 1019, 108 L. Ed. 2d 501, 110 S. Ct. 1326 (1990)*. For this reason, we are uncertain whether the Supreme Court of Iowa would apply its "predominant purpose" test when the alleged interference is predatory pricing. But in any event, we agree with the district court that the passing remark by J.B. Hunt that it could "take you out" is not the kind of competitive threat that will support a prima facie case of tortious interference. Cf. *Fischer v. UNIPAC Serv. Corp., 519 N.W.2d 793, 800 (Iowa 1994)*.

Accordingly, we affirm.

Concur by: HEANEY (In Part)

Dissent by: HEANEY (In Part)

Dissent

[*972] HEANEY, Circuit Judge, concurring in part and dissenting in part

I agree with the majority that, as a matter of law, NPS failed to establish a violation of federal ***antitrust law***. In my view, however, the district court erred by holding that as a matter of Iowa state law, J.B. Hunt did not have the predominant purpose of injuring or destroying NPS. There was more than sufficient evidence to present this issue to a jury. For this reason, I respectfully dissent.

Under the Iowa law of interference with prospective **[**6]** advantage, NPS was required to prove five elements as part of its prima facie case: "(1) that it had a prospective contractual or business relationship; (2) that defendant knew of the prospective relationship; (3) that defendant intentionally and improperly interfered with the relationship; (4) that defendant's interference caused the relationship to fail to materialize; and (5) the amount of the resulting damage." *Preferred Marketing Assocs. v. Hawkeye Nat'l Life Ins., 452 N.W.2d 389, 396 (Iowa 1990)* (citation omitted). As the majority correctly points out, NPS was required further to show that J.B. Hunt's predominant purpose was to injure or destroy NPS. In this regard, there remain genuine issues of material fact warranting a trial.

When NPS's president, John Krusenstjerna, met with J.B. Hunt's manger, Donald Swanson, Swanson stated: "I'm not going to buy you. Why would I buy you? I'd just take you out." Swanson also stated that Hunt decided to try and take NPS out of the zone-skipping market because "you were the easiest." J.B. Hunt immediately targeted NPS's most lucrative client, offered prices well below market costs, took a significant loss, and within a **[**7]** short time of Krusenstjerna's and Swanson's meeting, NPS was forced to leave the zone-skipping market.

In *Willey v. Riley, 541 N.W.2d 521 (Iowa 1995)*, the Iowa Supreme Court stated that in order to demonstrate that a defendant's predominant purpose was to injure or destroy the plaintiff, a plaintiff must present evidence of "intent" and mere "speculation . . . is not evidence" warranting that a case be submitted to a jury. *Id. at 527*. In this case, NPS presented evidence in the form of Swanson's statements to Krusenstjerna that J.B. Hunt had the intent to take NPS out of the market. Rather than NPS merely speculating that this was the case, Swanson said as much to Krusenstjerna.

Coupled with this intent, J.B. Hunt's subsequent conduct certainly raises genuine issues of material fact as to its predominant purpose.

The majority's correct resolution of the federal claim should not confuse the issue of the state law claim. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*, the United States Supreme Court stated:

> Even an act of pure malice by one business competitor **[**8]** against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."

Id. at 225 (quoting *Hunt v. Crumboch, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945)* (emphasis added)). Because there are genuine issues of material fact, a jury should determine whether J.B. Hunt committed a tort. In short, I would reverse on the state law claim and remand this case to the district court. On remand, the district court could retain jurisdiction over the case, see *28 U.S.C. § 1367(a)*, or exercise its discretion in dismissing the claim without prejudice. See id. *§§ 1367(c)*, *1367(d)*.

[Sport Squeeze, Inc. v. Pro-Innovative Concepts, Inc.](#)

United States District Court for the Southern District of California

August 10, 1998, Decided ; August 11, 1998, Filed; August 12, 1998, Entered

CASE NO. 97CV0115 BTM(JFS)

Reporter

1998 U.S. Dist. LEXIS 21559 *; 49 U.S.P.Q.2D (BNA) 1691

SPORT SQUEEZE, INC., Plaintiff, v. PRO-INNOVATIVE CONCEPTS, INC., et al., Defendants. and all related claims

Disposition: [*1] Defendants' motion for summary judgment or adjudication on prior art and on-sale bar claims DENIED. Motion for summary judgment on plaintiff's antitrust and intereference with prospective economic advantage claims DENIED. Motion for summary judgment on plaintiff's trade libel and negligence claims GRANTED. Motion for summary adjudication as to abuse of process claim GRANTED in part and DENIED in part. All evidentiary objections DENIED without prejudice to their reconsideration at trial.

Core Terms

patent, prior art, invention, oral testimony, infringement, antitrust, defendants', invalidity, summary judgment motion, abuse of process, summary judgment, antitrust claim, corroboration, cause of action, matter of law, trade libel, continuation, challenges, convincing, damages, on-sale

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment under *Fed. R. Civ. P. 56(c)* is appropriate if the record, read in the light most favorable to the non-moving party, demonstrates no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Material facts are those necessary to the proof or defense of a claim, and are determined by reference to the substantive law. The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. In attempting to illustrate why a case should proceed to trial, however, the nonmoving party may not just point to some theoretical factual dispute once the movant has made a strong showing that they are entitled to judgment. When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Defenses > Patent Invalidity > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN2[] **Burdens of Proof, Clear & Convincing Proof**

Because validity of a patent is presumed under *35 U.S.C.S. § 282*, a party challenging validity must show prior invention, knowledge, or market availability by clear and convincing evidence.

Patent Law > Anticipation & Novelty > General Overview

HN3[] **Patent Law, Anticipation & Novelty**

Oral testimony by an interested party about prior inventions and their presence on the market must be corroborated. While relying on oral testimony alone is heavily disfavored, this does not mean that oral testimony is irrelevant or somehow excludable from a court's consideration of the sufficiency of the evidence. There are eight criteria to assess whether the offered corroboration is sufficient to find the testimony significant. Applying these criteria calls more for general consideration than precise coverage of each element. The overall examination of proposed oral testimony and its corroboration is one of applying a "rule of reason" rather than per se categoricals.

Evidence > ... > Credibility of Witnesses > Impeachment > General Overview

Patent Law > Anticipation & Novelty > General Overview

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

Patent Law > Invention Date & Priority > General Overview

HN4[] **Credibility of Witnesses, Impeachment**

The eight criteria to assess whether the offered corroboration is sufficient to find the oral testimony significant about prior inventions and their presence on the market are: 1) relationship between the corroborating witness and the alleged prior user, 2) time period between the event and trial, 3) interest of the corroborating witness in the subject matter in suit, 4) contradiction or impeachment of the witness's testimony, 5) extent and details of the corroborating testimony, 6) witness's familiarity with the subject matter of the patented invention and the prior use, 7) probability that a prior use could occur considering the state of the art at the time, 8) impact of the invention on the industry, and the commercial value of its practice.

Patent Law > Anticipation & Novelty > General Overview

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

HN5[] **Patent Law, Anticipation & Novelty**

Where there is significant corroboration of the proposed oral testimony and the general circumstances of the proffered testimony take it outside relatively unreliable situations, it is improper to grant summary judgment without the factfinder's assessment of the credibility of the witnesses and the character of the documentary evidence.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Evidence > Inferences & Presumptions > Presumptions > Conflicting Presumptions

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN6[] **Bad Faith, Fraud & Nonuse, Fraud**

A monopoly granted pursuant to a patent is immune from either private or public suits under the Sherman Act. Where a patent is obtained by fraud, however, this immunity is stripped away.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN7[] **Bad Faith, Fraud & Nonuse, Fraud**

A patentee's omission of prior art in a patent application may give rise to the defense of inequitable conduct before the Patent and Trademark Office (PTO). It may also give rise to a fraud-based antitrust claim. The required showing to establish fraud, however, is greater than that required to establish the defense of inequitable conduct. This is because inequitable conduct is a defense that acts as a "shield," whereas a more serious finding of fraud acts as a "sword" that exposes the patentee to antitrust liability. A finding of fraud requires a higher showing of both intent and materiality: It must be based on independent and clear evidence of deceptive intent together with a clear showing of reliance, that is, that the patent would not have issued but for the misrepresentation or omission. For an omission such as a failure to cite a piece of prior art to support a finding of fraud, the withholding of the reference must show evidence of fraudulent intent. A mere failure to cite a reference to the PTO will not suffice.

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN8[] **Inequitable Conduct, Effect, Materiality & Scienter**

Although a mere failure to cite a piece of prior art is not itself sufficient to show fraud, a jury may infer the requisite intent from the facts and circumstances surrounding the intentional non-disclosure of material information.

Torts > Business Torts > Slander of Title > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Prospective Advantage > Intentional Interference > Remedies

Torts > Business Torts > Trade Libel > General Overview

Torts > Business Torts > Trade Libel > Elements

Torts > Business Torts > Trade Libel > Remedies

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > ... > Defamation > Remedies > General Overview

HN9[] **Business Torts, Slander of Title**

Only evidence as to general damages is necessary on a claim of interference with prospective economic advantage. On a trade libel claim, however, a showing of specific damages is required.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN10[] **Inequitable Conduct, Anticompetitive Conduct**

Though the antitrust laws prohibit certain monopolistic conduct, they do so in the interest of competition, not competitors. Thus, they do not give rise to private duties of care.

Counsel: For SPORT SQUEEZE, INC., plaintiff: Jeffrey R Smith, Smith and Brown, San Diego, CA.

For PRO-INNOVATIVE CONCEPTS, INC., MARK A SCATTERDAY, defendants: Steven J Nataupsky, Knobbe Martens Olson and Bear, Newport Beach, CA.

For PRO-INNOVATIVE CONCEPTS, INC., MARK A SCATTERDAY, defendants: Albert L Schmeiser, Mesa, AZ.

For PRO-INNOVATIVE CONCEPTS, INC., MARK A SCATTERDAY, counter-claimants: Steven J Nataupsky, Knobbe Martens Olson and Bear, Newport Beach, CA.

For SPORT SQUEEZE, INC., counter-claimant: Jeffrey R Smith, Smith and Brown, San Diego, CA.

Judges: HONORABLE BARRY TED MOSKOWITZ, United States District Judge.

Opinion by: BARRY TED MOSKOWITZ

Opinion

ORDER GRANTING [*2] IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

INTRODUCTION

This matter comes before the Court on two motions for summary judgment by defendants Pro-Innovative Concepts, Inc. ("PIC") and Mark Scatterday. Defendants seek the Court's determination that plaintiff's antitrust, business tort, and abuse of process claims are invalid, and that the on-sale bar and prior art challenges to defendant Scatterday's patent are insufficient to invalidate the patent as a matter of law. The motions are GRANTED in part and DENIED in part.

BACKGROUND

The facts surrounding the issues at the core of the case are addressed more fully in a separate order denying summary judgment to defendants on their counterclaim for patent infringement, but the essential issues are briefly covered again here for clarity. Defendant and counter-claimant's U.S. Patent No. 5,556,358 ("the '358 patent") is a continuation of two earlier patents on a deformable device used to exercise the hands, commonly known as a "squeeze ball." It is primarily embodied in a product called "The Gripp," which is manufactured and sold by PIC. Plaintiff Sport Squeeze allegedly infringes upon the patent **[*3]** through their production of a product called the "Ad Squeeze". It filed this suit seeking declaratory judgment of noninfringement and invalidity, as well as to recover antitrust and other business tort damages based on defendants' alleged improper use of the patent. Defendants counterclaimed for patent infringement. The separate order denies summary judgment for defendants on their patent infringement claim. This order addresses two summary judgment motions by defendants asserting that plaintiff's evidence is insufficient as a matter of law to show invalidity or violation of the antitrust and unfair competition laws. Because the antitrust and other business tort claims are based on the assertion that defendant and counterclaimant fraudulently procured the patent given their alleged knowledge that it would be disallowed on prior art and on-sale bar grounds, the Court addresses the logically prior invalidity claims first after covering the basic standard of review.

ANALYSIS

I. Summary Judgment Standard

HN1[] Summary judgment under *Fed. R. Civ. P. 56(c)* is appropriate if the record, read in the light most favorable to the non-moving party, demonstrates no genuine issue of material **[*4]** fact and the moving party is entitled to judgment as a matter of law. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996)*. Material facts are those necessary to the proof or defense of a claim, and are determined by reference to the substantive law. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *See* *Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 410 (9th Cir. 1996)*. In attempting to illustrate why a case should proceed to trial, however, the nonmoving party may not just point to some theoretical factual dispute once the movant has made a strong showing that they are entitled to judgment. "When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* **[*5]**

II. Prior Art and On-Sale Bar Challenges

Plaintiff challenged the validity of the patent on the grounds that it was anticipated within the relevant art under 35 U.S.C. § 102(a), that prior commercial availability more than one year before the initial patent was filed renders the invention unpatentable under 35 U.S.C. § 102(b), and that at least certain claims were previously invented and unpatentable under 35 U.S.C. § 102(g). By statute, the patent is presumed valid. *See* 35 U.S.C. § 282. **HN2**[] Because validity is presumed, a party challenging validity must show prior invention, knowledge, or market availability by clear and convincing evidence. *See* Innovative Scuba Concepts, Inc. v. Feder Indus., Inc., 26 F.3d 1112, 1115 (Fed.Cir.1994) ("Under 35 U.S.C. § 282, a patent is presumed valid and one challenging its validity bears the burden of proving invalidity by clear and convincing evidence.").

Plaintiff's evidence to support the prior art and on sale bar challenges to the patent comes primarily, but not exclusively, from proposed testimony **[*6]** to be presented by an alleged prior inventor, Geoffrey O'Connor. O'Connor claims to have invented his product, the "Deadball," in late 1990 and to have brought it to market in May or June of 1991. These claims are backed up by invoices showing bulk purchases of the materials used to construct the Deadball in May 1991 and sales for what the declarations indicate was a secondary purchase by a dealer in late June of 1991. Proposed testimony by others would detail O'Connor's prior invention efforts and a reduction to practice in late 1990. The record puts Scatterday's first relevant patent filing, U.S. Patent 5,190,504 ("the '504 patent"), of which the '358 patent is a continuation, at June 9, 1992. It further indicates that Scatterday reduced the claimed invention to practice in February or March in 1991. Plaintiff contends that its declarations and documentary evidence raise material issues of fact as to whether the invention was unpatentable as anticipated because O'Connor's invention was prior art or because it was on sale more than one year prior to Scatterday's first patent filing.

Defendants attack the sufficiency of this evidence to meet the demanding "clear and convincing" standard **[*7]** primarily by contending that oral testimony about prior inventions and their presence on the market is insufficient as a matter of law to survive summary judgment. They rely primarily on the doctrine set forth in Washburn & Moen Mfg. Co. v. Beat-Em-All Barbed Wire Co., 143 U.S. 275, 12 S. Ct. 443, 36 L. Ed. 154 (1892) ("Barbed Wire Patent Case"), and more recently invoked in the Federal Circuit's opinion in Woodland Trust v. Flowertree Nursery, Inc., 148 F.3d 1368, 1998 WL 385665 (Fed. Cir. 1998), that **HN3**[] oral testimony by an interested party must be corroborated. While relying on oral testimony alone is heavily disfavored, this does not mean that oral testimony is irrelevant or somehow excludable from a court's consideration of the sufficiency of the evidence. In *Woodland Trust*, the Federal Circuit noted both the general rule and eight criteria to assess whether the offered corroboration is sufficient to find the testimony significant under In re Reuter, 670 F.2d 1015, 1021 n.9 (C.C.P.A. 1981). [1] Applying these criteria calls more for general consideration than precise coverage of each element; the Federal Circuit has described **[*8]** the overall examination of proposed oral testimony and its corroboration as being one of applying a "rule of reason" rather than per se categoricals. *See* Mahurkar v. C.R. Bard. Inc., 79 F.3d 1572, 1577 (Fed. Cir. 1996).

The Court therefore finds it unnecessary to address each of these criteria individually on corroborating evidence. It instead finds **[*9]** that there is sufficient proposed and admissible testimony that a jury could find the Deadball prior art and that it was on sale more than one year prior to Scatterday's initial patent filing by clear and convincing evidence for three reasons. First, and most importantly, the testimony as to prior art and the time of first sale is not uncorroborated. The prior art claim is supported primarily by oral testimony, but as outlined below, it is not the type of uncorroborated oral testimony typically discredited in an infringement action. The on sale bar claim is supported

[1] **HN4**[] The eight criteria are: 1) relationship between the corroborating witness and the alleged prior user; 2) time period between the event and trial; 3) interest of the corroborating witness in the subject matter in suit; 4) contradiction or impeachment of the witness's testimony; 5) extent and details of the corroborating testimony; 6) witness's familiarity with the subject matter of the patented invention and the prior use; 7) probability that a prior use could occur considering the state of the art at the time; 8) impact of the invention on the industry, and the commercial value of its practice. Reuter, 670 F.2d at 1021 n.9.

by both oral testimony and documentary evidence indicating purchase of materials to construct the Deadball in the time frame that would invalidate Scatterday's patent under the on-sale bar doctrine.

Second, the disallowance of oral testimony as relevant evidence in the Barbed Wire Patent Case and its progeny was heavily dependent on the noted interests of the party claiming prior invention. Here, there is no clear interest on the part of alleged Inventor O'Connor. He is not the alleged infringer, nor is he affiliated with the alleged infringer. He did not patent his invention, and would be ineligible to file for such **[*10]** a patent now. At most, his interest in this litigation is in avoiding any possible infringement action against him, but even that possibility is foreclosed by the fact that his invention did not use a critical ingredient of the '504 patent. [2] It is also highly probable given the presence of squeezable toys and other equipment in the market, as well as easily available materials, that someone such as O'Connor could have put a very similar invention together before Scatterday.

Third, application of the Barbed Wire Patent Case doctrine relies heavily on the deterioration (or selectivity) of witnesses' memories because of the time lapse between invention and infringement actions and the entire absence of documentary corroboration. Here, O'Connor's proposed **[*11]** testimony is supported by an almost contemporaneous course of conduct in reaction to the defendants' assertion of infringement against O'Connor. When he received a cease and desist letter in early 1993, O'Connor through his counsel informed defendants in a May 6, 1993 letter that his invention had been on sale "at least as early as June 1, 1991" and reminded them of their obligation to reveal this fact to the Patent Office as likely barring the patent and any continuation patents thereon. Defendants did not report the Deadball's existence as posing a possible problem for the patentability of Scatterday's product in any of the continuation patent applications. They also dropped any action against the Deadball and pursued O'Connor no further. Defendants insistence that they were not obligated to indicate the Deadball's existence in any continuation application may or may not be consistent with the standards of the regulations governing a duty to investigate and report material prior art. *See* 37 C.F.R. §§ 1.56, 1.97 & 1.98. Regardless of whether it was proper to withhold this information from the PTO, the existence of this documented, almost contemporaneous action asserting priority **[*12]** supports the reliability of the testimony. [3]

[*13] Overall, then, ***HN5***[] where there is significant corroboration of the proposed oral testimony and the general circumstances of the proffered testimony take it outside the relatively unreliable situations analyzed In the Barbed Wire Patent Case and those like it, it is improper to grant summary judgment without the factfinder's assessment of the credibility of the witnesses and the character of the documentary evidence.

III. Antitrust Claims

Patent and ***antitrust law*** sometimes seem to be at loggerheads because the former conveys a type of monopoly while the latter forbids improper acquisition or maintenance of a monopoly. The general presumption resolving this conflict is that ***HN6***[] a monopoly granted pursuant to a patent is immune from either private or public suits under

[2] Defendants admit that the absence of talc as a lubricant in the Deadball would have prevented a valid infringement action under the '504 patent. (*See* Mem. of Pts. & Auth. in Supp. of Motion for Summ. Adjud. Of Issues that Deadball Is Not Prior Art at 5.)

[3] Defendants' rely extensively on *Hebert v. Lisle Corp., 99 F.3d 1109 (Fed. Cir. 1996)*, and specifically its alleged similarity to this case. But the Federal Circuit emphasized there that the basis of its invalidation of the jury verdict of unenforceability based on inequitable conduct was the fact that *no evidence whatsoever* was introduced that the information submitted to the patent holder was in fact prior art. *See* *Hebert, 99 F.3d at 1115* ("Lisle's patent expert did not testify that the omitted information was prior art. … No submission was offered or described as 'prior art' to the Hebert invention.") When there is literally no evidence that a party had prior art material, it is of course impossible for a factfinder to decide from an examination of the evidence that the party's decision to withhold prior art was willful. Here, there is evidence indicating that the Deadball was in fact prior art, and plaintiff's patent expert is prepared to testify that it was. Though *Hebert* certainly counsels a court to be careful in allowing final decisions by factfinders where no evidence of materiality is presented by a patent challenger, and underscores the burden on plaintiff to present evidence at trial to avoid a motion under *Fed. R. Civ. P. 50(a)*, it does not mandate summary judgment at this time.

the Sherman Act. Where a patent is obtained by fraud, however, this immunity is stripped away. *See* *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)*.

HN7[] A patentee's omission of prior art in a patent application may give rise to the defense of inequitable conduct before the Patent and Trademark Office. In some circumstances, it **[*14]** may also give rise to a fraud-based antitrust claim under Walker Process. *See* *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068-70 (Fed. Cir. 1998)*. The required showing to establish fraud, however, is greater than that required to establish the defense of inequitable conduct. *See id.* This is because inequitable conduct is a defense that acts as a "shield," whereas a more serious finding of fraud acts as a "sword" that exposes the patentee to antitrust liability. *See* *id. at 1070*. Thus, a finding of Walker Process fraud requires a higher showing of both intent and materiality:

> It must be based on independent and clear evidence of deceptive intent together with a clear showing of reliance, i.e., that the patent would not have issued but for the misrepresentation or omission. Therefore, for an omission such as a failure to cite a piece of prior art to support a finding of *Walker Process* fraud, the withholding of the reference must show evidence of fraudulent intent. A mere failure to cite a reference to the PTO will not suffice.

Id. at 1071.

Defendants contend that it is entitled to judgment **[*15]** as a matter of law on plaintiff's antitrust claims because there is insufficient evidence of intent and of materiality to create a jury question. Though defendants are undoubtedly correct that only a high showing of materiality and intent may support a claim of fraud that would, in turn, strip it of antitrust immunity, there is sufficient evidence here to let plaintiff's antitrust claims go to a jury.

HN8[] Although a mere failure to cite a piece of prior art is not itself sufficient to show *Walker Process* fraud, the *Nobelpharma* court specifically held that a jury may infer the requisite intent from the facts and circumstances surrounding the intentional non-disclosure of material information. *See* *Nobelpharma, 141 F.3d at 1072*.

Here, plaintiff has presented evidence that defendants knew that the patent might be invalidated by the existence of prior art embodied in the O'Connor Deadball and the fact that the Deadball may have been on sale more than one year prior to Scatterday's initial filing date. Consequently, there is at least a triable issue as to whether the Deadball was at least material prior art, and whether defendants were aware of it. Thus, the evidence, **[*16]** viewed in a light most favorable to the plaintiff, indicates that defendants knowingly failed to disclose material prior art. Under *Nobelpharma*, this is sufficient to allow a reasonable jury to conclude that defendants possessed the requisite fraudulent intent. *See* *id. at 1072*. Defendants' motion for summary judgment on plaintiff's antitrust claims is therefore DENIED. [4]

IV. Abuse of Process, Interference with Prospective Economic Advantage, and Trade Libel Claims

Plaintiffs have produced admissible evidence that tends to establish each element of the abuse of process and interference with prospective economic advantage claims sufficient to create disputes of material fact -- though not as to all issues within those two causes of action. Their evidence on trade libel claims fails entirely, however, for the reason that defendants point out in their papers -- proof of "special damages" is required and there is an utter **[*17]** lack of direct connection between the alleged actions of defendants that are supported by the evidence and loss of specific business.

On the abuse of process claim with respect to an action taken in Phoenix, evidence is presented tending to establish that defendants improperly requested a temporary restraining order and filed a false affidavit as part of a relevant action, making a grant of defendants' motion as to that claim impossible. But plaintiff also presents

[4] Defendant's motion to strike is DENIED without prejudice.

insufficient evidence as to abuse of process by the filing of a suit against people who defendants apparently thought were affiliated with Sport Squeeze, such that summary adjudication of that claim is proper.

For interference with prospective economic advantage, plaintiff presents evidence as to the decline in gross business and disruptions of order flow under circumstances indicating intentional interference by defendants, and that damages were thereby sustained. ***HN9***[] With this broader type of tort, only evidence as to general damages is necessary. On the trade libel claims, however, a showing of specific damages is required. *See Erlich v. Etner, 224 Cal. App. 2d 69, 73-74, 36 Cal. Rptr. 256 (1964)* ("In **[*18]** the usual case ... the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.") (quoting Prosser on Torts at 766)). Here, there is no direct evidence of damage tying the loss of even one customer precisely to the actions of defendant in such a fashion. Summary adjudication for the trade libel claims in defendants' favor is therefore appropriate.

With regard to the other causes of action, the evidence is sufficient to support a jury verdict for plaintiffs. It may not turn out to be enough to convince a jury that plaintiff's version of the facts is accurate, but it is enough, read favorably to plaintiff as the non-moving party, to create a material dispute of fact. Defendants' mere assertion that no evidence is present that a factfinder could use to decide these causes of action against defendant is without merit.

V. Remaining Claims

Defendants contend that plaintiff has waived the third and fifth causes of action pled in its complaint. The third cause of action is simply a plea for injunctive relief as a remedy. Such a possibility remains an option as the case goes **[*19]** on should the plaintiff show it is entitled to such relief. This motion to dismiss this claim is DENIED.

Plaintiff's negligence claim is merely an antitrust claim in disguise. Plaintiff alleges that defendants had a duty not to monopolize competition, and by breaching the antitrust laws, breached that duty. This claim must fail because defendants have no duty to plaintiff in this regard. ***HN10***[] Though the antitrust laws prohibit certain monopolistic conduct, they do so in the interest of competition, not competitors. *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. Thus, they do not give rise to private duties of care. Plaintiff's negligence claim is DISMISSED.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment or adjudication on the prior art and on-sale bar claims is DENIED. The motion for summary judgment on plaintiff's antitrust, and intereference with prospective economic advantage claims are also DENIED. The motion for summary judgment on plaintiff's trade libel and negligence claims is GRANTED. The motion for summary adjudication as to the abuse of process claim is GRANTED in part **[*20]** and DENIED in part. All evidentiary objections are DENIED without prejudice to their reconsideration at trial.

IT IS SO ORDERED.

Dated: August 10, 1998

HONORABLE BARRY TED MOSKOWITZ

United States District Judge

End of Document

Stewart Glass & Mirror, Inc. v. U.S.A. Glas, Inc.

United States District Court for the Eastern District of Texas, Beaumont Division

August 12, 1998, Decided ; August 14, 1998, Opinion Filed

Case No. 1:95-CV-813

Reporter
17 F. Supp. 2d 649 *; 1998 U.S. Dist. LEXIS 13051 **; 1999-1 Trade Cas. (CCH) P72,556

STEWART GLASS & MIRROR, INC., ET AL., Plaintiffs, v. U.S.A. GLAS, INC., ET AL., Defendants.

Disposition: [1]** Defendants' Motion for Summary Judgment GRANTED.

Core Terms

network, glass, shops, conspiracy, Defendants', policyholder, summary judgment, monopolize, antitrust, repair, insurer, affiliate, vertical, referrals, contracts, customer, exhibits, buyer, tortious interference, sufficient evidence, alleged conspiracy, concerted action, horizontal, conspire, seller, restraint of trade, insurance company, Sherman Act, circumstantial, demonstrates

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Regulated Practices, Private Actions**

Antitrust claims are subject to the same summary judgment standards as other claims. However, summary judgment is not common in antitrust cases. The disfavor given summary judgment in antitrust cases is not because of the application of a different set of rules but, rather, because the relevant factual disputes in antitrust cases are typically more complicated than those in other cases. Accordingly, it is typically more difficult for the trial court to resolve all doubt about the merits of an antitrust claim on the pre-trial record alone. Nevertheless, when defending an antitrust claim against summary judgment, an antitrust plaintiff must clear the same hurdle as the plaintiff in any other cause of action: it must come forward with specific facts showing that there is a genuine issue for trial.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Sherman Act, Claims

Section 1 of the Sherman Antitrust Act forbids contracts, combinations, or conspiracies in restraint of trade or commerce. The elements of a Section 1 claim are that the defendant (1) engaged in a conspiracy (2) affecting interstate commerce (3) that had an anti-competitive effect in the relevant market. In addition to proving the existence of an antitrust conspiracy, the plaintiff must also prove that it has suffered a cognizable antitrust injury.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > General Overview

HN3[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Antitrust law limits the range of permissible inferences from ambiguous evidence in a case under § 1 of the Sherman Act. A plaintiff must show concerted action. Consequently, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. When a plaintiff relies on circumstantial evidence to prove the existence of a conspiracy, it must proffer sufficient evidence to permit the inference of an antitrust conspiracy. The plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. When there is no economically plausible motive for the alleged conspiracy, the scope of permissible conclusions which may be drawn from ambiguous evidence is limited. In other words, if a defendant had no rational economic motive to conspire, and if its conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. Whether the plaintiff alleges a horizontal conspiracy among competitors, or a vertical conspiracy between a manufacturer/seller and a distributor/buyer, the focus remains the same: is there sufficient evidence to create a reasonable inference of concerted action to engage in illegal conduct?

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN4[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act makes it illegal to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN5[] **Conspiracy to Monopolize, Elements**

A plaintiff can bring three types of claims under *Section 2* of the Sherman Act: a claim for monopolization, a claim for attempted monopolization, and a claim for conspiracy to monopolize. The elements for each claim are as follows: To state a claim for monopolization, a plaintiff must allege: (i) a relevant product and geographic market; (ii) the possession of monopoly power in such a market; and (iii) the willful acquisition or maintenance of that power. To state a claim for attempted monopolization, a plaintiff must allege: (i) a relevant product and geographic market; (ii) a specific intent to monopolize that market; (iii) exclusionary or predatory conduct in furtherance of the attempted monopolization; and (iv) a dangerous probability that, absent judicial intervention, the attempt will be successful. To state a claim for conspiracy to monopolize, a plaintiff must allege: (i) the existence of a combination or conspiracy; (ii) an overt act in furtherance of the combination or conspiracy; (iii) substantial amount of interstate commerce affected; and (iv) specific intent to monopolize. While the elements of each claim differ, each claim has the common requirement that a defendant must have either monopoly power or the dangerous probability of acquiring it.

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN6[] **Intentional Interference, Defenses**

The elements for a cause of action for tortious interference with an existing contract are: (1) the existence of a contract subject to interference, (2) willful and intentional act of interference, (3) such act was a proximate cause of damage, and (4) actual damage has occurred. The elements of a cause of action for tortious interference with prospective contracts or business relationships are: (1) A reasonable probability that the parties would have entered into a contractual relationship, (2) an intentional and malicious act by the defendant that prevented the relationship from occurring, with the purpose of harming the plaintiff, (3) the defendant lacked privilege or justification to do the act, and (4) actual harm or damage resulted from the defendant's interference.

Counsel: For STEWART GLASS & MIRROR INC, TEXAS MOBIL AUTO GLASS INC, RLJ INC, FREDDY'S AUTO GLASS & MIRROR INC, NEDERLAND GLASS CO INC, LONE STAR GLASS INC, AUTO GLASS SPECIALISTS INC, ALAMO GLASS OF PORT ARTHUR INC, RAY GLASS COMPANY INC, plaintiffs: Dennis M Dylewski, Dylewski & Douglass, Houston, TX.

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For SAFELITE GLASS CORP, defendant: Paul Sanders Francis, Baker & Hostetler, Houston, TX.

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For HARMON GLASS COMPANY **[**2]** INC, defendant: Walter Joshua Crawford, Jr, Crawford & Olesen LLP, Beaumont, TX.

For WINDSHIELDS AMERICA INC, defendant: Thomas A Doyle, Donald J Hayden, Baker & McKenzie, Chicago, IL.

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Judges: RICHARD A. SCHELL, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD A. SCHELL

Opinion

[*651] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the court on Defendants' Motion for Summary Judgment filed on February 3, 1998. Plaintiffs filed a response on March 3, 1998. Defendants filed a reply to Plaintiffs' response on April 8, 1998, and Plaintiffs filed a sur-reply on April 9, 1998. The court heard oral argument on August 6, 1998. Upon consideration of the written submissions of the parties, oral argument, and the applicable law, the court is of the opinion that Defendants' Motion for Summary Judgment should be GRANTED.

I. BACKGROUND

Plaintiffs are eight Texas corporations engaged in the business of repair and replacement **[**3]** of auto glass and residential and commercial flat glass. At the time Plaintiffs filed this action, Defendants were four foreign corporations doing business in Texas. Defendants Windshields America and U.S.A. GLAS subsequently merged to form a single company, Vistar Inc. Vistar Inc. then merged into Safelite Glas Corporation on December 18, 1997. Therefore, the four companies have now become two: Vistar Inc. and Harmon Glass Company.

Defendants and Plaintiffs are competitors in the auto glass repair and replacement business. Each Defendant's glass repair business is comprised of two parts: (1) individual company-owned glass shops and (2) a glass repair network. Defs.' Mot. for Summ. J. at 2. The operation of the Defendants' networks is, on its face, quite simple. The network company enters into either a regional or national agreement with an insurer to provide a claims management network to provide repair services to the insurer's policyholders. *Id.* at 3. Although such a network is usually considered the insurance company's network, it is maintained and operated by the network company. The network company maintains a customer service call center network to receive claims calls **[**4]** from the insurer's policyholders. *Id.* When a policyholder calls his insurer with a claim, the insurer will transfer the policyholder to a network call center where he will be greeted by a customer service representative ("CSR"). The CSR will then obtain certain information from the policyholder such as his coverage and deductible amount. The CSR is required to follow a company-created and insurer-approved script when taking this information. The CSR will then "provide the policyholder with the names, phone numbers, and addresses of network affiliates near the policyholder who stand contractually committed to perform the glass work he needs." *Id.*

These network affiliates are individual glass shops. These individual shops include the network company's own glass shops, other Defendants' glass shops, and certain independent glass shops. *Id.* The network company enters into non-exclusive contracts with each of these individual network affiliates. Pursuant to these subcontracts, the network affiliates agree to specific prices at which they will perform repair services for policyholders referred to them by the network's CSR.

After giving the policyholder information regarding **[**5]** network affiliates who can perform his glass work, the CSR will then ask the policyholder if he has a particular shop which he would like to use. *Id.* at 4. If he has such a preference, the policyholder can use that shop; however, the CSR will encourage him to choose a network affiliate to do the work. *Id.* Once the network affiliate completes the work, the policyholder pays the affiliate an amount equal to his insurance **[*652]** policy deductible. *Id.* The network company then pays the remainder of the policyholder's bill directly to the network affiliate. Finally, the network company bills the insurer according to the terms of the contract between the network company and the insurer.

Under the network system, the price paid by the insurer often exceeds the price charged by the network affiliate. *Id.* This mark-up in price includes the actual repair or replacement work, as well as the costs of running the network call center and claim management services. *Id.* If the contract price paid by the insurer exceeds the aggregate prices charged by the network affiliate and the costs of operating the network, the network company enjoys a profit; if not, the network company **[**6]** suffers a loss. *Id.*

Plaintiffs sued Defendants, alleging that their conduct in forming and operating glass repair network systems such as that described above violates *Sections 1* and *2* of the Sherman Act, as well as Texas law. On September 16, 1996, the court signed an order granting in part and denying in part Defendants' motions to dismiss. *See* *Stewart Glass & Mirror, Inc. v. U.S.A. GLAS, Inc., 940 F. Supp. 1026 (E.D. Tex. 1996)*. In light of that order, the following claims remain:

1. *Section 1* claim for unreasonably restraining trade;

2. *Section 1* claim for unlawfully boycotting Plaintiffs by denying them referrals from insurance companies;

3. *Section 2* claim for monopolizing, attempting to monopolize, and conspiring to monopolize the auto glass repair market through willfully acquired monopoly power; and,
4. Claims under Texas common law for tortiously interfering with Plaintiffs' existing and prospective contracts.

Id. Defendants now move for summary judgment on each of these claims.

II. ANALYSIS

A. Summary Judgment Standard in Antitrust Cases

HN1[] Antitrust claims are subject to the same summary judgment standards **[**7]** as other claims. However, summary judgment is not common in antitrust cases. *Consol. Metal Prod. v. American Petroleum Inst., 846 F.2d 284, 288 (5th Cir. 1988)*. The disfavor given summary judgment in antitrust cases is not because of the application of a different set of rules but, rather, "because the relevant factual disputes in antitrust cases are typically more complicated than those in other cases. Accordingly, it is typically more difficult for the trial court to resolve all doubt about the merits of an antitrust claim on the . . . pre-trial record alone." *Id.* Nevertheless, when defending an antitrust claim against summary judgment, an antitrust plaintiff must clear "the same hurdle as the plaintiff in any other cause of action: it must come forward with specific facts showing that there is a *genuine issue for trial." Id. at 289* (internal quotations omitted).

B. Section 1 of the Sherman Act

HN2[] "*Section 1* of the Sherman Antitrust Act forbids contracts, combinations, or conspiracies in restraint of trade or commerce." *Johnson v. Hosp. Corp. of America, 95 F.3d 383, 392 (5th Cir. 1996)*. The elements of a *Section **[**8]** 1* claim are that the defendant (1) engaged in a conspiracy (2) affecting interstate commerce (3) that had an anti-competitive effect in the relevant market. *Id.* In addition to proving the existence of an antitrust conspiracy, the plaintiff must also prove that it has suffered a cognizable antitrust injury. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

HN3[] "***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita, 475 U.S. at 588*. A plaintiff must show concerted action. Consequently, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* When a plaintiff relies "on circumstantial evidence to prove the existence of a conspiracy, [it] must proffer sufficient evidence to permit the inference of an antitrust conspiracy." *Johnson v. Hosp. Corp. of America, 95 F.3d 383, 392 (5th Cir. 1996)*. The plaintiff must present evidence **[*653]** that tends to exclude the possibility that the alleged conspirators acted independently. **[**9]** *See Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. When there is no economically plausible motive for the alleged conspiracy, the scope of permissible conclusions which may be drawn from ambiguous evidence is limited. *Matsushita, 475 U.S. at 596*. In other words, if a defendant "had no rational economic motive to conspire, and if [its] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id. at 596-97*. Whether the plaintiff alleges a horizontal conspiracy among competitors, or a vertical conspiracy between a manufacturer/seller and a distributor/buyer, the focus remains the same: is there sufficient evidence to create a reasonable inference of concerted action to engage in illegal conduct?

Defendants argue that Plaintiffs do not have the specific type of evidence required to support their conspiracy claim under the above standard. Defendants claim that in order to establish a viable claim, Plaintiffs must come forward with specific evidence to establish the existence of a conspiracy. Defendants contend **[**10]** that Plaintiffs can make only a "mere showing of parallel action, of an opportunity to conspire, or of relationships between the alleged conspirators [which] is insufficient to survive summary judgment." Defs.' Mot. for Summ. J. at 20. Defendants contend that Plaintiffs must exclude the possibility of independent action. *Id.* at 21. Defendants also argue that Plaintiffs cannot show that Defendants had a plausible, economically rational motive to engage in the alleged conspiracy. *Id.* Further, Defendants allege that it was Plaintiffs, not Defendants, who refused to deal in this case.

Plaintiffs claim that a conspiracy can be proven by circumstantial or direct evidence. Plaintiffs contend that the alleged conspiracy in this case must be viewed as a whole. Plaintiffs claim that there are two intertwined types of conspiracies in this case. First, Plaintiffs complain of vertical agreements in restraint of trade between Defendants (sellers) and third-party insurance companies (buyers). Plaintiffs concede that these agreements are similar to vertical agreements which have been upheld in challenges to preferred provider agreements in the medical care industry. However, Plaintiffs **[**11]** argue that when viewed together with the second type of agreements complained of in this case, horizontal agreements in restraint of trade between each defendant company, these vertical agreements can be distinguished from preferred provider agreements.

The overriding theme of Plaintiffs' case is that the Defendants worked together to eliminate independent glass shops from the glass repair market. Plaintiffs offer several volumes of exhibits in support of their claim. Although the court has carefully reviewed each of these exhibits, it would be virtually impossible for the court to discuss each of Plaintiffs' exhibits in this opinion. For the purposes of this opinion, however, the court will discuss the numerous exhibits relied upon by Plaintiffs during oral argument, which are, according to Plaintiffs, most helpful to their case.

Plaintiffs claim that their summary judgment evidence creates an issue of fact as to whether Defendants conspired to form illegal network systems. Plaintiffs point to an internal Safelite memorandum where an executive stated: "If we (including the other majors) take share from independents to a point where we 'control' service, why can't we achieve price **[**12]** improvement?" [1] Pls.' Proper Summ. J. Evidence, Vol. 1, Ex. 66. Plaintiffs claim this memorandum demonstrates Defendants' desire to ensure that the major glass companies gained control of the industry. Plaintiffs also rely upon Exhibit 200. This exhibit is a 1995 Harmon memorandum listing several company concerns, one of which was: "How long will we [Harmon] share network accounts with independent glass shops[?]". *Id.*, Ex. 200. Exhibit 25 shows that Defendants stressed a switch in philosophy from "competition to cooperation," in dealing with recent changes in the auto glass **[*654]** repair and replacement industry and even held a closed door "kick-off" meeting attended by an antitrust attorney, but did not invite independent glass shops. *Id.*, Ex. 25. Further, Plaintiffs claim that Exhibit 19 shows that Defendants were encouraged by the idea that their concerted effort would increase profits because each Defendant would get "a set percentage of a bigger pie." *Id.*, Ex. 19.

[13]** Plaintiffs also allege that in order to increase this pie, each Defendant's network system was made up not only of that Defendant's glass shops, but also the other Defendants' shops. Former competitors allegedly became part of a unified team. Plaintiffs allege the Defendants conspired to "use the network system to channel work to each other by various deals giving each other preference of referrals." *Id.*, Ex. 31-32. Defendants allegedly used means such as referral fees, rebates, and wholesale discounts in exchange for such referrals. *Id.*, Ex. 16, 27, 31-32, 35, 47, 75. Plaintiffs claim they were excluded from these "side deals." Plaintiffs also allege that Defendants made efforts to keep information concerning these agreements confidential, and cautioned each other to hire attorneys to ensure that they were "protected." *Id.*, Ex. 23.

Plaintiffs also claim that even though they were allowed to join the networks, Defendants nevertheless continued to try to keep business away from Plaintiffs. Plaintiffs claim Defendants created onerous conditions for membership including low prices, a small amount of referrals, and sharing and alleged misuse of trade secrets. *Id.*, Ex. **[**14]** 167-75, 179. Defendants allegedly utilized a variety of methods to steer policyholders away from using independent shops even if a policyholder requested a specific shop. When independents joined LYNX, a network comprised of

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[1] There is a handwritten note, "AMEN!", in the margin of this memo. Defendants have stipulated that this note is written in the handwriting of Doug Herron, Safelite's CFO.

independent glass shops, Defendants allegedly attempted to convince insurers not to use LYNX, and "ghost wrote" a letter for an insurance executive who was trying to convince the insurers not to use LYNX. *Id.*, Ex. 1, 12, 13, 115.

C. Application of the Evidence

Despite Plaintiffs' arguments to the contrary, their evidence does not support their allegations of a conspiracy. Plaintiffs have not produced direct evidence of a conspiracy. Moreover, Plaintiffs' circumstantial evidence is not sufficient to eliminate the possibility that Defendants acted independently. Plaintiffs have not shown a single instance where a Defendant actually entered into an agreement with another Defendant to participate in illegal conduct. Plaintiffs' evidence does not show that Defendants' networks were the product of concerted action. Rather, this evidence merely shows that each Defendant's actions were directed toward winning business for themselves. Circumstantial evidence **[**15]** of conduct such as this, which is as consistent with a legal pro-competitive purpose as with an illegal purpose, is not sufficient to defeat summary judgment.

Indeed, Defendants' evidence demonstrates that each Defendant submitted separate bids to the insurance companies in order to obtain glass repair business on a national scale. *See, e.g.*, Defs.' Proper Summ. J. Evidence, Vol. 1, Ex. 21, pp. 163-64; Vol. 2, Ex. 12, pp. 99-101. This evidence shows that they did not cooperate with each other. Instead, the bidding process is highly competitive because the winning bidder can make greater profits. *Id.*, Vol 2, Ex. 12, pp. 116-17. If a Defendant is a losing bidder, it is no different than an independent glass shop striving to get referrals from the winning bidder's network. Defendants have also produced evidence that the network systems have led to lower costs for insurance companies, which have led to better service and lower premiums for policyholders. *Id.* at pp. 101-103.

The uncontroverted evidence is that the network companies needed to include some independent glass shops as subcontractors in order for the network systems to satisfy insurers' demands for services on **[**16]** a national scale. In order for a defendant to operate a network system for an insurer, the network must have at least one available glass repair shop in its network for each geographical location within the network. If an insured requested needed repair work in a location where there were no available glass shops within a network system, then the network would have to find a non-network shop to do **[*655]** the work. The network company would bear the risk that the shop would charge a price in excess of the price the insurer was contractually obligated to pay the network. Therefore, it was, and is, to Defendants' benefit to enter into subcontracts with as many glass shops as possible, including Plaintiffs, at as low a price as possible. It would be economically irrational for a Defendant to do otherwise.

The deposition of Glenn Decuir, a representative of one of the plaintiff independent glass shops, demonstrates that Defendants did not exclude Plaintiffs from participation in the network systems and that in many instances it was Plaintiffs who refused to participate. *Id.*, Vol. 1, Ex. 7, pp 121-123 (stating that he refused to take referral business from Defendants' CSR's by **[**17]** stating "I'm now against you, I don't want your business"). Further, Plaintiffs have not come forward with any specific evidence establishing that Defendants steered customers away from Plaintiffs' stores. To the contrary, both Plaintiffs' and Defendants' evidence shows that Defendants did no such thing. *See Id.* Vol III, Ex. L (Affidavit of Kim DiMaria) (stating that Harmon never gave preferential treatment to any glass shop, including Defendants', based on any factor other than service, quality, and price); Pls.' Proper Summ. J. Evidence, Vol. 1, Ex. 179 (Depo. of T. Cambree).

Plaintiffs claim that an inference of concerted action can be drawn from exhibits demonstrating that Defendants discussed alliances with each other and agreed upon such things as pricing and rebates. *See Id.*, Ex. 10, 23, 27, 28, 35, 46, 47, 75, 112, 119, 137. Defendants argue that the exhibits do not demonstrate any illegal agreements because they are not agreements between Defendants as networks. Rather, these are legal, vertical agreements between one Defendant as a network company and another Defendant as a network glass repair shop subcontractor.

Defendants rely on *Mosby v. American Medical Int'l, Inc., 656 F. Supp. 601 (S.D. Tex. 1987)*. **[**18]** In that case, Citizens General Hospital ("CGH") entered into an agreement with Dr. Vutpakdi, in which Vutpakdi agreed to provide continuous radiology services to CGH physicians. *Id. at 604*. Vutpakdi used an on-call roster of radiologists to help him meet his coverage obligations under this contract. The plaintiff, Mosby, was on this roster. Three months later, Vutpakdi stopped using the on-call roster, and began to use a full-time assistant to help him fulfill his obligations. *Id.* Vutpakdi's agreement was not an exclusive one. Therefore, although Mosby could no longer get referrals from Vutpakdi's on-call roster, he was still able to get referrals if an attending physician or patient requested his services. *Id.* Mosby filed suit, alleging that the agreement between CGH and Vutpakdi constituted an unreasonable restraint of trade in violation of *Section 1* of the Sherman Act. *Id.*

The court found that although Mosby provided sufficient proof of a combination or agreement, he did not provide sufficient proof that this agreement *unreasonably* restrained trade. *Id. at 606*. Mosby provided nothing but bare allegations that CGH had tried to **[**19]** exclude him. The court recognized that "competitive businesses maintain their share of the market by competing effectively. One method of [which] is to improve service to the customer. It is highly plausible that CGH sought to improve its radiology-service when it contracted with Dr. Vutpakdi." *Id.* Thus, the court did not find that CGH had an improper motive in entering into the agreement with Vutpakdi or allowing him to cease using the on-call list. *Id.* Further, the court found that competition and customer choice was not adversely affected. Mosby could still get business via patient and physician requests. *Id. at 609*. Patients could choose other hospitals, or they could choose a specific radiologist with staff privileges at CGH. *Id.* Thus, the court found that summary judgment in favor of CGH was proper because competition was not unreasonably restrained. *Id.*

Thus, the vertical agreements at issue in the present case are no different than *Mosby*. Just as any physician or patient could choose to use Mosby, a policyholder or insurance company can choose to use an independent glass shop. The policyholder has the right to choose a shop referred **[**20]** by the network's CSR or to choose a shop of his own. **[*656]** And, just as CGH's decision to utilize the agreement with Vutpakdi was as consistent with an independent legal business purpose--improving price and customer service--as an illegal reason, the network systems here are also consistent with the legal business purpose of improving price and customer service.

Thus, these agreements are legal vertical agreements akin to those upheld in the medical care industry. An insurer (buyer) can contract with one or more networks (seller) in order to give their policyholders better pricing and service. An insurer could even choose to enter into an exclusive dealing agreement with a single network, and the network could enter into an exclusive subcontract with its own company glass shops to provide glass repair services.

Plaintiffs nevertheless argue that, unlike the agreements in *Mosby*, where the agreements at issue were strictly vertical ones, the vertical agreements in the present case are intertwined with numerous horizontal agreements between the network companies. Plaintiffs argue that Defendants entered into horizontal agreements to help facilitate the network systems and **[**21]** eliminate competition from independent glass shops. These horizontal agreements allegedly included agreements to channel business to each other, share trade secrets and market allocation, enter into reciprocal subcontracting agreements, and channel business away from Plaintiffs.

Contrary to Plaintiffs' arguments, they have not produced evidence that these vertical agreements were the product of illegal horizontal agreements between Defendants. The evidence in this case demonstrates that Defendants each individually realized that in order to survive in this highly competitive market, they needed to compete at two levels--first as a network and second as a network subcontractor. Each Defendant worked independently to form its own network system and to gain as much business as possible in that role. Then, each Defendant worked to enroll as many glass shops as possible in its network. If a Defendant did not win business at the network level, it would then strive to enroll in each Defendants' network systems at the glass shop level, just as any independent shop would do.

It is only this second level of agreements to which Plaintiffs' evidence regarding agreements on price, rebates, and **[**22]** strategical alliances relates. Plaintiffs' exhibits pointing to agreements on pricing, strategical alliances, and rebates are simply common agreements between buyer and seller. A buyer has a right to purchase services from a seller at the most competitive rates possible. A buyer also has the right to provide the services itself instead of buying them from another source. Further, it is not illegal for a company to discuss, internally, strategies designed to keep as much work as possible within the company without having to refer the work out to its competitors.

Based on the above, the court finds that Plaintiffs have failed to come forward with evidence to create a fact issue on the conspiracy element of their Section 1 claim. Plaintiffs have not produced direct evidence of an agreement among Defendants at the network level. Further, Plaintiffs' circumstantial evidence neither negates the possibility that Defendants acted independently in creating and operating the network systems, nor creates an inference of concerted action by Defendants. The only evidence of agreements between Defendants relates to vertical agreements between buyer and seller. Such agreements are perfectly legal. **[**23]** Therefore, Defendants' Motion for Summary Judgment is GRANTED as to Plaintiffs' Section 1 claims.

D. Section 2 of the Sherman Act

HN4[] Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." 15 U.S.C. § 2. ***HN5***[] A plaintiff can bring three types of claims under Section 2: a claim for monopolization, a claim for attempted monopolization, and a claim for conspiracy to monopolize. The elements for each claim are as follows:

> To state a claim for *monopolization*, a plaintiff must allege: (i) a relevant product and geographic market; (ii) the possession of monopoly power in such a market; and (iii) *the willful acquisition or maintenance* **[*657]** *of that power*. . . . To state a claim for *attempted monopolization*, a plaintiff must allege: (i) a relevant product and geographic market; (ii) a specific intent to monopolize that market; (iii) exclusionary or predatory conduct in furtherance of the attempted monopolization; and (iv) a dangerous probability that, absent judicial intervention, the **[**24]** attempt will be successful. . . . To state a claim for *conspiracy to monopolize*, a plaintiff must allege: (i) the existence of a combination or conspiracy; (ii) an overt act in furtherance of the combination or conspiracy; (iii) substantial amount of interstate commerce affected; and (iv) specific intent to monopolize.

Stewart Glass, 940 F. Supp. at 1037 (citations and internal quotations omitted) (emphasis added). While the elements of each claim differ, each claim has the "common requirement that a defendant must have either monopoly power or the dangerous probability of acquiring it." *Id.*

As a threshold matter, Defendants argue that Plaintiffs' Section 2 conspiracy to monopolize claim must fail for the same reasons as Plaintiffs' Section 1 claims: lack of evidence of a conspiracy. Plaintiffs' Section 2 claims are based upon a theory of joint monopolization--the Defendants joined together to gain a dominant share of the market. Thus, to succeed under a theory of joint monopolization, Plaintiffs must establish that Defendants acted jointly.

Defendants argue that if there is not sufficient evidence of a conspiracy to support a Section 1 claim, then **[**25]** there is not sufficient evidence of a conspiracy to support a Section 2 claim. Defendants argue that the same standards of proof previously discussed apply when determining whether Plaintiffs have come forward with sufficient evidence to defeat summary judgment on a Section 2 claim. Defendants' argument is correct.

Plaintiffs' Section 2 claims allege that Defendants engaged in concerted action to gain a monopoly share. Plaintiffs have not produced sufficient evidence, however, to show that Defendants entered into an illegal agreement or engaged in a conspiracy of any kind. Therefore, Plaintiffs' Section 2 claims must fail. Accordingly, Defendants' Motion for Summary Judgment is GRANTED as to Plaintiffs' Section 2 claims.

E. State Law Claims for Tortious Interference with Actual and Prospective Contracts

HN6[] "The elements for a cause of action for tortious interference with an existing contract are: (1) the existence of a contract subject to interference, (2) willful and intentional act of interference, (3) such act was a proximate cause of damage, and (4) actual damage has occurred." Stewart Glass, 940 F. Supp. at 1038. The elements of a cause of action for **[**26]** tortious interference with prospective contracts or business relationships are:

> (1) A reasonable probability that the parties would have entered into a contractual relationship, (2) an intentional and malicious act by the defendant that prevented the relationship from occurring, with the purpose of harming the plaintiff, (3) the defendant lacked privilege or justification to do the act, and (4) actual harm or damage resulted from the defendant's interference.

Id. (citations and internal quotations omitted).

Defendants argue that Plaintiffs' tortious interference claims must fail because, even if they did interfere with Plaintiffs' contractual relationships, this interference is not unlawful if it resulted from mere spirited competition. That is, their conduct is only actionable if it was somehow wrongful. Plaintiffs concede this point and argue that proof of a violation of the antitrust laws is sufficient to support the wrongful conduct element in a tortious interference with existing or prospective contracts claim. In light of the court's ruling as to Plaintiffs' *Section 1* and *2* claims, Plaintiffs cannot satisfy this burden. Accordingly, Defendants' Motion for **[**27]** Summary Judgment is GRANTED as to Plaintiffs' claims for tortious interference with existing and prospective contracts.

III. CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment is GRANTED. It is so ORDERED.

SIGNED this the 12th day of August, 1998.

/S/

RICHARD A. SCHELL

UNITED STATES DISTRICT JUDGE

Telecomm Tech. Servs. v. Siemens Rolm Communications.

United States District Court for the Northern District of Georgia, Atlanta Division

August 14, 1998, Decided ; August 17, 1998, Filed; August 17, 1998, Entered on Docket

CIVIL ACTION FILE NO. 1:95-CV-649-WBH

Reporter
66 F. Supp. 2d 1306 *; 1998 U.S. Dist. LEXIS 22612 **; 1999-1 Trade Cas. (CCH) P72,467

TELECOMM TECHNICAL SERVICES INC.; REALCOM OFFICE COMMUNICATION; NOVA USA TELECOMMUNICATIONS CO.; AMERICAN TELECOM CORPORATION; DD HAWKINS COMMUNICATIONS, INC.; CMS COMMUNICATIONS, INC.; START TECHNOLOGIES CORPORATION; OLDE YORK VALLEY INN, Plaintiffs/Counter-Defendants v. SIEMENS ROLM COMMUNICATIONS, INC., Defendant/Counter-Plaintiff

Subsequent History: Appeal denied by, Reconsideration denied by, Motion denied by Telecomm Tech. Servs. v. Siemens Rolm Communs., 1998 U.S. Dist. LEXIS 23626 (N.D. Ga., Dec. 15, 1998)

Prior History: Telecomm Tech. Servs. v. Siemens Rolm Communs., Inc., 1997 U.S. Dist. LEXIS 24292 (N.D. Ga., Dec. 30, 1997)

Disposition: **[**1]** Defendant's motion for leave to file surreplies [407] GRANTED. Plaintiffs' motion to strike expert report and testimony of Miles Alexander [392] and motion for partial summary judgment on antitrust claims [386] DENIED. Defendant's motion for summary judgment on plaintiff's antitrust claims [384] DENIED. Plaintiff's motion for summary judgment on defendant's counterclaims [387] GRANTED IN PART and DENIED IN PART.

Core Terms

plaintiffs', software, summary judgment motion, summary judgment, end user, infringement, relevant market, counterclaims, manufacturers, entitled to summary judgment, defense motion, copying, prices, matter of law, antitrust, license, reasons, genuine issue of material fact, partial summary judgment, argues, patent, antitrust claim, Sherman Act, monopolization, allegations, contends, copyright infringement, customers, proprietary, consumers

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

International Trade Law > General Overview

HN1[] **Private Actions, Prioritizing Resources & Organization for Intellectual Property Act**

Section 2 (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a felony. Section 4 of the Clayton Act, codified at *15 U.S.C.S. § 15*, allows any person injured by a violation of the antitrust laws to sue for damages.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

HN2[] **Summary Judgment, Motions for Summary Judgment**

Under *Fed. R. Civ. P. 56*, a court shall grant a motion for summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Where the nonmoving party bears the burden of proof at trial, the moving party must demonstrate to the court that there is an absence of evidence to support the nonmoving party's case, or must put forth affirmative evidence negating an element of the nonmoving party's case. It is then the responsibility of the nonmoving party, by revealing evidence outside of the pleadings, to show that evidence supporting its case does exist or that the element sought to be negated remains a genuine issue of material fact to be tried. Essentially, this requires the nonmoving party to come forward with evidence sufficient to withstand a directed verdict on this issue at trial.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Evidence > Inferences & Presumptions > Inferences

HN3[] **Summary Judgment, Opposing Materials**

The nonmoving party is not required to carry its burden of proof at the summary judgment stage. In analyzing the case, the court views the facts in the light most favorable to the nonmoving party and makes all factual inferences in favor of that party. The court must avoid weighing conflicting evidence or making credibility determinations. Where a reasonable fact finder may draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN4[] **Private Actions, Remedies**

Under the federal antitrust laws, any suit to enforce a private cause of action must be brought within four years after the cause of action accrued. *15 U.S.C.S. § 15b*. Generally, a cause of action accrues when a defendant commits an act that injures a plaintiff's business.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Regulated Practices, Market Definition**

Proof of the existence of two separate markets is a necessary element to a *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, claim.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN6[] **Regulated Practices, Market Definition**

In order to succeed on a monopoly leveraging theory, a plaintiff must define the product and geographic components of both the primary and the secondary markets.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Conforming Pleadings to Evidence

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN7[] Relief From Judgments, Altering & Amending Judgments

Under *Fed. R. Civ. P. 15(b)*, the court may permit a party to amend its pleadings to conform them to the evidence presented at trial, and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party's action or defense upon the merits.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN8[] Antitrust & Trade Law, Sherman Act

Although the concept of relevant market is central to all *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, claims, it is a concept that is not easily defined. Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability actual or potential to take significant amounts of business away from each other. The reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9[] Regulated Practices, Market Definition

Cross-elasticity of demand is defined as the extent to which consumers will change their consumption of one product in response to a price change in another.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Regulated Practices, Market Definition

Although the United States Supreme Court rejects a per se rule that, as a matter of law, competition in the primary equipment market precludes a finding of monopoly power in the aftermarket for service, it recognizes that, in many instances, competition in the primary market will, as a matter of fact, prevent a firm from charging supracompetitive prices in an aftermarket.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

The United States Supreme Court has held many times that power gained through some legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Sherman Act, Claims**

Under the essential facilities doctrine, a plaintiff is required to prove the following four elements to establish a violation of the Sherman Act, *15 U.S.C.S. § 1 et seq.*: 1) that the facility to which the plaintiff has been denied access is essential to competition; 2) that the defendant has refused to allow the plaintiff access to the facility; 3) that the plaintiff cannot practically or reasonably duplicate the essential facility; and 4) that it is feasible for the defendant to provide access to the facility in light of its stated business goals.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN13[] **Monopolies & Monopolization, Actual Monopolization**

The elements for a plaintiffs' monopolization claim are: 1) the possession by defendant of monopoly power in the relevant market; and 2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. A plaintiffs' attempted monopolization claim consists of three elements: 1) predatory or anticompetitive engaged in by defendant; 2) specific intent to monopolize; and 3) a dangerous probability of achieving monopoly power in the relevant market.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN14[] **Sherman Act, Claims**

If a plaintiff asserting a claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, establishes a prima facie case of anticompetitive conduct, a defendant can avoid liability by demonstrating that its conduct was justified by valid business reasons. Whether a defendant's conduct was motivated by its proffered reasons is a question of fact, and the plaintiff can rebut the proffered reasons by demonstrating that they are pretextual. Thus, the court's inquiry on a motion for summary judgment on a *§ 2* claim is very similar to its inquiry on a motion for summary judgment in an employment discrimination case. In such cases, the defendant's true motivations are particularly difficult to ascertain, thereby making such factual determinations generally unsuitable for disposition at the summary judgment stage.

Computer & Internet Law > ... > Copyright Protection > Civil Infringement > General Overview

Copyright Law > ... > Civil Infringement Actions > Online Infringement > Determinations

Computer & Internet Law > ... > Copyright Protection > Formalities & Ownership Interests > General Overview

Computer & Internet Law > ... > Formalities & Ownership Interests > Ownership Interests > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Copyright Law > ... > Civil Infringement Actions > Elements > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > Copying by Defendants

HN15[] **Copyright Protection, Civil Infringement**

In order to prevail on its claims of software copyright infringement, a party must establish: 1) that it owns a valid copyright in the work allegedly infringed; and 2) that the opposing party copied that work by infringing upon any of the exclusive rights established by the copyright.

Copyright Law > ... > Notice > Requirements > Notice Content & Form

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Copyright

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Notice > Requirements > Notice Placement

HN16[] **Requirements, Notice Content & Form**

A certificate of registration constitutes prima facie evidence of validity only if it is made before or within five years after first publication of the work.

Copyright Law > ... > Protected Subject Matter > Audiovisual Works & Motion Pictures > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > ... > Ownership Rights > Distribution > General Overview

Copyright Law > ... > Ownership Rights > Distribution > Limitations

HN17[] **Protected Subject Matter, Audiovisual Works & Motion Pictures**

A distribution is considered a limited publication for copyright purposes if the work is only shown to a limited class of persons for a limited purpose, without the right of further reproduction, distribution, or sale.

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN18[] **Burdens of Proof, Clear & Convincing Proof**

Patents are presumed to be valid, and a plaintiff bears the burden of proving otherwise by clear and convincing evidence. *35 U.S.C.S. § 282*.

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

HN19[] **Civil Infringement Actions, Presumptions**

Under *17 U.S.C.S. § 117*, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided: (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or (2) that such a new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession should cease to be rightful.

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

HN20[] **Civil Infringement Actions, Presumptions**

Congress passed *17 U.S.C.S. § 117* knowing that computer users would need to make copies of computer software in order to utilize that software. Thus, *§ 117* provides a legitimate holder of a computer program with permission to do that copying of the program which is necessary for him to be able to use it in his computer without running afoul of possible infringement actions.

Computer & Internet Law > ... > Copyright Protection > Civil Infringement > General Overview

Copyright Law > ... > Civil Infringement Actions > Online Infringement > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > ... > Protected Subject Matter > Literary Works > General Overview

HN21[] Copyright Protection, Civil Infringement

To determine whether a state law claim is preempted by the Copyright Act, 17 U.S.C.S. § 1 et seq., the court must decide whether the rights at issue fall within the subject matter of the copyright set forth in § 102 and § 103 and whether the rights at issue are equivalent to the exclusive rights of § 106. With respect to the first prong of this test, it is clear that the software and other intellectual property fall within the subject matter of copyright. However, under the second prong of the test, the court must determine whether the state law claim requires an extra element for recovery, because a state law claim is not preempted if the extra element changes the nature of the action so that it is qualitatively different from a copyright infringement claim.

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For ROLM COMPANY, counter-claimant: Kenneth A. Gallo, phv, Rogers & Wells, Washington, DC.

For TELECOM TECHNICAL SERVICES INC., REALCOMM OFFICE COMMUNICATION, INC., counter-defendants: Patrick J. Flinn, William H. Jordan, Keith Edward Broyles, Alston & Bird, Atlanta, GA.

For TELECOM TECHNICAL SERVICES INC., REALCOMM OFFICE COMMUNICATION, INC., counter-defendants: Mark C. Hansen, phv, Michael K. Kellogg, phv, Steven F. Benz, phv, Kellogg Huber Hansen Todd & Evans, Washington, DC.

For TELECOM TECHNICAL SERVICES INC., counter-defendant: Robert Stephen Berry, phv, James Daniel Leftwich, phv, Berry & Leftwich, Washington, DC.

Judges: Willis B. Hunt, Jr., Judge, United States District Court.

Opinion by: Willis B. Hunt, Jr.

Opinion

[*1309] *ORDER*

Plaintiffs bring this antitrust action under sections four and sixteen of the Clayton Act, *15 U.S.C. §§ 15* and *26*, seeking damages and injunctive relief for violations of sections one and two of the Sherman Act, *15 U.S.C. §§ 1* and *2*. Defendant has also asserted a host of counterclaims under federal and state **[**4]** law. The Court has jurisdiction over this matter pursuant to *28 U.S.C. §§ 1331* and *1367*. Before the Court are defendant's motion for summary judgment on plaintiffs' complaint [384], defendant's motion for partial summary judgment on its counterclaims for copyright infringement [385-1] and for permanent injunctive relief [385-2], plaintiffs' motion for partial summary judgment on their claims for monopolization and attempted monopolization [386], plaintiffs' motion for summary judgment on defendant's counterclaims [387], defendant's motion to file surreplies in opposition to plaintiffs' motions for summary judgment [407], and plaintiffs' motion to strike the report and testimony of Miles Alexander [392].

[*1310] I. BACKGROUND

This case is about the servicing of Rolm-branded private branch exchanges ("PBXs"). A PBX, also known as a "switch," is a combination of hardware and software that allows businesses with multiple telephone lines (typically over 50) to send and receive telephone calls, both internally and externally. Rolm is a major manufacturer of PBXs sold in the United States, but it is not contended that Rolm enjoys a monopoly over the sale **[**5]** of this equipment. The parties all agree that other manufacturers, such as Lucent Technologies, Nortel, and NEC, compete with Rolm in the market for sales of PBXs. However, the parts and software used in the PBXs vary among the different manufacturers, and Rolm possesses intellectual property rights in many of the parts and all of the software incorporated into its PBXs.

In addition to manufacturing PBXs, Rolm is also in the business of providing parts and service to end users of Rolm PBXs. Plaintiffs are independent service organizations [1] ("ISOs") that are also in the business of servicing Rolm PBXs. Thus, they compete with Rolm for the business of end users. [2] However, because Rolm possesses patents on a number of proprietary parts and copyrights on its software, the ISOs are at a competitive disadvantage in this market. They contend that this competitive disadvantage is an "antitrust injury" for which they are entitled to treble damages under the Sherman Act.

[6]** Rolm denies that any of its conduct violates the federal antitrust laws. In addition, it contends that plaintiffs are liable to it for unlawfully infringing on Rolm's federally protected intellectual property rights and under principles of state law.

II. DISCUSSION

A. Procedural Motions

Before addressing those motions that deal with the merits of the parties' claims, the Court will first resolve the procedural matters that are before it. First, defendant has moved for leave to file surreplies in opposition to plaintiffs'

[1] Some plaintiffs are both end users and ISOs. Plaintiff Olde York Valley Inn is only an end user.

[2] End users have a third option for service of their PBXs-self-service-whereby they purchase the parts and software they need from Rolm and perform the maintenance themselves. The parties agree that these three alternatives-Rolm, ISOs, and self-service-are the only three service options available to end users. Self-service only accounts for a small portion of all service performed on Rolm PBXs, however.

motions for summary judgment on the ground that plaintiffs raised new arguments in their reply briefs. After considering the record before it, including plaintiffs' opposition to the motion, the Court finds that defendant should be permitted to file its surreplies. Accordingly, defendant's motion [407] is GRANTED, and the Court will consider its surreplies in ruling on plaintiffs' motions for summary judgment.

The other procedural matter before the Court is plaintiffs' motion to strike the expert report and testimony of Miles Alexander [392]. Through this motion, plaintiffs raise objections to the Court's consideration of the opinions offered by **[**7]** Miles Alexander in support of defendant's motion for summary judgment on plaintiffs' antitrust claims. However, the Court notes that rather than filing a motion to strike under *Federal Rule of Civil Procedure 12*, the proper method for challenging the admissibility of such evidence is to file a notice of objection to the challenged testimony. *Morgan v. Sears, Roebuck and Co., 700 F. Supp. 1574, 1576 (N.D. Ga. 1988)*. Accordingly, plaintiffs' motion is DENIED. Nonetheless, in ruling on defendant's motion for summary judgment, the Court will assess the admissibility of the statements in Alexander's report and will consider the objections raised by plaintiffs.

B. Plaintiffs' Claims

The complaint that is presently before the Court-the Revised Second Amended **[*1311]** Complaint-is the fourth formulation of claims presented by plaintiffs in this action. It has been considerably streamlined and only contains claims for monopolization and attempted monopolization under *section 2* of the Sherman Act. [3] Although these are distinct claims, plaintiffs essentially are pursuing a single theory of recovery. As plaintiffs' expert economist Dr. Roger Noll states, "this case is about Rolm's **[**8]** exploiting its control over parts and software to monopolize the service market." Report of Roger Noll at 31, Defendant's Motion for Summary Judgement, Ex. 8.

Plaintiffs' monopolization claim consists of two elements: 1) the possession by Rolm of monopoly power in the relevant market; and 2) the willful acquisition or maintenance of that power (as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident). *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 2089, 119 L. Ed. 2d 265 (1992)*. **[**9]** Plaintiffs' attempted monopolization claim consists of three elements: 1) predatory or anticompetitive engaged in by defendant; 2) specific intent to monopolize; and 3) a dangerous probability of achieving monopoly power in the relevant market. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 892, 122 L. Ed. 2d 247 (1993)*. Both of these claims are premised on a theory of "monopoly leveraging"--the use of market power in one market to gain market share in another market other than by competitive means. *Key Enterprises of Delaware, Inc. v. Venice Hosp., 919 F.2d 1550, 1566 (11th Cir. 1990)*.

Plaintiffs' contend that "Rolm has acquired market power in service by denying competitors access to proprietary parts and software." [4] Defendant does not dispute the validity of this theory of recovery in the abstract. It maintains, however, that the facts of this case do not support such a recovery.

[10]** 1. Defendant's Motion for Summary Judgment

HN2[] Under *Federal Rule of Civil Procedure 56*, a court shall grant a motion for summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Where the nonmoving party bears the burden of proof at trial, the moving party must demonstrate to the Court that "there is an absence of evidence to support the nonmoving party's case," *Celotex v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986)*, or must put forth affirmative evidence negating an element of the nonmoving party's case, *Fitzpatrick v. Atlanta, 2 F.3d 1112, 1116 (11th Cir. 1993)*. It is then the

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[3] ***HN1***[] *Section 2* of the Sherman Act provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a felony . . . ." *15 U.S.C. § 2*. Section 4 of the Clayton Act, *15 U.S.C. § 15*, allows any person injured by a violation of the antitrust laws to sue for damages.

[4] For purposes of their antitrust claims, plaintiffs do not dispute that Rolm's intellectual property rights are valid. In response to Rolm's counterclaims for copyright and patent infringement, however, plaintiffs do dispute the validity of those rights.

responsibility of the nonmoving party, by revealing evidence outside of the pleadings, to show that evidence supporting its case does exist or that the element sought to be negated remains a genuine issue of material fact to be tried. *Id.* Essentially, this requires the nonmoving party to come forward with evidence sufficient to withstand a directed verdict on this issue at trial. *Id. at 1116-17*.

HN3[] The nonmoving party is not required **[**11]** to carry its burden of proof at the summary judgment stage. In analyzing the case, the Court views the facts in the light most favorable to the nonmoving party and **[*1312]** makes all factual inferences in favor of that party. *Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 918 (11th Cir. 1993)*. "The court must avoid weighing conflicting evidence or making credibility determinations." *Id. at 919*. "Where a reasonable fact finder may 'draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment.'" *Id*. (quoting *Barfield v. Brierton, 883 F.2d 923, 933-34 (11th Cir. 1989))*.

Defendant offers a number of arguments in support of its motion for summary judgment on plaintiffs' antitrust claims. First, it contends that plaintiffs' claims are barred by the statute of limitations. Next, it maintains that plaintiffs have failed to plead their claims properly. Finally, it offers several substantive arguments concerning the merits of plaintiffs' claims. The Court will address these arguments in turn.

a. Statute of Limitations

Defendant initially **[**12]** argues that plaintiffs' claims arising out of defendant's alleged refusal to deal with plaintiffs are barred by the relevant statute of limitations. [5] ***HN4***[] Under the federal antitrust laws, any suit to enforce a private cause of action must be brought "within four years after the cause of action accrued." *15 U.S.C. § 15b*. Generally, a cause of action accrues "when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 328, 91 S. Ct. 795, 806, 28 L. Ed. 2d 77 (1971)*. Defendant, citing *David Orgell, Inc. v. Geary's Stores, Inc., 640 F.2d 936 (9th Cir. 1981)* and *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705 (11th Cir. 1984)*, argues that a statement of a definitive policy constituting a unilateral refusal to deal causes an antitrust claim to accrue and the statute of limitations to begin to run. Defendant maintains that it definitively announced its policy of refusing to sell new parts and software to ISOs in January 1990 and that plaintiffs, therefore, were required to file suit within four years of that time. Because plaintiffs did not **[**13]** file this action until July 1994, defendant argues that all of their claims based on the refusal to deal are time-barred.

As an initial matter, the Court notes that *Orgell* included only a very cursory discussion of the statute of limitations issue, and the Ninth Circuit expressly noted the need for a clearer analysis in *LaSalvia v. United Dairymen of Arizona, 804 F.2d 1113, 1118 (9th Cir. 1986)* ("the brief opinion in *Orgell* does not disclose **[**14]** the basis for its conclusion that the initial refusal was both final and the source of the plaintiff's injury. *Orgell* may encourage ambiguous responses to requests to deal coupled with later allegations that those denials were final."). After decrying the limited analysis of *Orgell*, the court stated "we therefore place on defendants the burden of showing that their initial refusal to deal was in fact final, and that the finality of the refusal was conveyed to the plaintiff." *Id.*

This statement is consistent with the Eleventh Circuit's holding in *Midwestern Waffles*. In that case, the court was confronted with the question of whether a refusal to grant plaintiffs a franchise that occurred more than four years prior to the filing of a suit was time-barred. The court concluded that a genuine issue of material fact existed on the question, noting that

> if plaintiffs' subsequent requests for a franchise territory in Alabama or another southern state were genuine, that is if plaintiffs had reason to believe the original **[*1313]** decision not to grant them such a franchise did not still stand, there would be a new alleged injury when a genuine subsequent request was denied. **[**15]** If,

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[5] Plaintiffs vigorously deny that this is a "refusal to deal" case. Plaintiffs' Opposition to Defendant's Motion for Summary Judgment at 1-2. Although defendant recognizes that plaintiffs' claims include allegations of anticompetitive conduct other than refusing to sell parts and software to plaintiffs and restricts its statute of limitations argument to those claims that are based on the alleged refusal to deal, the Court agrees with defendant that the overwhelming majority of plaintiffs' alleged damages appear to stem from the refusal to deal.

> however, plaintiffs' subsequent requests were futile and plaintiffs had reason to know they were futile, the statute of limitations will be found to bar plaintiffs' claim that defendants violated ***antitrust law*** by horizontally allocating territories.

Midwestern Waffles, 734 F.2d at 715. Although defendant has presented strong evidence that at least some of the plaintiffs viewed Rolm's announcement of January 1990 that it would not sell parts directly to ISOs as a final decision, in order to prevail on its motion for summary judgment, defendant must demonstrate that no reasonable jury could find that plaintiffs did not have reason to believe that defendant would reconsider its policy of refusing to sell parts directly to ISOs. Because documents in the record would support a contrary finding, defendant is not entitled to summary judgment on this ground.

The strongest evidence that plaintiffs viewed Rolm's January 1990 refusal to deal as final comes from the depositions of plaintiffs' representatives. Representatives of CMS, NOVA, and Realcom all testified that they were aware that, no later than January 1990, Rolm announced that it would not sell new parts **[**16]** directly to ISOs, and further testified that they were not aware of any change in that policy. Dep. of Thomas Murphy at 39-40; Dep. of Glenn Cosman at 280; Dep. of Fred Shriner at 228-229; Dep. of Robert Pyzna at 96-97; Dep. of Charles McNamee at 34-35. Defendant also points to answers to interrogatories from NOVA and ATC that state that these companies believed that requesting parts from Rolm was futile after January 1990. Defendant's Brief in Support of Motion for Summary Judgment, Ex. 3, 4. However, while this evidence could certainly support a finding in favor of defendant on the statute of limitations issue, plaintiffs have carried their burden of pointing to specific evidence outside the pleadings that demonstrates the existence of genuine issues of material fact on this question.

Three documents in particular can be read to support a finding that defendant's refusal to sell parts to plaintiffs in January 1990 was not sufficiently final to trigger the statute of limitations. The first two are minutes from the meetings of the Board of Directors of the National Association of Telecommunications Dealers ("NATD"), an industry group of which at least some plaintiffs are members. **[**17]** Fred Shriner of NOVA was present at both of these meetings, which took place on October 19, 1990 and November 11, 1991.

The minutes from the 1990 meeting indicate that a representative of Comdisco (a member of NATD but not a party to this action) had recently met with Rolm concerning its refusal to sell parts to "remarketeers" and that "a favorable resolution was expected." Plaintiffs' Opposition to Motion for Summary Judgment, Ex. 46 at 3. Similarly, the 1991 minutes indicate that Rolm is "currently rethinking its position" on selling parts to third parties. *Id.*, Ex. 71 at 3. The minutes further state that "Shriner's report [on this issue] is incorporated as APPENDIX III." *Id.* Appendix III of the minutes bears the heading "Rolm Liaison Committee," and summarizes the information relayed by Frank Keenan, Industry Relations Manager for Rolm, to members of the NATD summer meeting. According to the document, Keenan stated that Rolm's refusal to sell parts to third parties had not been as successful as it had hoped and that "perhaps in the 1992 time frame, Rolm might change this policy." *Id.* at Appendix III.

The third document is a Rolm memorandum to its file, dated February 7, 1994, regarding **[**18]** a meeting between Rolm and representatives of the NATD. Both Shriner and Charles McNamee of Realcom were in attendance. The memorandum indicates that the availability of parts to third parties was discussed at the meeting and that Rolm indicated that it would be willing to consider changing its current **[*1314]** practice of only selling parts to end users if the NATD could provide a business case to justify a change. Plaintiffs' Opposition to Motion for Summary Judgment, Ex. 182.

Because these documents indicate that after Rolm announced its allegedly final policy, it was making statements in the marketplace, and at times directly to plaintiffs' representatives that it was willing to discuss this policy and would consider changing it, the Court cannot conclude, as a matter of law, that Rolm's statement to its branch managers that "Rolm will not sell maintenance parts to other than end users of ROLM systems," contained in a memorandum dated January 8, 1990, constituted a final refusal to deal with plaintiffs that triggered the statute of limitations. Furthermore, the record contains evidence that at least some plaintiffs attempted to purchase parts from Rolm during the four years prior to the **[**19]** filing of this suit. *See* Defendants' Brief in Support of Motion for Summary Judgment, Ex. 3, 4. Accordingly, defendant is not entitled to summary judgment on this ground. [6]

b. Pleading Issue

Rolm also contends that it is entitled to summary judgment on plaintiffs' antitrust claims because the allegations contained in the Revised Second Amended Complaint are fatally inconsistent with the theory of recovery articulated by plaintiffs' expert economist. In the complaint, plaintiffs allege that each proprietary part and each piece of software is in a separate relevant antitrust market. *See* Revised Second Amended Complaint, PP 37-40. However, plaintiffs now seek to recover under a theory of **[**20]** a unified "parts and software" market. *See* Report of Roger Noll at 22-24, Defendant's Motion for Summary Judgement, Ex. 8. Although the obvious solution to this problem would be to amend the complaint, defendant strongly objects to any such amendment, and notes that the Court previously denied plaintiffs' motion for leave to file a third amended complaint that contained allegations of a unified parts and software market.

In response to this argument, plaintiffs take the position that it is immaterial to their claims under *section 2* of the Sherman Act whether Rolm has market power in a unified market for parts and software or multiple market because the claims under *section 2* only require the existence of, or a dangerous probability of achieving, monopoly power in a single relevant market that plaintiffs contend is service for Rolm PBXs. Although there is some intuitive appeal to this argument, it does not appear to be an accurate statement of the law that governs this case.

While plaintiffs are undoubtedly correct that most *section 2* claims only require the definition of a single relevant market, *see* *Kodak, 504 U.S. at 481, 112 S. Ct. at 2089*, plaintiffs' claims **[**21]** are based on a theory of monopoly leveraging, which, as noted above, involves the use of market power in one market to gain market share in another market other than by competitive means. Thus, ***HN5***[] "proof of the existence of two separate . . . markets is [a] necessary" element to this type of claim. *M.A.P. Oil Co., Inc. v. Texaco, Inc., 691 F.2d 1303, 1306*.

Plaintiffs do not necessarily dispute that they bear this burden, as they state that they are prepared to prove that service is in a separate market from parts and software. At issue here is whether plaintiffs are required to prove the product and geographic components of both markets or whether it is sufficient for them to prove these components for the market that they allege that defendant has monopolized and attempted to monopolize--service of Rolm PBXs--and that parts and software are in a distinct market or markets. Unfortunately, **[*1315]** the Court has been unable to locate a single published decision addressing this issue.

However, the Ninth Circuit has issued an unpublished decision that is directly on point. [7] In *Delta Systems, Inc. v. TRW, 874 F.2d 815, 1989 WL 41706 (9th Cir. 1989)* **[**22]** (table disposition at *874 F.2d 815*), the court, confronted with precisely the same argument advanced here by plaintiffs, noted that "we are aware of no case brought under a monopoly leveraging theory in which the secondary market has not been defined to the same extent as the primary market." *Delta Systems*, 1989 WL 41706, at **4 (citing cases). The Court's search for such a case decided since *Delta Systems* has also been fruitless. Accordingly, the Court holds that ***HN6***[] in order to succeed on their monopoly leveraging theory, plaintiffs must define the product and geographic components of both the primary and the secondary markets.

The conclusion that plaintiffs' claims must **[**23]** be dismissed does not flow from this holding, however. ***HN7***[] Under *Federal Rule of Civil Procedure 15(b)*, the Court may permit a party to amend its pleadings to conform them

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[6] The Court notes, however, that in order to recover for any injury arising out of an alleged refusal to deal, each plaintiff must demonstrate that it made a genuine request to purchase parts from Rolm during the limitations period and that such request was denied. *Midwestern Waffles, 734 F.2d at 715*.

[7] The Court recognizes that, under *Ninth Circuit Rule 36-3*, opinions that are not designated for publication are not precedential. However, as this Court is not bound by Ninth Circuit decisions, this rule is of no moment here. The Court simply finds the opinion instructive on the issue presented in this case.

to the evidence presented at trial, and "shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party's action or defense upon the merits." *Fed. R. Civ. P. 15(b)*. Although defendant argues that a finding that allowing such an amendment would unduly prejudice defendant was implicit in the Court's order of September 15, 1997, which denied plaintiffs' motion for leave to file their proposed third amended complaint, the Court disagrees. The Court's ruling was based on its finding that plaintiffs unduly delayed in seeking to assert the amendment and that allowing the amendment at that time would cause further delays in the litigation. These concerns are no longer present.

c. Substantive Antitrust Issues

i. Definition of Relevant Market

Although defendant reluctantly acknowledges that the theories under which plaintiffs seek to recover are legally valid, it contends that it is **[**24]** entitled to summary judgment on plaintiffs' antitrust claims because the record is devoid of any evidence to support such a recovery. These arguments must be evaluated in light of the Supreme Court's decision in *Kodak, 504 U.S. 451, 481, 112 S. Ct. 2072, 2089, 119 L. Ed. 2d 265 (1992)*, which forms the foundation of plaintiffs' claims.

The relationship between the parties in *Kodak* and the nature of the claims presented are virtually identical to those presented here. In *Kodak*, ISOs of Kodak copiers and micrographic equipment sued Kodak under *sections 1* and *2* of the Sherman Act, alleging that Kodak's refusal to sell them parts prevented them from competing in the market for service of Kodak products. As in this case, Kodak competed with other manufacturers in the equipment markets, but its machines were sufficiently unique that the other manufacturers could not provide parts or service for Kodak machines. The district court granted summary judgment in favor of Kodak, but the Supreme Court found that summary judgment was not appropriate for a variety of reasons.

Although much of the *Kodak* opinion is devoted to an analysis of the ISOs' *section 1* "tying" claims, **[**25]** the ISOs in *Kodak* were also pursuing a *section 2* claim under a theory of monopoly leveraging. The Supreme Court's holding with respect to that claim--that a single brand of service can be a relevant market under the Sherman Act, *Kodak, 504 U.S. at 481, 112 S. Ct. at 2090*--is of critical importance here, as the **[*1316]** outcome in this case hinges largely on the definition of the relevant antitrust market.

HN8[] Although the concept of "relevant market" is central to all *section 2* claims, it is a concept that is not easily defined. As the Eleventh Circuit has explained,

> Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability--actual or potential--to take significant amounts of business away from each other. The reasonable interchangeability of use or the cross-elasticity of demand [8] between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes.

U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995 (11th Cir. 1993) (quotations, citations, and footnotes omitted; footnote added). **[**26]** This is clearly a question of fact that normally must be resolved by a jury. *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1341 (11th Cir. 1987)*. In the instant case, however, both sides of this dispute contend that the question of relevant market can be decided as a matter of law. [9]

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[8] ***HN9***[] Cross-elasticity of demand is defined as "the extent to which consumers will change their consumption of one product in response to a price change in another." *Kodak, 504 U.S. at 469, 112 S. Ct. at 2083*.

[9] It is important to note, however, that unlike the usual case involving cross-motions for summary judgment, the parties do not agree that the question of relevant market can be decided as a matter of law regardless of the definition that is ultimately adopted. Rather, plaintiffs and defendant argue that the facts that are material to the inquiry are undisputed and they support a

[27]** Defendant maintains that competition in the sale of PBXs prevents Rolm from charging supracompetitive prices for service of its PBXs and that, therefore, the relevant market in this case is a "systems" market that includes PBX equipment (the PBX itself), parts, software, and service sold by all manufacturers in the United States. [10] ***HN10***[] Although the Supreme Court in *Kodak* rejected a per se rule that, as a matter of law, competition in the primary equipment market precludes a finding of monopoly power in the aftermarket for service, *Kodak, 504 U.S. at 471, 112 S. Ct. at 2084*, it recognized that, in many instances, competition in the primary market would, as a matter of fact, prevent a firm from charging supracompetitive prices in an aftermarket. In support of its motion for summary judgment, Rolm argues that the undisputed facts of this case demonstrate that this is the economic reality of the situation at issue here.

[28]** Plaintiffs, however, have produced evidence from which a reasonable jury could **[*1317]** conclude that Rolm's service pricing has been 30% to 60% higher than comparable ISO service during the period relevant to this litigation, *e.g.*, Plaintiffs' Opposition to Motion for Summary Judgment, Ex. 68 at ROLM 0633906, Ex. 151, and that Rolm was interested in preventing ISOs from effectively competing for the business of Rolm end users and employed strategies designed to achieve that goal, *e.g., id.*, Ex. 71 at Appendix III. Thus Rolm "bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable." *Kodak, 504 U.S. at 469, 112 S. Ct. at 2083*. After carefully considering the record before it, the Court concludes that Rolm has failed to carry this burden.

As the defendant did in *Kodak*, Rolm relies on the concept of "lifecycle pricing" in support of its definition of relevant market. Simply stated, Rolm contends that consumers recognize that PBXs are durable goods and, therefore, select among competing brands based not only on the price **[**29]** of the goods themselves, but also on the expected cost of the maintenance of the goods over their lifetime. Accordingly, Rolm argues that because it competes with a number of other manufacturers of PBXs, if it were to charge supracompetitive prices for service, consumers would choose other copiers when making their initial purchase decision. Thus, the competition in the equipment market prevents Rolm from exercising market power (by raising prices over competitive levels) in the service market.

In *Kodak*, of course, the defendant presented this argument as a purely theoretical matter and maintained that it should not be required to present empirical evidence supporting its application to the facts of its case. The Supreme Court rejected this argument for two reasons. First, as noted above, the Court observed that plaintiffs had presented direct evidence that Kodak had in fact charged supracompetitive prices for parts. Thus, Kodak's theory did not appear to describe the "actual market realities" that were presented in the case. *Kodak, 504 U.S. at 466, 112 S. Ct. at 2072*. The Court then went on to examine the factual assumptions underlying Kodak's theoretical argument, **[**30]** and found that plaintiffs had demonstrated sufficient disputes existed as to whether these assumptions were true to withstand summary judgment.

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finding of a certain relevant market. They disagree, however, about what facts are material. Consequently, they argue that if the Court is inclined to accept the opposing view of the relevant market, genuine issues of material fact preclude the Court from doing so as a matter of law.

[10] This market definition is consistent with the view that "relevant market" for antitrust purposes is defined by the "products that have a sufficient competitive impact on the product of the defendant to be considered collectively in deciding whether the defendant possesses monopoly power." Earl W. Kintner, Federal ***Antitrust Law*** § 12.3. To the extent that this definition of relevant market refers to the concept of monopoly power--defined as the ability to charge supracompetitive prices for an extended period of time--it is somewhat circular. It demonstrates an important point about the arguments advanced here, however.

Under defendant's definition of relevant market, the question of the percentage of Rolm PBXs to which Rolm provides service is irrelevant. Even if it were established that Rolm serviced virtually all of the Rolm PBXs, and, therefore, arguably could be said to have a monopoly share of that market, service for Rolm PBXs cannot be the "relevant market" for antitrust purposes, according to defendant, because competition in the sale of PBXs prevents Rolm from charging supracompetitive prices for service. Thus, for purposes of the instant motions, the concepts of "relevant market" and "monopoly power" are essentially indistinguishable. The Supreme Court recognized the conflation of these concepts *Kodak*. *See* *Kodak, 504 U.S. at 469 n.15, 112 S. Ct. at 2083 n.15*.

As the Court noted, "Kodak's proposed rule rests on a factual assumption about the cross-elasticity of demand in the equipment and aftermarkets: If Kodak raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment." *Id. at 469, 112 S. Ct. at 2084-85* (internal quotations omitted). The Court specifically mentioned two reasons why this assumption might not hold true in reality. First, the information necessary to engage in accurate lifecycle pricing may be difficult or expensive to obtain. Second, because the initial investment in the durable goods is quite large, the cost of switching to another brand might be greater than the increase in the price of service or parts. In this case, purchasers of a manufacture's brand of equipment would be "locked-in" and would be forced to tolerate some increases in the prices of parts and service. Because of these market imperfections, the Court was not willing to adopt the per se rule proposed by Kodak.

In the instant case, Rolm **[**31]** argues that *Kodak* stands for the proposition that unless a plaintiff presents evidence that information costs and switching costs are high and that the consumers became "locked-in" to their purchases of a durable good, summary judgment is appropriate in a case brought by ISOs against a manufacturer that faces competition in the sale of its goods. The Court disagrees with Rolm's reading of *Kodak*. [11]

[32]** **[*1318]** The Supreme Court's discussion of information and switching costs in *Kodak* was offered as "a forceful reason why Kodak's theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods." *Kodak, 504 U.S. at 473, 112 S. Ct. at 2085*. Nothing in the discussion suggests that these were the only factors that should be considered in evaluating such an argument. Rather, the opinion makes clear that "the relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners," *id., at 482, 112 S. Ct. at 2090*, and that "the proper market definition . . . can be determined only after a factual inquiry into the commercial realities faced by consumers." *Id.* Contrary to Rolm's assertion, the facts regarding the commercial realties faced by consumers in this case are not undisputed. Rather, plaintiffs have produced evidence from which a reasonable jury could conclude that Rolm has charged supracompetitive prices for service and that Rolm has willfully maintained its ability to charge such prices by adopting business strategies designed **[**33]** to prevent ISOs from competing successfully for the business of Rolm end users. Accordingly, Rolm is not entitled to summary judgment on this ground.

ii. Interplay Between ***Antitrust Law*** and Intellectual Property Rights

Rolm also contends that its intellectual property rights in its proprietary parts and software insulate it from liability under the Sherman Act as a matter of law. This argument requires little discussion.

In *Kodak*, the Supreme Court reiterated that ***HN11***[] "the Court has held many times that power gained through some legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'" *Kodak, 504 U.S. at 479 n.29, 112 S. Ct. at 2089* (quoting *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 73 S. Ct. 872, 882, 97 L. Ed. 1277 (1953))*. This is precisely what plaintiffs have alleged here. As in *Kodak*, if a jury concludes that Rolm "adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated *§ 2*." *Kodak, 504 U.S. at 483, 112 S. Ct. at 2090*. **[**34]** Accordingly, Rolm is not entitled to summary judgment on this ground.

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[11] The Court notes, however, that even if it accepted Rolm's reading of *Kodak*, plaintiffs have presented sufficient evidence to withstand defendant's motion for summary judgment. First, Rolm's own lifecycle expert, John Anderson, testified that he is paid between $ 7,000 and $ 60,000 to conduct PBX lifecycle analyses for consumers. Dep. of John Anderson, pp. 309-312. Second, evidence in the record suggests that the average consumer expenditure for a Rolm PBX in 1992 and 1993 was $ 438,239. Plaintiffs' Brief in Support of Motion for Partial Summary Judgment, Ex. 31 at EDM 002037. This figure is more than twice as much as the expenditure required to purchase the most expensive equipment at issue in *Kodak*, in which the Supreme Court found that there was sufficient evidence of high switching costs to withstand the defendant's motion for summary judgment. Plaintiffs' Opposition to Motion for Summary Judgment, Ex. 229. Finally, regardless of whether Rolm's conduct in January 1990 constituted an announcement of a final policy of refusing to sell parts directly to ISOs, the record contains sufficient evidence to support a finding that, prior to that time, Rolm sold parts directly to ISOs. *See* section II.B.1.a, *supra*. This demonstrates the existence of a genuine issue of material fact on the question of whether end users who purchased Rolm PBXs prior to that time became "locked-in" to their purchases as a result of this change.

iii. Essential Facilities Doctrine

Rolm next contends it is entitled to summary judgment under the "essential facilities doctrine." ***HN12***[] Under this doctrine, which has been applied by several federal courts in cases involving allegations of unlawful refusals to deal, a plaintiff is required to prove the following four elements to establish a violation of the Sherman Act: 1) that the "facility" to which the plaintiff has been denied **[*1319]** access is essential to competition; 2) that the defendant has refused to allow the plaintiff access to the facility; 3) that the plaintiff cannot practically or reasonably duplicate the essential facility; and 4) that it is feasible for the defendant to provide access to the facility in light of its stated business goals. *MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983)*. However, the Court finds that this doctrine is not applicable here.

The Supreme Court has never explicitly held that a *section 2* refusal to deal claim must be analyzed under this doctrine. Although the claims in *Kodak* clearly involved allegations of refusal to deal virtually identical **[**35]** to those presented here, the Court never discussed the doctrine in its opinion, nor was it mentioned in any of the cases cited by the Court. *See Kodak, 504 U.S. at 483, 112 S. Ct. at 2090-91* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778 (1966)*; *United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2nd Cir. 1945)*; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600-05, 105 S. Ct. 2847, 2856-59, 86 L. Ed. 2d 467 (1985))*. Furthermore, in *Aspen Skiing*, the Court affirmed a jury verdict in favor of a plaintiff on a *section 2* refusal to deal claim, expressly declining to evaluate the claim under the essential facilities doctrine. *Aspen Skiing, 472 U.S. at 611 n.44, 105 S. Ct. at 2862 n.44* ("Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unneccessary to consider the possible relevance of the 'essential facilities' doctrine . . . ."). In light of these authorities, the Court finds that plaintiff need only prove the elements set forth at page **[**36]** 5, *supra*, [12] in order to prevail on its claims under *section 2*.

iv. Business Justification

HN14[] If a plaintiff asserting a claim under *section 2* of the Sherman Act establishes a prima facie case of anticompetitive conduct, a defendant can avoid liability by demonstrating that its conduct was justified by valid business reasons. *Aspen Skiing, 472 U.S. at 605, 105 S. Ct. at 2859*. **[**37]** Whether a defendant's conduct was motivated by its proffered reasons is a question of fact, and the plaintiff can rebut the proffered reasons by demonstrating that they are pretextual. *See Kodak, 504 U.S. at 483-84*; *112 S. Ct. at 2091*. Thus, the Court's inquiry on a motion for summary judgment on a *section 2* claim is very similar to its inquiry on a motion for summary judgment in an employment discrimination case. In such cases, the Eleventh Circuit has long recognized that the defendant's "true motivations are particularly difficult to ascertain, thereby making such factual determinations generally unsuitable for disposition at the summary judgment stage." *Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 919 (11th Cir. 1993)* (internal citations omitted).

Here, defendant has offered two legitimate business justifications for its conduct: 1) its "procompetitive distribution strategy"; and 2) its desire to avoid liability under the Robinson-Patman Act. However, plaintiffs have pointed out specific evidence from which a reasonable jury could infer that neither of these proffered reasons were considered by Rolm when it decided to **[**38]** adopt its restrictive parts and software policies. *See* Plaintiffs' Opposition to Motion for Summary Judgment at 45-49. Accordingly, the Court finds that genuine issues of material fact exist with respect to the question of whether Rolm's proffered business justifications are pretextual.

[*1320] v. Testimony of Plaintiffs' Expert

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[12] To reiterate, ***HN13***[] the elements for plaintiffs' monopolization claim are: 1) the possession by Rolm of monopoly power in the relevant market; and 2) the willful acquisition or maintenance of that power (as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident). Plaintiffs' attempted monopolization claim consists of three elements: 1) predatory or anticompetitive engaged in by defendant; 2) specific intent to monopolize; and 3) a dangerous probability of achieving monopoly power in the relevant market. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 892, 122 L. Ed. 2d 247 (1993)*.

Rolm's final argument in support of its motion for summary judgment is that the deposition of plaintiffs' expert economist demonstrates that his analysis, which is at the heart of plaintiffs' case, is insufficient to support plaintiffs' theory of recovery. The Court disagrees.

Although Rolm disagrees with the conclusions of plaintiffs' expert and has presented expert testimony of its own that reaches a conclusion directly contrary to that of plaintiffs' expert, this fact does not demonstrate that Rolm is entitled to summary judgment. After reviewing the passages of the deposition of plaintiffs' expert that defendant claims are factually deficient, the Court easily concludes that the conflicting testimony of these experts presents genuine issues of material fact that must be resolved by a jury. For these reasons, defendant's motion for summary judgment is DENIED.

[39]** 2. Plaintiffs' Motion for Partial Summary Judgment

Through this motion [386], plaintiffs seek a ruling that, as a matter of law, the relevant market in this case is service of Rolm PBXs. Although plaintiffs' motion is governed by essentially the same standard as set forth above in connection with defendant's motion for summary judgment, plaintiffs' burden is even more onerous than that borne by defendant because plaintiffs bear the burden of proof on this question at trial. *See* *Celotex, 477 U.S. at 331-32, 106 S. Ct. at 2557* (Brennan, J., dissenting). [13]

Plaintiffs' argument is based largely on the following dicta from *Kodak*: "The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners. Because service and parts for Kodak equipment **[**40]** are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed only of those companies that service Kodak machines." *Kodak, 504 U.S. at 481-82, 112 S. Ct. at 2090*. Although this statement, standing alone, appears to indicate that the Court found that the relevant market was, as a matter of law, limited to service of Kodak machines, the Court, of course, reached no such conclusion. Rather the Court ultimately concluded its opinion by stating that, "in the end, of course, Kodak's arguments may prove to be correct. It may be that its parts, service, and equipment are components of one unified market." *Id. at 486, 112 S. Ct. at 2092*.

In order to withstand plaintiffs' motion for summary judgment, Rolm need only demonstrate that, viewing all of the evidence in the light most favorable to it, a reasonable jury could find that a systems market was the relevant market. There is ample evidence in the record to support such a finding.

For example, in support of their motion, plaintiffs rely heavily on a document entitled "Services Core Business Strategy," which strongly supports **[**41]** a conclusion that Rolm considered service a separate market in which it competes with ISOs and not equipment manufacturers. Plaintiffs' Brief in Support of Motion for Partial Summary Judgment, Ex. 1 at 2015178 ("End users of Siemens Rolm provided communications equipment are the core market. . . . There are two classes of competition in this market. The first is third party service providers whose primary business competes with Siemens Rolm in all its lines of business."). However, the same document also contains language that would support a finding of a systems market. *Id.* at 2015206 ("This similarity [between service and support "packages" offered by Rolm and other PBX manufacturers] is critical during the customer's purchase cycle decision, when each manufacturer's products and services are compared **[*1321]** and the solution with the most value to the customer is chosen.").

Plaintiffs also argue that the expert opinion presented by defendant on this question is not supported by the facts of this case. However, the Court has carefully reviewed the expert evidence presented by all parties, and finds that the conclusions of each expert are sufficiently supported by the record to render **[**42]** summary judgment on this issue inappropriate. Any discrepancies between their testimony must be resolved by a jury. For these reasons, plaintiffs' motion for partial summary judgment is DENIED.

C. Defendant's Counterclaims

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[13] Although Justice Brennan dissented in *Celotex*, he agreed with the majority's analysis of *Rule 56*. He believed, however, that the majority did not adequately explain what is required of the moving party.

Defendant has taken an expansive approach in pleading its counterclaims. Although it appears that the crux of its complaint is that plaintiffs unlawfully infringed upon its federally protected intellectual property rights, it has asserted the following counterclaims: declaratory judgment on the issue of copyright validity (Count I); copyright infringement (Counts II and III); patent infringement (Count IV); misappropriation of trade secrets (Count V); false advertising (Count VI); trademark infringement (Count VII); unfair and deceptive trade practices (Count VIII); breach of contract (Counts IX and XIX); tortious interference with contract (Count X); tortious interference with prospective business relations (Count XI); conversion and trover (Count XII); unjust enrichment (Count XIII); unfair competition (Count XIV); computer fraud/tampering/trespass (Count XV); product disparagement (Count XVI); for price of reasonable value of goods and services (Count XVII); **[**43]** quantum meruit (Count XVIII); and for an account stated (Count XX). Plaintiff now seeks summary judgment on all of these claims, and defendant seeks partial summary judgment on its claims for copyright infringement with respect to its software (Count II and parts of Count III). The Court will address defendant's motion first.

1. Defendant's Motion for Partial Summary Judgment

Rolm alleges that plaintiffs infringed upon its software copyrights in four distinct ways. First, Rolm complains that plaintiffs are guilty of "distribution infringement." The essence of this complaint is that plaintiffs, who are not licensed users of Rolm's proprietary software, have failed to comply with the formalities regarding the transfer of a software license contained in the license agreements executed by Rolm and end users. Specifically, defendant alleges that plaintiffs have purchased PBXs, which include Rolm's proprietary software, from end users and sold them to other end users without complying with these formalities.

Next, defendant accuses plaintiff of "mix and match copying infringement" by copying proprietary software installed on one PBX and installing it onto other PBXs [14] in violation of **[**44]** Rolm's software license, which only permits an end user to install software on a single PBX, and federal copyright law.

Defendant also complains of "feature activation infringement." These claims are based on the fact that Rolm's software includes certain features for PBXs that permit the PBXs to perform certain functions. Although all PBXs have the capability of performing these functions, the functions will only operate if they are activated by Rolm or an ISO. Rolm will only activate those features for which the end users have paid. Rolm contends, however, that plaintiffs have unlawfully activated features for their customers for which Rolm has not been paid.

Finally, defendant complains of "computer copying infringement." These claims are based on the fact that several **[**45]** routine maintenance tasks for Rolm PBXs **[*1322]** require that software be "reloaded" into the PBXs Random Access Memory ("RAM"). For example, whenever the power supply to the PBX is interrupted, software must be reloaded into the RAM before it will work properly. Rolm maintains that every time an ISO performs one of these maintenance tasks that requires reloading of the RAM, the ISO is making an unauthorized "copy" of the software. Rolm asserts that it is entitled to summary judgment on all of these claims.

The standard governing a motion for summary judgment was set forth above. *See* pp. 5-6, *supra*. As the Court explained previously, defendant, as the party that bears the burden of persuasion on these issues at trial, bears an even greater burden than it did in connection with its motion for summary judgment on plaintiffs' antitrust claims.

HN15[] In order to prevail on its claims of software copyright infringement, Rolm must establish: 1) that it owns a valid copyright in the work allegedly infringed; and 2) that the ISOs "copied" that work by infringing upon any of the five exclusive rights established by the copyright. *Donald Frederick Evans & Assocs., Inc. v. Continental Homes, Inc., 785 F.2d 897, 903 (11th Cir. 1986)*. **[**46]** The Court need not delve too deeply into the merits of Rolm's claims because the Court finds that the ISOs have produced evidence sufficient to establish the existence of a genuine issue of material fact with respect to the first element of Rolm's claims.

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[14] Although all PBXs come with software installed, Rolm periodically produces "upgraded" software that works with the same PBX system. Plaintiffs are accused of providing their customers with these upgrades by copying them from other customers.

Although Rolm relies on its certificates of registration--obtained in September 1994, after the initiation of this litigation--as prima facie evidence of the validity of its copyrights, under *17 U.S.C. § 401(c)*, ***HN16***[] a certificate of registration constitutes prima facie evidence of validity only if it is "made before or within five years after first publication of the work." Plaintiffs contend that Rolm did not obtain registration for all of its software titles within five years of the public distribution of the software and that Rolm, therefore, is not entitled to summary judgment on these claims. [15] Rolm counters that there has never been a "publication" of its software titles within the meaning of the Copyright Act. Rather, it argues, its distribution of the software to Rolm distributors and end users constitutes, at most, a "limited publication," which does not fall within the definition of "publication" contained **[**47]** in *17 U.S.C. § 101*.

A district court in California was recently presented with a strikingly similar scenario. In *Bell Atlantic Business Sys. Servs., Inc. v. Hitachi Data Sys. Corp.*, No. C 93-20079 JW, 1995 WL 836331, (N.D. Cal. Dec. 14, 1995), the plaintiff **[**48]** was an independent service provider that serviced computer equipment, including direct access storage devices manufactured by the defendant. The plaintiff asserted antitrust claims against the defendant, and the defendant filed a counterclaim for copyright infringement based on the plaintiff's allegedly unlawful copying of the defendant's software. In support of its motion for summary judgment on the copyright infringement claim, the plaintiff argued that the defendant could not establish its ownership of a valid copyright because the defendant's distribution of its software constituted "publication." As in this case, the defendant responded that its distribution only constituted "limited publication."

As the court in *Hitachi Data* noted, ***HN17***[] a distribution is considered a "limited **[*1323]** publication" for copyright purposes if the work is only shown to a limited class of persons for a limited purpose, without the right of further reproduction, distribution, or sale. *Id.* at *5 (citing *Academy of Motion Picture Arts and Sciences v. Creative House, 944 F.2d 1446, 1452 (9th Cir. 1991))*. *See also* *Brown v. Tabb, 714 F.2d 1088, 1091 (11th Cir. 1983)*. After examining **[**49]** the record before it, the court noted that the evidence would support a finding that the software was made available only to a limited class of persons, that the end users did not own the copies of the software that accompanied their purchase of the hardware manufactured by the defendant, and that the defendant placed strict restrictions on the access and use of the software by distributors of the hardware. *Hitachi Data Sys*, 1995 WL 836331, at *5, 6. Accordingly, the court concluded that "a triable issue of material fact exists as to whether the distribution of [the software] by Hitachi constituted a limited publication." *Id.* at *6.

The analysis applied in *Hitachi Data Sys.* is equally applicable here. Although Rolm urges the Court to determine, as a matter of law, that the distribution of its software constituted no more than a "limited publication," based on the record before it, the Court finds that this question is more appropriately resolved by a jury. Consequently, Rolm's motion for partial summary judgment on its counterclaims is DENIED.

2. Plaintiffs' Motion for Summary Judgment

As noted above, plaintiffs have moved for summary judgment on the entirety **[**50]** of the counterclaims, offering several arguments in support of their motion. [16] As an initial matter, the Court notes that defendant has chosen not to respond to some of these arguments. For example, defendant has offered no response to: 1) plaintiffs' argument that there is no basis for defendant's fraud/tampering/trespass claim (Count XV); 2) plaintiffs' argument that there is no basis for defendant's copyright and patent infringement claims against Start Technologies Corporation, Olde York Valley Inn, or DD Hawkins Communications, Inc. (Counts II, III, and IV); 3) plaintiffs' argument that applicable state law does not recognize a claim for product disparagement (Count XVI); or 4) plaintiffs' argument that there is

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[15] The Court recognizes that plaintiffs only contend that "Rolm failed to obtain registration until more than five years after *almost every* software title had been publicly distributed." Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment at 5 (emphasis added). Therefore, it appears that plaintiffs concede that at least some of the registrations constituted prima facie evidence of validity. However, as the moving party with respect to this motion, Rolm bears the burden of demonstrating that it is entitled to judgment as a matter of law on each of its claims, and it has not attempted to break down its claims with respect to each of the nineteen software titles it alleges that plaintiffs infringed.

[16] The standard governing this motion is set forth above. *See* pp. 5-6, *supra*.

no evidence to support defendant's claim for tortious interference with contract (Count X). [17] Accordingly, the Court finds that plaintiffs are entitled to summary judgment on these claims.

[51]** a. Patent Claims

In support of their motion for summary judgment with respect to these claims, plaintiffs argue that Rolm has exhausted its patent rights by selling PBX systems that contained the patented inventions and that Rolm's patents are invalid. In response, defendant maintains that it has not exhausted its patent rights because its sales of the PBX systems were conditional or restricted sales or licenses. This argument is similar to the "limited publication" issue discussed above. As the Court concluded with respect to that issue, genuine issues of material fact preclude the entry of summary judgment on this ground. [18]

[*1324] Furthermore, Rolm's ***HN18***[] patents are presumed to be valid, and plaintiffs bear the burden of **[**52]** proving otherwise by clear and convincing evidence. *35 U.S.C. § 282*; *Hybritech, Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 1375 (Fed. Cir. 1986)*. On the record before it, the Court cannot say that, as a matter of law, plaintiffs have carried this burden. Accordingly, their motion for summary judgment is DENIED with respect to these claims.

b. Copyright Claims

As noted above, defendant has asserted copyright infringement claims arising out of four distinct types of conduct. Plaintiffs' primary argument in support of its motion for summary judgment with respect to these claims is that they are barred by the doctrine of "copyright misuse," which the plaintiffs describe as a defense that "forbids the use of a copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office." *See Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 977-79 (4th Cir. 1990)*. Essentially, plaintiffs' contend that Rolm's "computer copying" infringement claim is so lacking in merit, that Rolm's prosecution of this claim constitutes an abuse of its property rights, and that the equitable remedy for this abuse is to **[**53]** prevent Rolm from recovering for any of its infringement claims.

This argument has two major flaws, however. First, the Eleventh Circuit has not recognized the defense of "copyright misuse." [19] Second, regardless of whether this Court ultimately accepts the validity of Rolm's "computer copying" claim, at least one federal court of appeals has already done so. *See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993)*. Thus, even if the Court were inclined to recognize a "copyright misuse" defense, such a defense would not be appropriate because the Court cannot conclude that Rolm's claims are "objectively meritless" in light of the Ninth Circuit's decision in *MAI Sys. Corp.*. *See In re Independent Serv. Org. Antitrust Litigation, 964 F. Supp. 1479, 1491 (D. Kan. 1997)* (misuse defense based on the filing of suit not authorized unless claims are objectively meritless).

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[17] The Court recognizes that defendant did respond to plaintiffs' initial attack on the sufficiency of its evidence with respect to Count X, directing the Court to the "numerous issues of fact presented by each element of that claim" allegedly demonstrated by defendant's statement of material facts that were in dispute. However, plaintiffs' specifically attacked the sufficiency of the evidence cited by defendant in their reply brief, and although the Court allowed defendant to file a surreply in support of its opposition to this motion, defendant did not respond to this attack therein.

[18] Plaintiffs offer an additional, "closely related" argument that defendant has granted them an implied license with respect to the patents-in-suit. This inquiry is also fact-intensive, and the Court finds that summary adjudication of this issue is not appropriate based on the record before it.

[19] Contrary to plaintiffs' assertion, the Eleventh Circuit has not "acknowledged that copyright misuse could in an appropriate case be used as a defense to discipline those who abuse their copyrights." As an initial matter, the Court notes that the case that plaintiffs cite for this proposition, *BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing, 933 F.2d 952 (11th Cir. 1991)* was vacated en banc. Furthermore, although the vacated opinion stated that the judicially recognized patent misuse defense might someday be extended to copyright law, the court expressly declined to do so in that case. *Id. at 961*.

[54]** Nonetheless, the Court agrees with plaintiffs that defendant's "computer copying" claims fail as a matter of law. ***HN19***[] Under *17 U.S.C. § 117*,

> It is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
>
> (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
>
> (2) that such a new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession should cease to be rightful.

HN20[] Congress passed *section 117* knowing that computer users would need to make copies of computer software in order to utilize that software. *Aymes v. Bonelli, 47 F.3d 23, 26 (2nd Cir. 1995)* (citing H.R. Rep. No. 1307, 96th Cong., 2d Sess., Pt. I, at 23 (1980), reprinted in 1980 U.S.C.C.A.N. 6460, 6482). Thus, *section 117* provides a legitimate holder of a computer program with permission to do that copying of the **[*1325]** program which is necessary for him to be able to use it **[**55]** in his computer without running afoul of possible infringement actions.

Rolm does not challenge plaintiffs' contention that the maintenance tasks that form the basis of the "computer copying" claims fall within the scope of activity covered by *section 117*. Rather, it argues that *section 117* is inapplicable to these claims because plaintiffs' end user customers are not "owners of a copy of" Rolm's software within the meaning of the statute. The Court disagrees.

In support of its position, Rolm notes that it licenses its software to end users and expressly retains ownership of all copies. This fact, however, "does not preclude a finding that the [end users] are 'owners of a copy' for purposes of *section 117*." *DSC Communications Corp. v. Pulse Communications, Inc., 976 F. Supp. 359, 362 (E.D. Va. 1997)*. Rather, as the court noted in *DSC Communications*, "it is necessary to determine ownership of the copy, not whether the transaction . . . involved a license to use the program." *Id.*

In making its determination that the holders of the software were "owners" within the meaning of *section 117*, the court in *DSC Communications* noted that, "the transaction involves **[**56]** a single payment, giving the buyer an unlimited period in which it has a right to possession, making [the] transaction a sale." *Id.* The Court finds this analysis persuasive, [20] **[**57]** and its application to the instant case leads to the same conclusion; because Rolm's software license is granted for the life of the system and the initial purchaser pays one price for the software when it buys its PBX system, [21] the Court finds that Rolm's end users are "owners" within the meaning of *section 117*. Furthermore, because *section 117* allows "owners" to "authorize the making of another copy" of a computer program, plaintiffs are also entitled to the protections of *section 117* since they were acting on behalf of their customers when they committed the alleged infringements. Accordingly, plaintiffs' are entitled to summary judgment on these claims.

Plaintiffs' remaining arguments regarding Rolm's other copyright claims are not persuasive, however. Although plaintiffs assert defenses of estoppel and implied license with respect to Rolm's distribution infringement claims, the

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[20] The Court recognizes that some courts have reached the contrary conclusion on this issue. *E.g., MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993)* (software licensee not "owner" for purposes of *section 117*); *Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp., 845 F. Supp. 356 (E.D. Va. 1994)* (same); *CMAX/Cleveland, Inc. v. UCR, Inc., 804 F. Supp. 337 (M.D. Ga. 1992)* (same). Many of these decisions, however, have been criticized in one of the leading treatises on copyright law. *See* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright § 8.08[B][1]* & nn. 37-38.1 (1998). The Court notes that defendant has cited this treatise as authoritative on at least one occasion in this litigation.

[21] Although Rolm notes that its software license provides that any "modifications to, or new releases or versions of, the software will be provided subject to this Agreement at applicable charges," this does not change the fact an end user only pays a single price for each copy of software that is licensed to it under the agreement.

applicability of these fact-intensive defenses to this action cannot be resolved as a matter of law based on the record that is before the Court. [22] Similarly, the fact that less than four percent of the ISO transactions had a "mismatch" problem does not indicate that plaintiffs are entitled to judgment as a matter of law on these claims. Finally, other than the misuse argument that the Court rejected above, plaintiffs have not offered any arguments in support of their motion with respect to Rolm's "feature activation" claims.

[58]** c. State Law Claims

Plaintiffs also maintain that Rolm's claims for misappropriation of trade secrets **[*1326]** (Count V), breach of contract (IX), tortious interference with prospective business relations (Count XI), conversion (Count XII), and unjust enrichment (Count XIII) are preempted by the Copyright Act. *See* 17 U.S.C. § 301. The Court agrees with defendant that this argument is without merit with respect to portions of Count V that relate to passwords and customer information, as well as Counts XII and XIII, which relate to such matters as the alleged theft of items not covered under any copyright, such as customer lists.

However, Rolm concedes that its claims for breach of contract and tortious interference "are preempted to the extent they are premised on acts that counterdefendants now concede implicate Siemens Rolm's exclusive rights under the Copyright Act." Defendant's Opposition to Motion for Summary Judgment on Counterclaims at 25. Accordingly, Rolm states that it is willing to withdraw these claims on the condition that plaintiffs are barred from contesting the application of the Copyright Act to the conduct at issue. Plaintiffs, however, have refused **[**59]** to agree to not contest the application of the Copyright Act, and Rolm, therefore, has not withdrawn these claims.

The fact that Rolm has offered to withdraw its claims is not dispositive on the question of preemption. Under the law of this circuit, ***HN21***[] to determine whether a state law claim is preempted by the Copyright Act, the Court must decide "whether the rights at issue fall within the 'subject matter of the copyright' set forth in sections 102 and 103 and whether the rights at issue are equivalent to the exclusive rights of section 106." *Donald Frederick Evans & Assocs., Inc. v. Continental Homes, Inc., 785 F.2d 897, 913-914 (11th Cir. 1986)*. With respect to the first prong of this test, it is clear that the software and other "intellectual property" at issue in these claims fall within the "subject matter of copyright." However, under the second prong of the test, the Court must determine whether the state law claim requires an "extra element" for recovery, because "[a] state law claim is not preempted if the 'extra element' changes the nature of the action so that it is *qualitatively* different from a copyright infringement claim." *Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1549 (11th Cir. 1996)* **[**60]** (emphasis in original) (quoting *Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 716 (2nd Cir. 1992)*.

Under this analysis, it is clear that Rolm's breach of contract claim, which alleges that plaintiffs used Rolm software in a manner inconsistent with the terms of the licensing agreements and by failing to comply with the provisions governing the assignment or transfer of rights and duties established under the agreements, is not preempted. *See* *National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 433 (8th Cir. 1993)* ("The contractual restriction on use of the programs constitutes an extra element that makes this cause of action qualitatively different from one for copyright."). The same is true for Rolm's tortious interference claim, which also alleges that plaintiffs violated the terms of Rolm's software license. Accordingly, the Court finds that these claims are not preempted. [23]

[61]** d. Trademark Claims

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[22] For example, while plaintiffs argue that Rolm does not enforce the formalities relating to transfer that are contained in its licensing agreement, this is clearly a question for the jury.

[23] The Court notes, however, that if, in fact, the plaintiffs are not bound by Rolm's software license, then these claims would be preempted under the Copyright Act because the claims would essentially amount to allegations that plaintiffs did something that the copyright laws reserve exclusively to Rolm, such as unauthorized reproduction, distribution, or display. *See* *American Movie Classics Co. v. Turner Entertainment Co., 922 F. Supp. 926, 931 (S.D.N.Y. 1996)* (also noting that an action will not be saved from preemption by elements such as intent, which alter the action's scope but not its nature).

Rolm has asserted a number claims under both state and federal law relating to plaintiffs' allegedly unlawful use of the Rolm name in advertisements. At the center of these claims is Rolm's allegation that plaintiffs have used the Rolm mark in a way that creates a substantial **[*1327]** likelihood of confusion among consumers concerning the relationship between Rolm and the ISOs. For example, Rolm complains that plaintiffs include the Rolm mark in their promotional materials and that plaintiffs advertise that they employ "Rolm-certified" technicians without disclosing the fact that these technicians do not receive ongoing training by, or approval from, Rolm. Plaintiffs do not dispute that they engage in these practices. Rather, they argue that these practices are not likely to cause confusion among consumers. However, "likelihood of confusion is a factual matter," *Versa Products Co., Inc. v. Bifold Co. (Mfg.) Ltd., 50 F.3d 189, 200 (3rd Cir. 1995)*, and the Court cannot conclude, on the record before it, that no reasonable jury could find that a likelihood of confusion exists. [24] **[**62]** Accordingly, summary judgment is not appropriate. [25]

e. Trade Secret Claims

Plaintiffs next contend that they are entitled to summary judgment on Rolm's misappropriation of trade secrets claim (Count V) because the uncontroverted evidence demonstrates that Rolm did not make reasonable efforts to maintain the secrecy of its purported trade secrets and there is no evidence of misappropriation. However, the record materials **[**63]** cited in Rolm's response brief and its response to plaintiffs' statement of material facts not in dispute make clear that genuine issues of material fact exist with respect to the extent of the efforts employed by Rolm to maintain the secrecy of the materials at issue and whether plaintiffs misappropriated any of these materials. Defendant's Opposition to Motion for Summary Judgment on Counterclaims at 23-24; Defendant's Response to Plaintiffs' Statement of Material Facts Not in Dispute at PP 58-59. Accordingly, plaintiffs' motion for summary judgment is DENIED with respect to these claims. [26]

f. Claims for Money Due and Owing

Under Counts XVII through **[**64]** XX, Rolm seeks to recover debts allegedly owed to it by Realcom Office Communication ("Realcom") and Olde York Valley Inn ("Olde York"). These plaintiffs contend they are entitled to summary judgment on these claims for different reasons. First, Realcom Office Communication argues that these claims are barred by the doctrine of accord and satisfaction. However, Rolm denies that such a settlement was entered or that it received any payment. Although there is strong evidence in the record suggesting that a debt was settled by a payment of $ 15,403.64 in 1994, the amount of the debt that was allegedly settled by that does not precisely conform to the amount alleged in the counterclaim. *Compare* Counterclaim, P 181 *with* Aff. of Marla Buckman, P 3, Plaintiffs' Brief in Support of Motion for Summary Judgment on Counterclaims, Ex. 30. In light of this factual dispute, the Court cannot grant summary judgment on this claim.

[*1328] Similarly, factual disputes preclude summary judgment on defendant's claims against Olde Valley. Although Olde York contends that it was fraudulently induced into entering its service contract with Rolm by a statement made by a Rolm representative to the effect that **[**65]** Rolm was the only company that could provide service for its PBXs, Olde York has not identified the name of the Rolm employee that allegedly made this statement, and Rolm disputes that this statement was ever made. This factual dispute must be resolved by a jury.

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[24] The question of likelihood of confusion is central not only to Rolm's claims under the Lanham Act, but also to its claims under Georgia law. *See* *University of Ga. Athletic Ass'n v. Laite, 756 F.2d 1535, 1539 n.11 (11th Cir. 1985)*.

[25] The Court recognizes that plaintiffs alternatively contend that they are entitled to summary judgment on the issue of damages because such an award under the Lanham Act requires a showing of actual confusion, which plaintiffs claim is lacking here. *See* *Web Printing Controls Co. v. Oxy-Dry Corp., 906 F.2d 1202, 1204-05 (7th Cir. 1990)*. Although the Court agrees that there is little evidence of actual confusion in the record before it, defendant has also moved for injunctive relief under the Lanham Act, which requires only a showing of likelihood of confusion. In light of the factual issues that exist on this question, the Court will not preclude defendant from attempting to establish actual confusion at trial.

[26] In further support of their contention that the materials were not "trade secrets," plaintiffs argue that the materials were readily available from third-parties. Assuming this to be true, however, plaintiffs have not cited any binding authority for the proposition that this fact precludes recovery for misappropriation of trade secrets as a matter of law.

III. CONCLUSION

For the aforementioned reasons, defendant's motion for leave to file surreplies [407] is GRANTED, and plaintiffs' motion to strike the expert report and testimony of Miles Alexander [392] is DENIED. Defendant's motion for summary judgment on plaintiff's antitrust claims [384] is DENIED, as is its motion for partial summary judgment on its copyright counterclaims and permanent injunctive relief [385-1, 385-2]. Plaintiffs' motion for partial summary judgment on their antitrust claims [386] is also DENIED. Plaintiff's motion for summary judgment on defendant's counterclaims [387] is GRANTED IN PART and DENIED IN PART. [27]

[66]** The Court reminds the parties that "motions for reconsideration shall not be filed as a routine practice." Local Rule 7.1E. Any frivolous motions for reconsideration filed concerning this order will be met with severe sanctions.

It is so ORDERED this 14 day of August, 1998.

Willis B. Hunt, Jr.

Judge, United States District Court

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[27] Plaintiffs' motion is granted with respect to Count X, Count XV, Count XVI, the claims asserted against Start Technologies Corporation, Olde York Valley Inn, and DD Hawkins Communications, Inc. in Counts II, III, and IV, and defendant's claims for "computer copying infringement." It is denied with respect to all other claims.

Concord Boat Corp. v. Brunswick Corp.

United States District Court for the Eastern District of Arkansas, Western Division

August 19, 1998, Decided ; August 20, 1998, Filed, Entered

NO. LR-C-95-781

Reporter

21 F. Supp. 2d 923 *; 1998 U.S. Dist. LEXIS 14432 **; 1999-1 Trade Cas. (CCH) P72,558; 50 Fed. R. Evid. Serv. (Callaghan) 1294

CONCORD BOAT CORPORATION, et al, PLAINTIFFS v. BRUNSWICK CORPORATION, DEFENDANT

Disposition: **[**1]** Defendant's Renewed Motion for Judgment and Motion for New Trial DENIED.

Core Terms

engines, discount, market share, pricing, manufacturers, programs, boat, calculation, argues, drive, anticompetitive, present value, dealers, Marine, stern, Plaintiffs', purchases, antitrust, damages, percent, hypothetical, competitors, inboard, relevant market, Sherman Act, overcharge, volume, matter of law, new trial, contracts

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Weight & Sufficiency

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN1[] **Trials, Judgment as Matter of Law**

A motion for judgment as a matter of law under *Fed. R. Civ. P. 50(b)* poses the legal question as to whether sufficient evidence was presented to support a jury verdict. The motion is properly granted only if the nonmoving party has not offered sufficient evidence to support a jury verdict in its favor. Before ruling on such a motion, a court must (a) resolve direct factual conflicts in favor of the nonmovant; (b) assume as true all facts supporting the nonmovant that the evidence tended to prove; (c) give the nonmovant the benefit of all reasonable inferences; and (d) deny the motion if the evidence would allow reasonable jurors to differ as to the conclusions that could be drawn. Judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible to no reasonable inference sustaining the position of the nonmoving party.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN2[] **Private Actions, Remedies**

An antitrust plaintiff is not entitled to recover for losses due to factors other than defendant's anticompetitive acts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A monopolist does not receive immunity merely because it has priced the product in issue above its average cost.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN4[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The "above cost" rule applies only to the price itself; and that those cases do not per se validate all above cost pricing programs which may be combined with additional restraints or otherwise structured in an anticompetitive manner.

Civil Procedure > Trials > Bench Trials

HN5[] **Trials, Bench Trials**

The United States Supreme Court has specifically stated that antitrust cases must be resolved on their own unique facts: Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. This Supreme Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN6[] **Antitrust & Trade Law, Sherman Act**

Conduct that does not meet the "traditional" requirements for a particular antitrust claim can still violate the Sherman Act if it shares the same anticompetitive effect.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

Regardless of whether the conduct at issue fits perfectly within a previously determined category of unlawful conduct, the fundamental concern is whether the conduct, in light of its requisite effects, can reasonably be found to violate the Sherman Act *§§ 1* and *2*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

To prevail under the Sherman Act *§ 1*, plaintiffs are required to prove the presence of agreements which unreasonably restrained trade. Under the Sherman Act *§ 2*, plaintiffs are required to demonstrate that defendant's pricing programs constituted exclusionary conduct in furtherance of a scheme to willfully acquire or maintain its monopoly power.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

HN9[] **Testimony, Expert Witnesses**

The focus of *Fed. R. of Evid. 702* is solely on technique and methodology, not the conclusions that they generate.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Civil Procedure > Remedies > Judgment Interest > General Overview

HN10[] **Private Actions, Remedies**

Prejudgment interest is not recoverable in an antitrust case.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN11[] **Private Actions, Remedies**

The appropriate measure of damages in a antitrust case is the present value of profits lost as a result of the unlawful conduct.

Civil Procedure > Parties > Capacity of Parties > General Overview

HN12[] **Parties, Capacity of Parties**

There is no substantive or procedural requirement that a party must take the stand and testify that it "owns" the claims it is pursuing. In fact, such a notion is plainly contradicted by *Fed. R. Civ. P. 17(a)* and *25(c)*.

Civil Procedure > Parties > Real Party in Interest > Assignees

Civil Procedure > Parties > General Overview

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > Parties > Real Party in Interest > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN13[] **Real Party in Interest, Assignees**

Under *Fed. R. Civ. P. 17(a)*, an action shall be prosecuted in the name of the real party in interest. In other words, the action must be brought by the person entitled under the governing substantive law to enforce the asserted right. The purpose of the rule is to prevent multiple or conflicting lawsuits by persons such as assignees, executors, or third-party beneficiaries, who would not be bound by res judicata principles. But *Fed. R. Civ. P. 17* specifically requires that before an action can be dismissed at a defendant's behest, the court must allow a reasonable time for ratification by, or joinder of; the real party in interest.

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Civil Procedure > Parties > Real Party in Interest > General Overview

HN14[] **Parties, Capacity of Parties**

Under *Fed. R. Civ. P. 17*, objections must be timely raised: Because the requirements in *Fed. R. Civ. P. 17(a)* are for the benefit of defendant, we have held that an objection on real party in interest grounds should be raised with reasonable promptness in the trial court proceedings. If not raised in a timely fashion, the general rule is that the objection is deemed waived.

Civil Procedure > Parties > Substitution > General Overview

HN15[] **Parties, Substitution**

Under *Fed. R. Civ. P. 17*, applies only to transfers prior to the commencement of the lawsuit. When a transfer occurs during the pendency of litigation, *Fed. R. Civ. P. 25(c)* governs. *Fed. R. Civ. P. 25(c)* states that in case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. *Fed. R. Civ. P. 25(c)*. The rule is designed to allow an action to continue unabated when an interest in a lawsuit changes hands, rather than requiring the initiation of an entirely new lawsuit. Whether to substitute or join a transferee under *Fed. R. Civ. P. 25(c)* is a discretionary determination by the trial court. The court, if it sees fit, may allow the transferee to be substituted for the transferor. It is also free, if it wishes, to retain the transferor as a party and to order that the transferee be made an additional party.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Weight & Sufficiency

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN16[] **Trials, Judgment as Matter of Law**

The court may grant a new trial on the basis that the verdict is against the weight of the evidence, if failing to do so would result in a miscarriage of justice. In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict. The court, however, may not reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > ... > Methods of Discovery > Interrogatories > General Overview

HN17[] **Jury Trials, Jury Instructions**

The submission and form of interrogatories to the jury are matters within the sound discretion of the trial court.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

HN18[] **Jury Trials, Jury Instructions**

A district court's decision to reject a proffered jury instruction is improper only if when viewed in their entirety, the jury instructions contain an error or errors that affect the substantial rights of the parties. The district court has discretion in the style and wording of jury instructions so long as the charge as a whole fairly and adequately states the law. Furthermore, where the charge to the jury correctly sets forth the law, a lack of perfect clarity will not render the charge erroneous.

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Judges: James M. Moody, United States District Judge.

Opinion by: James M. Moody

Opinion

[*924] **ORDER**

Before the Court are Defendant Brunswick Corporation's Renewed Motion for Judgment as a Matter of Law Pursuant to *Rule 50(b) of the Federal Rules of Civil Procedure* **[**4]** and separate Motion for a New Trial. For the reasons set forth herein, the motions will be DENIED.

I.

Plaintiffs, a group of twenty-one boat manufacturers and their buying cooperative, Independent Boat Builders Incorporated ("IBBI"), brought this action against Brunswick Corporation ("Brunswick") alleging that Brunswick engaged in a variety of anticompetitive conduct with respect to the market for stern drive and inboard marine engines. [1]

[1] Brunswick manufactures MerCruiser stern drive engines. The Court will refer to "Brunswick" and "MerCruiser" interchangeably.

Plaintiffs alleged violations of *Sections 1* and *2* of the Sherman Act and Section 7 of the Clayton Act. Specifically, Plaintiffs claimed that Brunswick engaged in a multifaceted anticompetitive scheme that included **[*925]** the following unlawful practices: (1) the use of various exclusionary discount programs in the sale of stern drive and inboard marine engines to boat manufacturers; (2) the use of various exclusionary discount programs **[**5]** in the sale of stern drive and inboard marine engines to boat dealers; (3) the use of long-term contracts in the sale of stern drive and inboard marine engines; (4) the acquisitions of the boat manufacturers Ray Industries (Sea Ray), U.S. Marine (Bayliner), and Baja; and (5) the acquisitions of the engine manufacturers BMW Marine Diesel, Kiekhaefer Aeromarine and Force. Plaintiffs also alleged that Brunswick fraudulently concealed its anticompetitive acts.

Brunswick counterclaimed against the Plaintiffs who purchased stern drive engines, alleging that those Plaintiffs engaged in an unlawful group boycott. Brunswick alleged that Plaintiffs conspired to boycott MerCruiser stern drive engines at industry boat shows and conspired to price MerCruiser engines at a disadvantage to MerCruiser's competitors. Brunswick also brought three state law counterclaims against Plaintiffs G.W. Invader and KCS International relating to the alleged submission of falsified market share affidavits.

The trial commenced on April 13, 1998 and lasted ten weeks. The jury returned a verdict on June 19, 1998, after a day-and-a half of deliberations. The verdict defined the relevant market as the market for stern **[**6]** drive and inboard marine engines. The jury found for Plaintiffs on all three of the antitrust claims, finding that Brunswick had monopolized the market for stern drive and inboard marine engines; that Brunswick engaged in unreasonable restraints of trade in violation of *Section 1* of the Sherman Act; and that Brunswick engaged in acquisitions in violation of Section 7 of the Clayton Act. The jury awarded damages of $ 44.4 Million on the antitrust claims. [2] In addition, the jury returned a verdict for Plaintiffs on Brunswick's antitrust counterclaim and for G.W. Invader and KCS International on the three state law counterclaims.

II.

HN1[] A motion for judgment as a matter of law under *Federal Rule of Civil Procedure 50(b)* poses the legal **[**7]** question as to whether sufficient evidence was presented to support a jury verdict. *Gray v. Bicknell, 86 F.3d 1472, 1478 (8th Cir. 1996)*. The motion is properly granted only if the nonmoving party has not offered sufficient evidence to support a jury verdict in its favor. *Parrish v. Immanuel Med. Ctr., 92 F.3d 727, 731 (8th Cir. 1996)*; *Gray, 86 F.3d at 1478*; *Abbott v. Crocker, Mo., 30 F.3d 994, 997 (8th Cir. 1994)*. Before ruling on such a motion, a court must (a) resolve direct factual conflicts in favor of the nonmovant; (b) assume as true all facts supporting the nonmovant that the evidence tended to prove; (c) give the nonmovant the benefit of all reasonable inferences; and (d) deny the motion if the evidence would allow reasonable jurors to differ as to the conclusions that could be drawn. *Parrish, 92 F.3d at 731*; *Gray, 86 F.3d at 1478*; *Sherlock v. Quality Control Equip. Co., 79 F.3d 731, 735 (8th Cir. 1996)*. "Judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible to no reasonable inference sustaining **[**8]** the position of the nonmoving party." *Kehoe v. Anheuser-Busch, Inc., 96 F.3d 1095, 1100 (8th Cir. 1996)* (quoting *Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490, 494 (8th Cir. 1996)*.

III.

Brunswick argues that Plaintiffs are seeking damages for conduct which is not anticompetitive or has been excluded from the case. This "disaggregation" argument is based upon the well-settled principle that ***HN2***[] an antitrust plaintiff is not entitled to recover for losses due to factors other than the defendant's anticompetitive acts. *Amerinet Inc. v. Xerox Corp., 972 F.2d 1483 (8th Cir. 1992)*.

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[2] The jury rejected Plaintiffs' claim of fraudulent concealment, thus limiting damages to the beginning of the limitations period, December 7, 1991. The jury also rejected Plaintiffs' claims for prospective damages. After trebling, the verdict is approximately $ 133 Million.

In order to place Brunswick's disaggregation argument in context, some explanation of Plaintiffs' damage model is necessary. Plaintiffs' expert, Dr. Robert Hall, provided the damage testimony for Plaintiffs at trial. **[*926]** Following his discussion of the alleged anticompetitive conduct, Dr. Hall testified that in order to quantify damages, he had to consider "what the market would have looked like without the conduct." Tr. at 1256. This analysis, commonly termed a "but for" analysis, required Dr. Hall to opine on the structure of the market and **[**9]** the market share of the participants in the absence of the conduct alleged to be anticompetitive. As a prelude to his damages testimony, Dr. Hall described the hypothetical "but for" market:

> These are my conclusions as an economist about how the market would be different. We'll be talking more about how I reached these conclusions, but the conclusions are: today Brunswick's share of sterndrive market is around 80 percent -- 75 to 80 percent. In this market without exclusionary acts, I believe that market share would be about 50 percent. It's not that Brunswick would not be in the market. Its role in the market would be smaller. Other rivals would be there, at least one other, taking up the other half the market there to give a good deal to compete against Brunswick.

Tr. at 1258. Thus, Dr. Hall essentially opined that in the "but for" market, Brunswick and at least one other engine manufacturer would each have approximately 50 percent of the relevant market.

Another key component to Dr. Hall's damage model is the economic model Dr. Hall used to derive his damage opinion, the Cournot model. In the Cournot model, competition is based on changing levels of output; each **[**10]** firm assumes that its rivals will produce a certain quantity of output and then selects its own profit-maximizing level of output. The Cournot model predicts that as the number of firms competing in a market increases, the relative concentration of the market decreases and the equilibrium price falls towards the competitive level.

Dr. Hall used the Cournot model to determine the average price in a competitive market for stern drive and inboard engines and then subtracted that price from an average actual price to determine an average overcharge per engine. One of the primary inputs into the Cournot model is market share. Consistent with Dr. Hall's opinion of the hypothetical market, if a market share of 50% is inserted into the formula, the model predicts no overcharge. However, as actual market share rises above 50%, the model predicts an overcharge, and the amount of the overcharge correspondingly increases the higher the share rises.

Brunswick contends that the damage model is fundamentally flawed for two reasons. First, according to Brunswick, events occurred in the actual market (the "real market") which were completely unrelated to any anticompetitive activity and resulted **[**11]** in market share gains for MerCruiser. Because Dr. Hall's model (the "hypothetical market") does not specifically account for these market share gains, Brunswick contends that the model inherently penalizes Brunswick for market share gains from lawful activity. Second, Brunswick points out that Dr. Hall's initial damage opinion at trial was identical to the opinion from his pre-trial report, even though the Court, prior to trial, had excluded from the jury's consideration two alleged anticompetitive acts which formed the basis of the damage opinion in the report.

A.

With respect to Brunswick's first argument, evidence was introduced at trial that two "events" in the real market, unrelated to the conduct of Brunswick, accrued to Brunswick's benefit and most likely resulted in some degree of market share gain for MerCruiser. The first event, the Outboard Marine Corporation ("OMC") Cobra recall, received quite a bit of attention throughout the trial. OMC was one of Brunswick's principal competitors in the stern drive business in the 1980's and early 1990's. In 1986, OMC's stern drive engine, the "Cobra," developed a problem with a shift cable which controlled whether the drive **[**12]** unit was in or out of gear. The testimony at trial was that the problem lingered about for some time, and that OMC initially blamed its dealers for the problem. Finally in 1989, OMC was forced to issue a voluntary recall of all of its Cobra engines produced from 1986 through 1989. Dr. Hall agreed that the Cobra problem cost OMC engine sales and resulted in market share gains by MerCruiser.

[*927] The second event involved the alleged contusion and mismanagement relating to the joint venture between OMC and Volvo Penta of the Americas ("Volvo"). There was evidence that several boat manufacturers were skeptical of the joint venture in its initial stages and that both Volvo and OMC seemed to compete against each other, despite the joint venture relationship, to their own detriment.

And finally, several witnesses offered evidence of MerCruiser's alleged superior products, outstanding reputation, quality service, and extensive dealer network. No witness was able to empirically quantify any market share gains due to these traits, but Brunswick argued at trial that these characteristics benefitted MerCruiser in the form of increased sales.

The Court notes that the task Dr. Hall faced **[**13]** in analyzing this case was an enormous one. Notwithstanding the complex nature of the conduct at issue, Dr. Hall was required to construct a hypothetical market, a "but for" market, free of the restraints and conduct alleged to be anticompetitive. The difficulty of such a task has long been recognized by courts in antitrust cases because" the vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*.

Dr. Hall unequivocally testified that his 50/50 hypothetical market is a market in which *only* Brunswick's unlawful conduct has been removed. He also testified that he fully considered all of the characteristics of the relevant market before he reached his 50/50 conclusion, including the events which allegedly increased Brunswick's share. [3] And finally, Dr. Hall correctly noted that the creation of the "but for" market required consideration of certain market characteristics that could have prevailed in a more competitive market. Taking all of these factors **[**14]** into account, Dr. Hall opined that in the hypothetical market Brunswick would have fifty percent of the sales. He did not opine that Brunswick would exit the market altogether. Thus, inherent in Dr. Hall's damage analysis is the notion that Brunswick sells 50% of all stern drive and inboard engines in the relevant market because it is a vigorous competitor with a quality product, a good reputation, and the ability to capitalize on its competitors shortcomings. Dr. Hall has not eliminated those variables from any equation, he has only placed them into a proper frame of reference in a hypothetical competitive market. Dr. Hall testified that he constructed a market in which *only* the unlawful conduct had been removed, and that was all he was required under the law to do.

As Plaintiffs correctly point out, the fundamental flaw in Brunswick's **[**15]** argument is that Brunswick uses the 50% benchmark as the starting point of the analysis and then implies that share gains from the Cobra problem or "quality products" or "superior service" must be added on top of that. In other words, Brunswick assumes that it would have 50% of the hypothetical market *by default.* But, as Dr. Hall testified at trial, that is an inappropriate way to approach his model. Those factors are necessary for Brunswick to reach 50% of the hypothetical market in the first place.

Dr. Hall recognized that his 50/50 prediction is not mathematically precise. He recognized that in a complex market certain events will cause market share to rise and fall. And contrary to Brunswick's assertions, he never testified that every "positive" balances out exactly with every "negative." Dr. Hall's 50/50 opinion is an average, an equilibrium point, for Brunswick's market share in the absence of the unlawful conduct, and the Court does not believe the model inappropriately incorporates lawful conduct into its analysis.

B.

Next, Brunswick argues that Dr. Hall's damage opinion is based upon certain alleged conduct which was excluded from the jury's consideration prior **[**16]** to trial. Dr. Hall's expert report set forth an initial damage opinion based upon the conduct alleged to be unlawful. Prior to trial the Court excluded **[*928]** two instances of alleged unlawful conduct: that Brunswick caused Yamaha to exit the stern drive engine market and that Brunswick disseminated boat manufacturers' confidential information. Brunswick argues that Dr. Hall's damage opinion did not change following these rulings, so his damage opinion at trial necessarily incorporates lawful conduct.

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[3] The Court notes that there were substantial factual disputes at trial concerning the significance of these events that purportedly increased MerCruiser's market share.

With respect to this issue, Brunswick might have had a viable argument had it chosen to raise it. As it turned out, Brunswick did not ask a single question of Dr. Hall about the excluded incidents, and Plaintiffs were prevented by the Court's orders from raising them. Brunswick did not ask Dr. Hall whether his opinion should have changed because of the exclusion of the conduct from consideration. At oral argument on the instant motion, Plaintiffs' counsel did offer an opinion as to what Dr. Hall would have said had he been asked that question, but the Court believes that it would not be appropriate to speculate as to what Dr. Hall's testimony might have been. If Brunswick wanted **[**17]** to demonstrate this particular flaw in Dr. Hall's damage opinion, then it should have inquired about the issue on cross-examination Because Brunswick did not do so, this issue is moot. [4]

IV.

At trial, Plaintiffs challenged three separate types of pricing programs used by Brunswick in the distribution of its stern drive engines: (1) market share discounts; (2) volume discounts; and (3) long-term discounts and contracts.

Prior to the beginning of each new model year, MerCruiser provides boat manufacturers **[**18]** (OEMs) with the upcoming model year's MerCruiser OEM Purchase Agreement (the "agreements"). These agreements provide the terms and conditions under which OEM's may purchase MerCruiser engines, including the discount schedules available on MerCruiser purchases. In any given year, several types of discounts may be available to OEMs. For example, in one year MerCruiser may offer market share, volume, purchase planning, cash, freight and long term discounts. Combined these discounts can reach approximately 15% off the list price.

Although they have recently been discontinued, MerCruiser provided various market share discounts from 1984 to 1997. The market share discounts allowed boat manufacturers and dealers to earn discounts if they purchased certain percentages of their total engine purchases from MerCruiser. The discounts were usually highest at an 80% market share although in later years the threshold was lowered to 70%. For example, the 1995 through 1997 model year program provided a 1% discount for a 60% share, a 2% discount for a 65% share, and a 3% discount for a 70% share. Tr. at 2474-75.

The volume discounts did not contain a market share component. The volume discounts were **[**19]** based upon the total volume of engines purchased in a given model year. In the 1995-1997 program the volume discounts ranged from 1% to 5% off list price depending on the volume purchased. In 1990, the threshold level for the volume discounts was 15,000 units. By the 1995-1997 model year program, the volume discount threshold had been reduced by 83% to 2,500 units. [5]

The long term discounts did contain market share provisions. Under the long term discounts OEMs would get an additional 1% to 2% discount if they would agree to purchase a certain market share (i.e., 80%) for a term of three years. Brunswick also entered into specific long term contracts with four boat manufacturers: Baja, Porter, Pro-Line and Fountain. These contracts were three to five years in duration and, in the case of Baja and Porter, contained some provisions extending beyond five **[**20]** years. Baja and Fountain's contracts obligated those companies **[*929]** to purchase 100% of their engines from Brunswick, while Porter was obligated to purchase 99%. Pro-line's contract contained a 50% market share threshold.

Although they were nominally termed "purchase agreements," none of the agreements embodying these discount programs expressly obligated the manufacturers or dealers to purchase engines. Rather, they provided that the

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[4] Even if Brunswick had appropriately raised these issues with respect to Dr. Hall's damage opinion, it is unlikely that Dr. Hall's decision to use the same damage figure would be any cause for concern. Plaintiffs challenged a variety of unlawful conduct, some instances of which, understandably, were more serious than others. The two incidents at issue here were minor in comparison to the other conduct, and it highly unlikely that they would have impacted the damage calculation in any meaningful way.

[5] At trial, Plaintiffs presented evidence that these drastic reductions were part of an anticompetitive scheme to break up large buying groups such as IBBI.

OEMs and dealers would receive the discounts if their purchases reached the stated levels. Additionally, none of the agreements contained express provisions restricting the OEMs' or dealers' ability to deal with other engine suppliers.

Brunswick has advanced two closely related arguments in support of the discount pricing programs. First, Brunswick argues that prices under the discount programs were above cost, and are therefore legal *per se.* Second, Brunswick argues that the market share and other discount pricing programs cannot be found to be unlawfully exclusionary. [6]

[21] A.**

In support of its first argument, Brunswick relies heavily on the First Circuit case, *Barry* *Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983)*. In *Barry Wright,* Grinnell's co-defendant, Pacific, offered Grinnell deep discounts on mechanical "snubbers," shock absorbers used in nuclear power plants. Barry Wright, a competitor of Pacific, alleged that the discounts were anticompetitive because they were unreasonably low and were intended to drive Barry Wright out of business. On appeal, the First Circuit examined the existing case law to determine when a price cut should be viewed as "predatory" and condemned by the antitrust laws. The court rejected a number of approaches from other circuits and ruled that prices above incremental and average costs are *per se* lawful. The court also found that the contract was not unreasonably exclusionary even though it required Grinnell to purchase the majority of its expected requirements (approximately 86%) from Pacific.

Brunswick further cites *Henry v. Chloride, 809 F.2d 1334 (8th Cir. 1987)*, another predatory pricing case, wherein the Eighth Circuit cited *Barry Wright* **[**22]** for the proposition that "prices above average total cost are legal *per se." Id. at 1346*. Because there has never been an allegation of below cost pricing in the present case, Brunswick argues that Plaintiffs' claims with respect to the various discount programs are foreclosed.

The Court questions whether this principle from *Barry Wright* and *Henry* completely forecloses Plaintiffs' claims. Plaintiffs have never alleged predatory pricing by Brunswick, and the Court agrees with Plaintiffs that this case has never been about "low prices." To the contrary, Plaintiffs have alleged and attempted to prove that Brunswick charges anticompetitive *high* prices for its engines. Plaintiffs are seeking to recover an overcharge based upon those prices. In essence, Plaintiffs have maintained that Brunswick sets an anticompetitive high price for its engines and then offers an attractive discount schedule designed to lock customers in to Brunswick purchases. Although one could attempt to argue that the discounts are merely functions of price, these discounts, are not *solely* functions of price because they are tied to corresponding conditions based upon certain degrees **[**23]** of exclusivity.

Furthermore, at least one court has rejected the argument that *any* pricing practice that leads to above cost prices is *per se* lawful under the antitrust laws. *See Le Page's Inc v. 3M, 1997 U.S. Dist. LEXIS 18501*, No. Civ.A. 97-3983, 1997 WL 734005 (E.D. Pa. Nov. 14, 1997). In that case, the restraint at issue was product "bundling," where the defendant, 3M, offered discounts on several products purchased together, but the prices were not below cost. In a motion to dismiss, 3M cited the Supreme Court's decision in *Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*, (as does Brunswick) in support of the position that above cost prices are legal *per se. 509 U.S. at 212, 213*. However, in an earlier case, *SmithKline v. Eli Lilly & Co., 575 F.2d 1056 (3rd Cir. 1978)*, the Third Circuit had found that a similar "bundling" program violated *Section 2*. The district court in *Le Page's* rejected 3M's argument, ruling that the conduct at issue was similar enough to that found unlawful **[*930]** in *SmithKline* to overcome the **[**24]** motion to dismiss. *509 U.S. at 213*. In the face of the obvious distinction that *Brook Group* was a predatory pricing and price discrimination case, the court stated that it "could not conclude that *Brooke Group* supersedes *SmithKline* with respect to this case." *509 U.S. at 212*.

[6] Brunswick did not raise either of these arguments prior to trial.

Similarly, the district court in *SmithKline* specifically rejected a "safe harbor" argument somewhat identical to Brunswick's argument here. *SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089 (E.D. Pa. 1976)*. The district court's rationale is entirely applicable to the instant case, in spite of the slightly different factual context:

> *[**HN3**[] A] monopolist does not receive immunity merely because it has priced the product in issue above its average cost.* For that immunity is lost when it uses a pricing scheme linking the monopolistic products (Keflin and Keflex) with another competitive product (Kefzol) to deter SmithKline from entering or effectively competing in the cephalosporin market. We should be ever mindful that the gravamen of this complaint and my holding are not that the *price* Lilly separately charges for Keflin or Keflex **[**25]** are unreasonable from an antitrust standpoint; the nub of this case is the *linkage of these latter products in a pricing scheme to deter competition in Kefzol….*

SmithKline, 427 F. Supp. at 1128 (emphasis added). Thus, the district court recognized that it was not the price that was relevant, it was the "strings" attached to the price. [7] In the instant case, Plaintiffs are not challenging unreasonably low prices. They are challenging the "strings" attached to Brunswick's prices, i.e., the exclusivity provisions.

[26]** Notably, *SmithKline* and *Le Page's* are not the only "bundling" cases which lend support to Plaintiffs' position here. In *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F. Supp. 455 (S.D.N.Y. 1996)*, the court undertook an extensive analysis of the above average variable cost issue with respect to "bundling" and stated:

> This analysis disposes of Abbott's contention that it is entitled to dismissal of the *Section 2* claims because it is not even accused of pricing below average variable cost. While average variable cost is the controlling standard in this circuit in single product cases, … *Brooke Group* did not even address package pricing such as that involved here and thus cannot have decided the issue. For present purposes the controlling standard *serves only one purpose* - distinguishing in single product situations (a) *pricing* that constitutes competition on the merits from (b) *pricing* that may permit a monopolist or putative monopolist to get rid of its competitors and pave the way for an abuse of market power.

Id. at 467-68 (emphasis added) (footnote omitted). This quote lends support **[**27]** to Plaintiffs' position that the various incarnations of the "above cost" rule apply only to the price itself.

The Court believes that the proper application *of Brooke Group, Barry Wright,* and *Henry* to this case is that ***HN4***[] the "above cost" rule applies only to the price itself; and that those cases do not *per se* validate all above cost pricing programs which may be combined with additional restraints or otherwise structured in an anticompetitive manner.

B.

Brunswick next argues that its various market share discount programs can not, as a matter of law, constitute unlawful conduct in violation of *Section 1* or *2* of the Sherman Act.

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[7] The Third Circuit affirmed the district court in *SmithKline.* The court's ruling is instructive:

> "In sum, the act of willful acquisition and maintenance of monopoly power was brought about by linking products on which Lilly faced no competition Keflin and Keflex with a competitive product, Kefzol. The result was to sell all three products on a non-competitive basis in what would have otherwise been a competitive market for Ancef and Kefzol…. Were it not for the Lilly's [pricing plan], the price, supply, and demand of Kefzol and Ancef would have been determined by the economic laws of a competitive market. The Revised CSP blatantly revised those economic laws and made Lilly a transgressor under *§ 2* of the Sherman Act.

SmithKline v. Eli Lilly & Co., 575 F.2d 1056, 1065 (3rd Cir. 1978).

As described above, the market share discount programs required the boat manufacturers **[*931]** and dealers participating in the programs to purchase certain levels of their total engine requirements (usually 70% - 80%, and in the case of some dealer programs, 100%) in order to receive certain discounts. Plaintiffs uniformly testified that purchasing MerCruiser engines and fulfilling the market share requirements was their only viable economic option and that in order to remain in business they had to achieve the maximum discounts. At **[**28]** trial, Plaintiffs presented evidence that the market share programs excluded Brunswick's competitors from the relevant market which in turn allowed Brunswick to artificially inflate engine prices. In addition, Plaintiffs introduced substantial evidence demonstrating Brunswick's monopoly power. With a market share of approximately 75% -80%, the evidence reflected that Brunswick dominates the relevant market.

Plaintiffs' expert, Dr. Hall, testified that the various programs and contracts operated to tax boat manufacturers and dealers on their purchases of non-Brunswick engines. Dr. Hall described the operation of the programs and their resulting tax as follows:

> First of all, we should understand the economics of the transaction that occurs between Brunswick and a boatmaker. Both of them desire to buy and sell the engine, so that's part of the story, so part of what you see there is boatmaker purchases of engines from Brunswick. But something else is happening in these contracts that's very important to understand, and that is that Brunswick is buying from the purchaser a barrier to entry. It does that by putting provisions into the contract, the market share, quantity discount, **[**29]** those type of provisions that we'll talk about. In order to sustain that, Brunswick has to, basically, buy that from the boatmaker. That's part of the deal.
> * * *
> The effect of these provisions is to give a substantial discount to a company that gives Brunswick a large fraction of its business. That's why they're called market share contracts. The market share being measured here is not the market as a whole, it's the share of that boatmaker's engine purchases that … is directed to Brunswick. The discounts are largest if a high share of the purchases come from Brunswick, and typically disappears below some level here (indicating), 60 percent. So, to start with the market share provision of the contract, it gives a 3 percent discount if more than 70 percent of engine purchases come from Brunswick; 2 percent between 65 and 69; 1 percent between 60 and 64; and below 60, no discount. The discount is taken away.
>
> Now, I'll go over this several times. But the tax comes in the following way: If a boatmaker decides to take some of its engine business elsewhere so that . . . for example, it drops below 70 percent, but it continues to purchase some engines, say 65 percent of its **[**30]** engines from Brunswick, it loses discount on the remaining engines. So you're losing something; business that's staying with Brunswick is no longer as well priced, its price is going up. That means, in effect, it's costly to buy those engines. You're sacrificing discounts by buying engines from another supplier. You lose the discount on the remaining engines. So as -- if a company went several notches down here (indicating), it could lose all three percentage points and, yet, if it continued to buy engines, it would have to be paying a higher price for the Brunswick engines. So there's a tax, as a company, in this case, as a boatbuilder, that goes from the 70 percent level below the 60 percent level. As they make that transition from being more loyal to Brunswick to less loyal, they're paying a tax on the engines that they're still buying.

Tr. 1158-61.

Plaintiffs presented further evidence regarding the effects of these discount programs. Dr. Hall testified that in 1996, 38% of all stern drives and inboards were sold under the market share discount programs. Similarly, the evidence reflected that Brunswick's captive boat companies, Bayliner and Sea Ray, accounted for 40% **[**31]** of the stern drive and inboard sales in 1996. Thus, the foreclosure rate at the manufacturer level was estimated to be 78%. In addition, at the dealer level, approximately 25% of the total industry's stern drive and inboard shipments in 1996 were tied to the dealer market share agreements. Evidence was also introduced **[*932]** that Brunswick's current principal competitor, Volvo, has been unable to achieve minimum efficient scale because of the alleged unlawful programs and acquisitions.

Finally, Plaintiffs presented a substantial amount of evidence regarding the "two-tiered" effect of the discount programs. In the marine industry boat manufacturers must have a network of dealers willing to carry their boat lines. Because Brunswick utilized the discount programs at the boat manufacturer and dealer level, several boat manufacturers testified that even if they had wanted to support Volvo, they could not have switched because the incentivized dealers would refuse to purchase non-MerCruiser powered boat lines. In contrast to the 70% to 80% manufacturer programs, several of the dealer programs from 1992 to 1996 required that the dealer sell 100% MerCruiser engines.

Although Brunswick **[**32]** was acutely aware of the effects of the various programs, the industry's concerns apparently fell on deaf ears. Plaintiffs, along with other boat manufacturers, complained vehemently to Brunswick that the market share requirements were unfair, and that they effectively prevented boat manufacturers from supporting other engine manufacturers. In spite of this, Brunswick never withdrew the market share requirements and even sought to increase the market share requirement to 95% in the proposed 1994 "Industry Growth Program." Those efforts ultimately proved unsuccessful due to serious backlash from boat manufacturers. Notably, MerCruiser's Director of Marketing, Bob Gowens, wrote that the purpose of the initial version of the Industry Growth program was to put MerCruiser's customers in "golden handcuffs" and to "lock out" Volvo. *See* PX 239, 1323.

Brunswick's business documents are riddled with acknowledgments of the anticompetitive nature of these agreements. In one document, MerCruiser employee Mike Gyorog wrote that "MerCruiser's market share is being driven by OEM's pricing to dealers to achieve 80 percent market share commitment." PX1369A. The reasonable inference from such a **[**33]** statement is that boat manufacturers were disadvantageously pricing non-MerCruiser equipped boats in order to achieve the market share requirements, and that this practice was "driving" MerCruiser's near-80% market share. Similarly, Barry Eller, MerCruiser's General Manager, acknowledged that the market share programs insulated MerCruiser from market share erosion:

> *MerCruiser will incur the risk of market share loss as a result of eliminating the market-share related discounts form the OEM program.* Falling below 70% market share today has significant implications.... The minimum penalty for falling below 70% market share is 3.2%, and as much as 7%. The current program does have an impact on our business ....

PX 1510A (emphasis added). Additionally, in 1990, McKinsey & Company and Mercury Marine jointly produced a document titled "Final Progress Review." According to that document, "Marine Power [i.e. Mercury Marine] has *meaningful barriers to entry* at sterndrive boat builders based upon volume rebates, share pricing, and long-term contract commitments." PX 1128A (emphasis added). Numerous other Brunswick documents reflect the anticompetitive intent and effect **[**34]** of the various programs.

Brunswick seeks to avoid the substantial evidence described above on formalistic legal presumptions. According to Brunswick: (1) Plaintiffs' claims are appropriately described as exclusive dealing claims; (2) under exclusive dealing law, a contract may be found unlawful *only* if it *completely* prevents customers from dealing in the goods of a competitor (in other words, only if it is 100% exclusive); and (3) because the boat manufacturers and dealers in this case retained the ability to deal with Brunswick's competitors, then the agreements at issue cannot constitute exclusive dealing and cannot violate the Sherman Act. Brunswick further argues that even if the agreements can constitute exclusive dealing, they are non-binding, and thus their short "duration" mandates a finding that they are lawful.

Brunswick's arguments are incorrect as a matter of law and fact. After a ten-week jury trial, the record is replete with evidence that Brunswick's programs, in conjunction with the remainder of the allegedly anticompetitive conduct, effectively *required*Plaintiffs **[*933]** and other boat manufacturers to purchase *extremely* high percentages of their **[**35]** total engine purchases from Brunswick for terms as long as three to five years, and that the manufacturers in fact risked their economic survival by dealing with alternative suppliers. The record also reflects the anticompetitive effects of these agreements, specifically that they prevented MerCruiser's competitors from competing in the relevant market and allowed MerCruiser to artificially elevate engine prices in the relevant market. The fact that the contracts are "non-exclusive" on their face and allow *some* purchases from other suppliers is technically irrelevant, as the fundamental consideration is the objective reasonableness and overall economic effect of *the entirety* of Brunswick's conduct, including the agreements at issue. Although Plaintiffs ostensibly retained the ability to deal with Brunswick's competitors, the overwhelming evidence was that this ability was tremendously restrained by the agreements, and that this restraint produced anticompetitive effects. In the Court's opinion, these agreements cannot be upheld *as a matter of law* merely because they were not 100% exclusive. [8]

[36]** The Court has found no existing case law addressing anything even close to the unique situation presented in this case. That is: (1) a defendant with monopoly power; (2) competing at two levels of distribution; (3) effectively requiring its downstream customers *at separate levels of distribution* (i.e., OEM's and dealers) to purchase extremely high percentages (70% - 100%) of their requirements from the defendant; (4) in order to receive discounts, the receipt of which are the buyers' only viable economic option; and (5) resulting in the obvious exclusion of any significant competition in the relevant market, the artificial inflation of prices in that market, and the assessment of unreasonable taxes and penalties on non-complying buyers. The Court has no doubt that such practices are within the purview of the Sherman Act, regardless of their alleged non-exclusivity because they are the de facto equivalent of exclusive dealing.

HN5[] The Supreme Court has specifically stated that antitrust cases must be resolved on their own unique facts:

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. This **[**37]** Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record."

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466-67, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992), *citing* *Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563, 579, 69 L. Ed. 1093, 45 S. Ct. 578 (1925)*. Similarly, the Eighth Circuit has expressly found that ***HN6***[] conduct that does not meet the "traditional" requirements for a particular antitrust claim can still violate the Sherman Act if it shares the same anticompetitive effect. *In Terre Du lac* *Association, Inc. v. Terre Du Lac, Inc., 772 F.2d 467 (8th Cir. 1985)*, the court refused to dismiss a claim for unlawful tying, even though the conduct at issue clearly did not constitute a tying arrangement. In doing so the court stated:

> The evil which is allegedly generated by the defendants' initiation fee arrangement is the same as that generated by traditional unlawful tying arrangements - competition in the market for one product is restrained due to the seller's exploitation of its control over another product. **[**38]** ... Thus, even though a proper tying claim was not alleged in the Association's complaint, the factual allegations made in the complaint may support a conclusion that the defendants' initiation fee arrangement constitutes an unreasonable "restraint of trade," *15 U.S.C. § 1*, in violation of the antitrust laws, *with the Association's tying arrangement serving only as an analogy for analyzing the lawfulness of the defendants' initiation fee arrangement.*

[*934] *Id. at 474-75* (emphasis added). Thus, ***HN7***[] regardless of whether the conduct at issue fits perfectly within a previously determined category of unlawful conduct, the fundamental concern is whether the conduct, in light of its requisite effects, can reasonably be found to violate *Sections 1* and *2* of the Sherman Act.

HN8[] To prevail under *Section 1* of the Sherman Act, Plaintiffs were required to prove the presence of agreements which unreasonably restrained trade. *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. Under *Section 2* of the Sherman Act, Plaintiffs were required to demonstrate that Brunswick's **[**39]** pricing programs constituted exclusionary conduct in furtherance of a scheme to willfully acquire or maintain its monopoly power. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. Plaintiffs have presented a tremendous amount of proof on these elements, and the jury obviously found that Plaintiffs had satisfied their burdens. The Court has not found any rule

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[8] Plaintiffs raise a good point with respect to the 100% argument. At what point would courts draw the line if that was in fact the law? Could 99% contracts violate the Sherman Act? Apparently under Brunswick's theory they could not, regardless of the anticompetitive impact such contracts might have. Such a drastic example reinforces the notion that it is the manifest reasonableness and effect of a challenged restraint, not its conclusory label, that is relevant to a Sherman Act rule of reason analysis.

of law that would mandate a reversal of those findings. Accordingly, Brunswick's motion for judgment as a matter of law with respect to the market share discount programs is denied.

V.

Brunswick next argues that Dr. Hall's methodology used to support Plaintiffs' liability claims and to calculate their damages fails to meet the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)* and *FED. R. EVID. 702*. Brunswick further argues that Dr. Hall's testimony cannot provide a "legally sufficient evidentiary basis" necessary to survive a motion for judgment as a matter of law.

Prior to trial the Court denied Brunswick's Daubert-related motion, and the Court will do so again here. **[**40]** The Supreme Court could not have stressed more forcefully in *Daubert* that ***HN9***[] the focus of *Rule 702* is solely on technique and methodology, not the conclusions that they generate. *Daubert, 509 U.S. at 595*. Plaintiffs have amply demonstrated the soundness of the Cournot model as a fundamental, time-tested economic tool that has been widely accepted for years by reputable economists. Indeed, the Cournot model provides the theoretical underpinnings for the Department of Justice's Horizontal Merger Guidelines and the widely used Herfindahl-Hirschman Index (the "HHI"). Noted economist Dr. Carl Shapiro has described the Cournot model as follows:

> Another attractive feature of the Cournot equilibrium is that it allows us to draw some direct relationships between market structure and performance ... Thus, Cournot's theory provides an intuitively reasonable prediction of the relationship between equilibrium market structure (as measured by market shares), and performances... Amazingly, this relationship can be summarized using a simple concentration index, the Herfindahl Index, in conjunction with the elasticity of industry demand.

DR. CARL SHAPIRO, HANDBOOK **[**41]** OF INDUSTRIAL ORGANIZATION 342 (1984). Brunswick makes no attempt to argue that the Cournot model is an inappropriate method of predicting equilibrium price formation in oligopolistic markets. And once one accepts the proposition that the Cournot model can be used to predict competitive price formation, each of Brunswick's criticisms are reduced to complaints about how Dr. Hall applied the Cournot model to the facts of this case. Accordingly, the Court finds that neither *Daubert* nor the Federal Rules of Evidence render Dr. Hall's opinions inadmissible.

But even if *Daubert* and *Rule 702* did apply to these *factual* criticisms of Dr. Hall's opinions, those opinions would still be entirely admissible. Brunswick more or less attacks every opinion Dr. Hall rendered in this case, arguing that Dr. Hall's 50/50 opinion is legally impermissible, and that every other opinion flowing from the 50/50 assumption is therefore fundamentally flawed. According to Brunswick, the 50/50 theory is "repugnant to the procompetitive purposes of the antitrust laws."

In its memorandum, Brunswick seems to argue that Dr. Hall has opined that every competitive market results in a 50/50 division. In fact, **[**42]** many of Brunswick's criticisms are in the same vein: Brunswick attempts to paint Dr. Hall's conclusions as absolutes *in* **[*935]** *every market.* But Dr. Hall could not have testified more clearly that his opinions in this case are based on a specific analysis of *this* market and the *specific* conduct that has been occurring in *this* market. Dr. Hall also clearly testified that the 50/50 conclusion was not mathematically precise. He further described how the hypothetical market could have been even more competitive, resulting in even lower equilibrium prices.

Beyond that, it is hard for the Court to see what is so "repugnant" about the 50/50 conclusion. If Dr. Hall had altogether eliminated Brunswick from the hypothetical market, there would be serious cause for concern. But Dr. Hall chose a hypothetical market division that is, with all things considered, relatively conservative and based upon actual facts in the record. Brunswick's protestations to the contrary are unfounded and, not surprisingly, implicate factual disputes that were for the jury to decide.

Brunswick's arguments with respect to the remainder of Dr. Hall's opinions suffer from the same infirmities **[**43]** as described above. In each instance Brunswick argues that an opinion is "completely unfounded" or "speculative" or "bogus," even though every one of the opinions was carefully explained by Dr. Hall, was reasonable under the circumstances, and has abundant support in the factual record. Furthermore, as explained in Section III., *supra,* Dr. Hall's opinions did in fact take into account the events which purportedly increased Brunswick's market share.

In sum, the Court finds no defects in Dr. Hall's methodology *or* the application of his methodology to the facts of this case, and his expert testimony is plainly sufficient to support the jury's verdicts.

VI.

Brunswick next asserts that it is entitled to judgment as a matter of law on the present value calculation incorporated into Dr. Hall's damage analysis. First, Brunswick argues that such a recovery is precluded because present value and prejudgment interest are synonymous under the law. Second, Brunswick argues that Dr. Hall's present value calculation is in actuality a prejudgment interest calculation and should therefore be precluded.

It is well settled that ***HN10***[] prejudgment interest is not recoverable in an antitrust **[**44]** case. *See Fishman v. Estate of Wirtz, 807 F.2d 520, 561-62 (7th Cir. 1986)*. However, several courts have upheld awards compensating for the present value of the injury, and the Eighth Circuit expressly allows for present value calculations in antitrust cases. *See H.J. Inc. v. International Tel. and Tel. Corp., 867 F.2d 1531, 1549 (8th Cir. 1989)*. In *H.J.,* the court ruled that ***HN11***[] the appropriate measure of damages "is the present value of profits lost" as a result of the unlawful conduct. *Id.; see also Multiflex Inc. v. Samuel Moore, 709 F.2d 980 (5th Cir. 1983)* (recovery allowed for damages that included "what the asserted lost profits would have earned in an open investment market," given that the claim was "based on an economic theory and not on a claim to statutory or common law prejudgment interest."); *Lovett v. General Motors Corp., 769 F. Supp. 1506, 1521-22 (D. Minn. 1991)* (allowing a present value calculation), *rev'd on other grounds, 998 F.2d 575 (8th Cir. 1993)*.

Brunswick argues that present value calculations are not recoverable because they are identical in function to prejudgment **[**45]** interest. Brunswick cites a non-antitrust case, *Library of Congress v. Shaw, 478 U.S. 310, 321, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986)* where the Supreme Court ruled that a plaintiff in a suit against the government may not recover for prejudgment interest absent "an express waiver of sovereign immunity from an award of interest." *Id. at 311*. The Court in *Library of Congress* rejected the plaintiffs' argument that the no-interest rule did not preclude an award for delay in recovery. The Court stated that "interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money…." *Id. at 322*. Brunswick cites several unpublished cases that have applied *Library of Congress* in the antitrust context and precluded present value damage calculations.

The Court finds that *Library of Congress* does not preclude a present value damages calculation in this context. Plaintiffs are not making any type of claim to statutory or common law prejudgment interest. Rather, **[*936]** they are seeking to recover the present value of the overcharge. Given that *H.J.* (which was decided **[**46]** three years after *Library of Congress)* and other persuasive authority specifically allow for such a recovery, the Court finds that such an award would be appropriate.

The Court must still resolve the issue as to whether Dr. Hall's present value calculation is in effect a prejudgment interest calculation that would be precluded. Brunswick points to Dr. Hall's initial expert report where he stated: "Plaintiffs are entitled to interest on these damages from the time the damages were incurred until the time of trial. I calculated this interest as the cost of debt that Brunswick faces." Prelim. Rep. of Dr. Robert Hall at 46. Brunswick moved *in limine* to preclude this portion of Dr. Hall's damage calculation, and Plaintiffs argued in response that although Dr. Hall called the calculation "interest" in his report, he actually was describing a calculation for present value. Because it was unclear at the time how Dr. Hall made his calculation, the Court reserved ruling on that portion of the motion, finding that the true nature of the calculation would have to be determined from his trial testimony.

Dr. Hall's testimony at trial demonstrated that his calculation was actually one for **[**47]** present value. The following exchange occurred between Plaintiffs' counsel and Dr. Hall:

> A. Now, there is one more thing that needs to be done in the measurement of what this means in terms of how -- what amount of compensation today would be necessary to make up for overcharges that occurred in the past. Because to make up today for a loss that occurred in the past -- loss being the overcharge here -- you have to adjust for the time value of money and we do that through the discount rate.
> (Objection)
> Q. Dr. Hall, if you will continue with your answer, which I think was directed at how you went about calculating the time value of damages, time value of that money.
>
> A. Certainly. Another word for the adjustment that I'm applying here is what economists call present value. This 202, say, for 1986 says that it takes $ 2.02 to compensate someone today for a dollar that they lost in 1986. Or what we would say is the present value today of a 1986 dollar is $ 2.02. That's how we adjust for the fact of timing matters. If we look into the future, as we will, it goes the other way. The amount of compensation today for a future dollar lost is less than a dollar because **[**48]** you would rather have the dollar now than later. That's the time value of money expressed as the present value. So the overcharge in 1986 of $ 925,000.00 then to bring to present value is multiplied by 2.02 and that gives the $ 1.8 million for 1986. Similarly, all the way across. The same calculation for each year through 1993.

Brunswick's expert, Dr. Richard Rapp, challenged Dr. Hall's description of the calculations as present value calculations. Tr. at 5365-67. However, Dr. Rapp's testimony did not persuade the Court that Dr. Hall's calculations were bare interest calculations. Accordingly, the Court finds that Dr. Hall appropriately adjusted his damage calculations to reflect the present value of the overcharges. Brunswick's motion for judgment as a matter of law with respect to this issue is denied.

VII.

Brunswick next argues that two Plaintiffs did not prove at trial that they acquired their claims from their corporate predecessors. Plaintiffs filed this lawsuit on December 1, 1995. In 1991 Mirage Marine transferred some of its assets to Mirage Holdings. In 1996, following the commencement of the lawsuit, Mirage Holdings transferred its assets to the named Plaintiff **[**49]** in this action, Mirage Manufacturing, LLC. Similarly, in 1993 WTYS No. 4 acquired the assets of Thompson Boat Company out of bankruptcy. Then in 1996, WTYS No. 4 sold its assets to the current Plaintiff, Thompson Marine Products.

Brunswick argues that Mirage and Thompson cannot recover on any of their claims because the did not prove at trial that they "own" their claims. Brunswick characterizes the argument as follows:

> **[*937]** Plaintiffs Mirage Manufacturing, LLC ("Mirage") and Thompson Marine Products, Inc. ("Thompson") offered no *evidence* that they acquired a cause of action from their predecessors. Neither is entitled to recover damages for claims that they failed to demonstrate that they own. And, at trial, they did not demonstrate anything at all about the subject. Simply put, this is a failure of proof.

Brunswick's Mem. dated June 15, 1998 at 32 (emphasis in original); *see also,* Brunswick's Mem. dated May 13, 1998 at 115-16 ("But neither offered any proof to the jury that it acquired its predecessor's cause of action against Brunswick…. As a matter of law, Brunswick is entitled to judgment on those damage claims.").

This argument is somewhat **[**50]** puzzling, because ***HN12***[] there is no substantive or procedural requirement that a party must take the stand and testify that it "owns" the claims it is pursuing. In fact, such a notion is plainly contradicted by the Federal Rules of Civil Procedure. *See* *FED. R. CIV. P. 17(a)* and *25(c)*. Apparently equally confused, Plaintiffs initially responded to the argument as if Brunswick had asserted a lack of standing defense. However, an argument of this nature has nothing to do with standing. Instead, the issue falls squarely within the "real party in interest" doctrine, a concept directly addressed by *Rule 17 of the Federal Rules of Civil Procedure*. *See* *Tate v. Snap-On Tools Corp., 1997 U.S. Dist. LEXIS 1485*, No. 90 C 4436, *1997 WL 106275* (N.D. Ill. Feb. 11, 1997) (distinguishing standing from the real party in interest doctrine); *see also* 6A WRIGHT, MILLER & KANE,

FEDERAL PRACTICE AND PROCEDURE, § 1542 (2d ed. 1990). Accordingly, the Court will construe Brunswick's "failure of proof" argument as a real party in interest objection under *Rule 17*.

HN13[] *Federal Rule of Civil Procedure 17(a)* specifies that an action "shall be prosecuted in the name of the real party **[**51]** in interest." In other words, the action must be brought by the person entitled under the governing substantive law to enforce the asserted right. The purpose of the rule is to prevent multiple or conflicting lawsuits by persons such as assignees, executors, or third-party beneficiaries, who would not be bound by *res judicata* principles. 6A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 1543 (2d ed. 1986). But *Rule 17* specifically requires that before an action can be dismissed at a defendant's behest, the court must allow a reasonable time for ratification by, or joinder of; the real party in interest. Thus, the Eighth Circuit Court of Appeals has consistently held that ***HN14***[] *Rule 17* objections must be timely raised:

> Because the requirements in *Rule 17(a)* are for the benefit of the Defendant, we have held that an objection on real party in interest grounds "should be raised with reasonable promptness in the trial court proceedings. If not raised in a timely fashion, the general rule is that the objection is deemed waived."

United Healthcare Corp. v. American Trade Ins. Co., 88 F.3d 563, 569 (8th Cir. 1996) (quoting Sun Refining & Marketing Co. v. Goldstein Oil Co., 801 F.2d 343, 345 (8th Cir. 1986). **[**52]** In *United Healthcare,* the court found that an objection raised one week prior to trial was untimely. Other courts have routinely rejected untimely objections as having been waived. *See, e.g., Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp. 40 F.3d 1416, 1431 (3rd Cir. 1994)* (buyer of corporation waived right to require successor in interest of seller to be substituted as party plaintiff, by not raising objection until it made a motion for summary judgment at trial); *Gogolin & Stelter v. Karn's Auto Imports Inc., 886 F.2d 100, 102-03 (5th Cir. 1989)* (holding that defendant waived real party in interest defense by "untimely assertion," where defendant raised it for the first time in a motion for directed verdict); *Hefley v. Jones, 687 F.2d 1383, 1388 (10th Cir. 1982)* (objection raised sixteen days prior to trial was untimely).

In the present case, Brunswick did not raise its real party in interest objection until it filed its motion for judgment as a matter of law. Under well-settled authority Brunswick raised the issue in an untimely manner, and the issue is waived.

Because some of the transfers at issue here occurred **[**53]** after the commencement of this lawsuit, consideration of *Rule 17* does not completely resolve the matter. ***HN15***[] *Rule 17* applies only to transfers prior to the commencement **[*938]** of the lawsuit. *ELCA Enterprises, Inc. v. Sisco Equip. Rental & Sales, Inc., 53 F.3d 186 (8th Cir. 1995)*. When a transfer occurs during the pendency of litigation, *Rule 25(c)* governs. *Rule 25(c)* states that "in case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." *FED. R. CIV. P. 25(c)*. The rule is "designed to allow an action to continue unabated when an interest in a lawsuit changes hands, rather than requiring the initiation of an entirely new lawsuit." *ELCA Enterprises, Inc., 53 F.3d at 191*. Whether to substitute or join a transferee under *Rule 25(c)* is a discretionary determination by the trial court. "The court, if it sees fit, may allow the transferee to be substituted for the transferor. It is also free, if it wishes, to retain the transferor as a party and to order that the **[**54]** transferee be made an additional party." 7C WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 1958 (2d ed. 1986).

Here, two transfers of interest occurred during the pendency of the litigation. On April 18, 1996, Plaintiff Thompson Marine Products foreclosed on the assets of WTYS No. 4, Inc. On October 1, 1996, Mirage Holdings Inc. was sold to Plaintiff Mirage Manufacturing, LLC. Plaintiffs filed a motion for leave to file a third amended complaint on March 5, 1997. In the memorandum in support of the motion, Plaintiffs described the two corporate transfers and requested leave to substitute the new corporate entities. Plaintiffs specifically averred that the new corporate entities received the rights to any proceeds received in connection with this lawsuit. On March 17, 1997, Brunswick responded to Plaintiffs' motion to amend, stating that it had no objection to the party modifications proposed by Plaintiffs.

Although Plaintiffs filed their motion to amend pursuant to Rule 15, the import of the motion was clear: Plaintiffs intended to substitute two corporate successors in interest for the then existing Plaintiffs, WTYS No. 4 and Mirage

Holdings. Thus, the fact that the motion **[**55]** did not implicate *Rule 25(c)* on its face is irrelevant. By failing to object to the substitution, Brunswick waived any objection that it may have had. And even if the objection was not waived at the time of the motion, Brunswick was still obligated to raise any "improper substitution" issue in a timely manner to allow the Court to properly address it and to allow Plaintiffs to cure any possible defects. In sum, as with the *Rule 17(a)* objection, Brunswick has simply waited too long to inject this issue into this litigation. If Brunswick did not believe that Thompson Marine Products and Mirage Marine Manufacturing LLC were proper Plaintiffs, it should have raise the issue at an appropriate time. Similarly, if Brunswick believed that additional parties should have been joined to allow for complete relief, that issue should have been timely raised as well.

The Court believes the foregoing makes it clear that Plaintiffs Mirage and Thompson were not obligated to "prove up" their corporate history as a predicate to recovering on these claims. To the contrary, it was incumbent upon Brunswick, not the Plaintiffs, to raise issues of "ownership" of claims and necessary parties in a timely manner **[**56]** under the Federal Rules of Civil Procedure. Because Brunswick failed to do so, any objections it may have had in that regard are waived.

VIII.

In its final argument, Brunswick merely repeats the basic thrust of the argument above regarding Mirage and Thompson. Brunswick argues that "with respect to each Plaintiff who failed to appear and testify at trial, the record is devoid of any evidence that these Plaintiffs are in fact the Plaintiffs specified in the Complaint." Brunswick's Supp. Mem. dated May 15, 1998. Of course, as explained above, none of the Plaintiffs were obligated to testify to "identify" themselves or demonstrate that they "own" their claims. This argument is rejected.

Brunswick also argues that for those Plaintiffs who did not testify, there is no evidence in the record that they in fact purchased engines from Brunswick. Brunswick argues that the engine purchase data introduced through Dr. Hall is insufficient to establish this point.

[*939] This argument in simply incorrect. The engine purchase information introduced through Dr. Hall was based upon data supplied by Brunswick. As such, it was competent evidence regarding engine purchases that the jury **[**57]** was entitled to consider. Furthermore, it is significant that Brunswick never contested that the engine purchases were made by the Plaintiffs. In fact, in Brunswick's Answer to Plaintiffs' Fourth Amended Complaint, Brunswick admitted that each Plaintiff purchases stem drive engines from Brunswick. Brunswick never even objected to the introduction of exhibits through Dr. Hall attempting to establish the engine purchase information. In sum, there is substantial evidence in the record regarding all of the Plaintiffs' engine purchases, and the Plaintiffs were not obligated to individually appear and offer that testimony.

IX.

In its motion, Brunswick has raised several additional grounds for judgment as a matter of law. The Court has carefully considered these remaining issues and finds that they are uniformly lacking in merit. Several of these arguments clearly raise questions of fact that are not properly considered in a motion for judgment as a matter of law. Others ask the Court to completely disregard established authority as well as the voluminous evidence produced by the Plaintiffs in this case. The Court will summarily address these issues.

First, Plaintiffs presented substantial **[**58]** evidence to support the jury's verdict defining the relevant product market as the market for the sale of stern drive and inboard marine engines. Second, the jury's implicit finding that Brunswick possessed monopoly power in the relevant market is supported by substantial evidence and applicable authority. Third, the statute of limitations clearly does not act as a bar to Plaintiffs' claims under Section 7 of the Clayton Act. Fourth, Plaintiffs unquestionably have standing to recover damages based on Brunswick's anticompetitive acquisitions. And finally, the jury's finding that Brunswick's multiple acquisitions, considered collectively, violated Section 7 of the Clayton Act is fully supported by the evidence and applicable authority.

X.

Brunswick has also filed a motion for a new trial raising many of the same issues in its motion for judgment as a matter of law. ***HN16***[] The Court may grant a new trial on the basis that the verdict is against the weight of the evidence, if failing to do so would result in a miscarriage of justice. *Shaffer v. Wilkes, 65 F.3d 115, 117 (8th Cir. 1995) (quoting White v. Pence, 961 F.2d 776, 780 (8th Cir. 1992))*. "In **[**59]** determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence--it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict'." *White, 961 F.2d at 780 (quoting Ryan v. McDonough Power Equip., 734 F.2d 385, 387 (8th Cir. 1984))*. The Court, however, may not "reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *White, 961 F.2d at 780* (quotations omitted).

The discussions in sections III, IV, V, and IX, *supra,* are particularly relevant to the initial issues raised in Brunswick's motion, and the Court will not repeat those discussions here. The Court finds that the jury's verdicts with respect to Plaintiffs' claims under *Sections 1* and *2* of the Sherman Act and Section 7 of the Clayton Act are not against the great weight of the evidence, and do not constitute a miscarriage of justice.

Brunswick argues that it is entitled to a new trial because the damages **[**60]** awarded by the jury were grossly excessive. However, the bulk of Brunswick's argument is directed to the same criticisms of Dr. Hall's opinions that the Court has rejected above. Brunswick also argues that if it had charged Dr. Hall's competitive price for engines, then it would have lost money on the sale of those engines. However, Dr. Hall offered a reasonable explanation for why that was an incorrect argument, and the jury was well within its province to reject the testimony of Dr. Rapp.

Brunswick also argues that it is entitled to a new trial based upon several evidentiary rulings. The Court finds that the admission **[*940]** of Dr. Hall's testimony, including the testimony regarding the present value of Plaintiffs' damages, was in no way unfairly prejudicial and does not provide a basis for a new trial. Furthermore, as explained in Sections VII and VIII, *supra,* all of the Plaintiffs presented competent, substantive evidence to demonstrate the elements of their claims, and they were in no way obligated to individually appear to testify that they "owned" their claims or to offer testimony regarding engine purchases.

The McKinsey documents were admitted by the Court after **[**61]** thorough consideration of the arguments and authority cited in Plaintiffs' Memorandum in Opposition to Defendant Brunswick Corporation's Motion in Limine (McKinsey & Company Documents) dated March 16, 1998. The McKinsey documents were relevant and admissible under multiple grounds, and Brunswick suffered no unfair prejudice from their admission.

The Court finds no error in the admission of the FTC Stipulation, which was appropriately admitted under 801(d)(2) and was not unfairly prejudicial. Brunswick's arguments as to the irrelevance of the FTC Stipulation are completely contradicted by the trial testimony of former Brunswick CEO Jack Reichert, who testified that there was actually *more* competition between outboards and stern drives in 1976. Tr. 4727-29. Furthermore, even if the FTC stipulation was improperly admitted (which it was not), it could only constitute harmless error. The amount of evidence in this case demonstrating that outboard engines and stern drive engines are in separate product markets was overwhelming.

The Court's decision to exclude the expert testimony of Stephen Humphries was fully explained in the Court's Order of May 20, 1998, and Brunswick makes no **[**62]** persuasive argument suggesting that the Order was erroneous. A party simply cannot wait until its opponent rests, and then seek to vastly expand the subject matter of expert testimony to areas that had never been properly disclosed in accordance with firm disclosure deadlines. Furthermore, it makes no difference that Humphries received some data after the disclosure deadline of March 16, 1998. The trial of this matter commenced on April 13, 1998, and Brunswick had ample opportunity to file a timely request to supplement.

Brunswick objects to the Court's verdict form, basically repeating its disaggregation argument addressed in Section III, *supra.* Because there is not a disaggregation problem, this issue does not warrant a new trial. Brunswick also argues that certain interrogatories should have been included in the verdict. ***HN17***[] The submission and form of interrogatories to the jury are matters within the sound discretion of the trial court. *E. I. du Pont de Nemours & Co. v. Berkley and Co., 620 F.2d 1247, 1271 (8th Cir. 1980)*. The proposed interrogatories were, quite simply, unnecessary and misleading, and the Court was justified in omitting them.

Brunswick further **[**63]** argues that the Court's instructions to the jury contained prejudicial errors and omissions. ***HN18***[] A district court's decision to reject a proffered jury instruction is improper only if when viewed in their entirety, the jury instructions contain an error or errors that affect the substantial rights of the parties. *Hastings v. Boston Mut. Life Ins. Co., 975 F.2d 506, 510 (8th Cir. 1992)*. "The district court has discretion in the style and wording of jury instructions so long as the charge as a whole fairly and adequately states the law." *Beckman v. Mayo Found., 804 F.2d 435, 438 (8th Cir. 1986)*. Furthermore, "[where] the charge to the jury correctly sets forth the law, a lack of perfect clarity will not render the charge erroneous." *Roth v. Black & Decker; U.S., Inc., 737 F.2d 779, 783 (8th Cir. 1984)*.

The Court finds that the jury was properly instructed on the definition of monopoly power, as the instruction was in full accord with established Supreme Court and Eighth Circuit precedent. Brunswick's argument with respect to Instruction No. 17 has no merit. First, the instruction itself is not an instruction on the law because it **[**64]** only recites several categories of conduct which Plaintiffs maintained were anticompetitive. Furthermore, the instructions as a whole fairly and adequately stated the law.

XI.

In accordance with the above, Defendant Brunswick Corporation's Renewed Motion **[*941]** for Judgment as a Matter of Law (Docket # 1239) and separate Motion for a New Trial (Docket # 1240) are hereby DENIED.

IT IS SO ORDERED this 19 day of August, 1998.

James M. Moody

United States District Judge

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Automated Salvage Transp. v. Wheelabrator Envtl. Sys.

United States Court of Appeals for the Second Circuit

August 29, 1997, Argued ; August 20, 1998, Decided ; August 20, 1998, Filed

Docket No. 96-9281

Reporter

155 F.3d 59 *; 1998 U.S. App. LEXIS 22030 **; 29 ELR 20171

AUTOMATED SALVAGE TRANSPORT, INC.; BRIA RUBBISH AND RECYCLING, INC.; CONNECTICUT CARTING & SALVAGE CORP.; CONNECTICUT DISPOSAL SERVICE, INC.; D.P.L. REFUSE SERVICE, INC.; FRANK PERROTTI & SONS, INC.; ROYAL REFUSE & RECYCLING, INC.; SANITARY REFUSE COMPANY, INC.; QUALITY RECYCLING AND DISPOSAL; C & D SANITATION & RECYCLING, LLC, Plaintiffs-Appellants, v. WHEELABRATOR ENVIRONMENTAL SYSTEMS, INC.; BRIDGEPORT RESCO COMPANY, L.P.; RILEY ENERGY SYSTEMS OF LISBON CORPORATION, Defendants-Appellees, CONNECTICUT RESOURCES RECOVERY AUTHORITY, Intervenor-Defendant-Appellee.

Subsequent History: **[**1]** As Amended October 9. 1998. As Amended.

Prior History: Appeal from an order of the United States District Court for the District of Connecticut, Burns, J., dismissing a complaint alleging violations of the Sherman Act and the *Commerce Clause*, and declining to exercise supplemental jurisdiction over related state claims. The complaint challenged a settlement agreement between the Connecticut Resources Recovery Authority and Wheelabrator Environmental Systems, Inc., and its related corporate entities, which operate waste-to-energy facilities inside and outside of Connecticut. The settlement agreement, inter alia, removed what may have been the last obstacle to the opening of a sixth waste-to-energy plant in Connecticut by the Wheelabrator defendants in return for their promise to not process any waste that Connecticut municipalities had contractually committed to CRRA's facilities for processing. The challenge to the settlement agreement was rejected on the grounds that, even if it was anticompetitive, CRRA was exempt from the Sherman Act under the state action immunity doctrine, and that the settlement agreement did not discriminate against or unduly burden interstate commerce.

Disposition: Affirmed. **[**2]**

Core Terms

settlement agreement, municipalities, facilities, plants, interstate commerce, solid waste, disposal, haulers, contracts, commission of waste, plaintiffs', antitrust, general assembly, waste-to-energy, regulation, market participant, processing, landfills, deliveries, commerce, exempt, state action, out-of-state, resources, solid waste management, Sherman Act, anticompetitive, environmental protection, anti trust law, waste disposal

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Judicial Notice > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] Standards of Review, De Novo Review

The courts review the grant of a motion under *Fed. R. Civ. P. 12(b)(6)*, de novo, and must construe in plaintiffs' favor factual allegations in the complaint. The court's consideration, like the district court's, is limited to facts stated on the face of the complaint and in documents appended to the complaint or incorporated in the complaint by reference, as well as to matters of which judicial notice may be taken.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] Defenses, Demurrers & Objections, Motions to Dismiss

Dismissal of the complaint is proper only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Real Property Law > Subdivisions > State Regulations

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Public Improvements > General Overview

HN3[] Scope, Exemptions

The Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions; pursuant to state policy to displace competition with regulation or monopoly public service.

Constitutional Law > Congressional Duties & Powers > General Overview

International Law > Authority to Regulate > General Overview

International Trade Law > Authority to Regulate > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Transportation Law > Interstate Commerce > Federal Powers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

HN4[] **Constitutional Law, Congressional Duties & Powers**

The *commerce clause* provides that Congress shall have the Power to regulate commerce with foreign nations and among the several states. *U.S. Const. art. I., § 8, cl. 3*. A dormant or negative aspect of this grant of power is that a state's power to impinge on interstate commerce is limited.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Environmental Law > Solid Wastes > Disposal Standards

HN5[] **Congressional Duties & Powers, Commerce Clause**

The processing and disposal of solid waste is commerce under the *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Transportation Law > Interstate Commerce > Balancing Tests

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN6[] **Commerce Clause, Dormant Commerce Clause**

The first step in analyzing any law subject to judicial scrutiny under the dormant *Commerce Clause* is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce. In this context, discrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Balancing Tests

HN7[] **Congressional Duties & Powers, Commerce Clause**

If a restriction on commerce is discriminatory, it may be applied only if it is demonstrably justified by a valid factor unrelated to economic protectionism. In contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Balancing Tests

Transportation Law > Intrastate Commerce

HN8[] **Congressional Duties & Powers, Commerce Clause**

The incidental burdens are the burdens on interstate commerce that exceed the burdens on intrastate commerce.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Balancing Tests

HN9[] **Interstate Commerce, State Powers**

Where a regulation does not have this disparate impact on interstate commerce, then the court must conclude that it has not imposed any incidental burdens on interstate commerce that are clearly excessive in relation to the putative local benefits. Thus, the minimum showing required to succeed in a *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*, challenge to a state regulation is that it have a disparate impact on interstate commerce. The fact that it may otherwise affect commerce is not sufficient.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Transportation Law > Interstate Commerce > Market Participant Doctrine

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN10[] **Commerce Clause, Dormant Commerce Clause**

Under the market participant doctrine, which distinguishes between the direct exercise of a state's sovereign powers and a state's actions in the more general capacity of a market participant, only the former actions are subject to the limitations of the dormant *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Market Participant Doctrine

HN11[] **Interstate Commerce, State Powers**

When it acts as a market participant, a state agency may impose restrictions that reach beyond the immediate parties with which the government transacts business. The *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*, does not require the state to stop at the boundary of formal privity of contract.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN12[] **Interstate Commerce, State Powers**

Only if the actions of a state, whether by statute, regulation, or contract, have a substantial regulatory effect outside of the particular market in which the state is a participant, do they offend the dormant *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*.

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EVERETT E. NEWTON, New Haven, CT (Barry J. Waters, April L. Lieberman, Murtha Cullina Richter & Pinney, New Haven, CT, of counsel), for Intervenor-Defendant-Appellee.

Judges: Before: MESKILL and JACOBS, Circuit Judges, and KORMAN, District Judge. *

Opinion by: KORMAN

Opinion

[*62] KORMAN, District Judge:

The Connecticut Resources Recovery Authority (CRRA") was created by the Connecticut General Assembly in 1973. Since then, "CRRA has developed and maintained a vast system of solid waste management projects, under a Solid Waste Management Plan, which include[s] waste-to-energy plants . . . ." Amended Complaint P 7. The Solid Waste Management Plan, which was promulgated by Connecticut's Department of Environmental Protection ("DEP") pursuant to express **[**3]** legislative directive, *Conn.Gen.Stat § 22a-211*, "abandoned landfilling in favor of transporting waste via transfer stations or directly to trash-to-energy plants for ultimate disposal." Amended Complaint P 7.

CRRA owns four of the six trash-to-energy plants currently operating in Connecticut. These four plants, which were constructed by CRRA with the proceeds of bonds issued by CRRA, are in Hartford, Preston, Wallingford, and Bridgeport, and serve over two-thirds of the cities and towns in Connecticut pursuant to long-term contracts by which these cities and towns committed themselves to dispose of their waste. [1] A fifth waste-to-energy plant is located in Bristol, Connecticut, and is privately "owned, operated and/or controlled" by Ogden Systems, Inc. Amended Complaint P 9.

[4]** The opening of Connecticut's sixth waste-to-energy facility in Lisbon by defendant, Wheelabrator Environmental Systems (and related defendants), provides the backdrop for this lawsuit. See generally *Connecticut Resources Recovery Authority v. Commissioner of Environmental Protection, 233 Conn. 486, 488-96, 659 A.2d 714, 715-19 (1995)* (detailing history of CRRA opposition to permit). Specifically, CRRA challenged the decision of the Commissioner of Environmental Protection to permit the Lisbon waste-to-energy plant. CRRA invoked *Conn.Gen.Stat. § 22a-208d*, which was enacted to ensure that new solid waste disposal facilities would be permitted only if they would "not result in substantial excess capacity of resources recovery facilities . . . ."

* Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

[1] The Hartford, Preston, and Wallingford plants are "owned, operated and/or controlled" in conjunction with either Ogden Systems, Inc., or American Refuel, Amended Complaint P 9, neither of whom is a party to this case. The Bridgeport plant is allegedly "operated and/or controlled in conjunction with the Wheelabrator defendants." Id.

The challenge was ultimately resolved by the settlement agreement at the center of this case. CRRA agreed to withdraw its objection to the Lisbon facility permit in consideration for an agreement that addressed, inter alia, a problem caused by certain waste haulers including plaintiffs, Automated Salvage Transport, Inc. (and related plaintiffs). These waste haulers essentially interfered with the performance of long-term **[**5]** contracts that CRRA negotiated with Connecticut municipalities to commit the municipal solid waste to CRRA facilities for disposal at fixed long-term rates. Instead of delivering this waste to CRRA, plaintiffs hauled it to privately operated waste-to-energy plants with more favorable spot market rates. The settlement agreement requires both CRRA and the Wheelabrator defendants to respect one another's municipal contracts by rejecting deliveries of any waste committed to one another. In addition, if a hauler delivers waste committed to CRRA three times within a three-month period to the Wheelabrator defendants, the Wheelabrator defendants must refuse all deliveries of waste from that hauler for the next three months.

The settlement agreement is the subject of Sherman Act and *Commerce Clause* complaint. Plaintiffs allege that the settlement agreement is a per se antitrust violation because it is "an unlawful contract, combination and conspiracy" to maintain an alleged CRRA monopoly over Connecticut waste disposal, Amended Complaint PP 11, 13(e), and that it violates the *Commerce Clause* because it "unreasonably restrain[s] free trade and interstate commerce." Amended Complaint P **[**6]** 13(h). Since the defendants have asserted the state action immunity defense to the **[*63]** antitrust cause of action and the market participant defense to the *Commerce Clause* cause of action, a brief history of the CRRA, and of the State of Connecticut's role in its creation and operation, is appropriate before we discuss plaintiffs' challenge to this settlement agreement.

Background

In 1973, after decades of reliance on landfills, the Connecticut legislature recognized that the State's "prevailing solid waste disposal practices . . . resulted in unnecessary environmental damage, wasted valuable land and other resources, and constituted a continuing hazard to the health and welfare of the people of the state." *Conn.Gen.Stat. § 22a-258*. Worse yet, floor debates in the Connecticut General Assembly revealed that roughly ninety percent of these landfills were actually illegal. 16 (S-97) Senate Proceedings, Pt. 8. 1973 Sess., p. 3753 (remarks of Sen. Costello). [2] They continued to operate, violating clean air and landfill regulations, because there was simply no alternative means for waste disposal. Id. Unable to enforce the laws without aggravating the crisis, Connecticut's **[**7]** Department of Environmental Protection (DEP) was forced into a "holding action." Id. at 3761. In 1971, the Connecticut General Assembly ordered the DEP to study Connecticut's solid waste system, and develop a master solid waste disposal solution for the entire state.

The DEP unveiled the contours of its state-wide waste disposal plan in 1973, proposing "an antithesis to the burn and bury philosophy which had caused such a problem" for Connecticut. 16 (H-143) H. R. Proceedings, Pt. 8, 1973 Sess., p. 6665 (remarks of Rep. Harlow). [3] Rather than simply incinerating or landfilling Connecticut's solid waste, the DEP plan phased out these disposal methods in favor of recycling and energy recovery. In the DEP's model, which has since become common across the nation, residents would "segregate" their waste, separating combustible materials from non-combustibles. The combustible waste would be **[**8]** sent to incinerators where it would be converted into energy, which, in turn, would be sold to utility companies. The non-combustible materials, such as aluminum, would be recycled. H. Rep. Tr. at 6658, 6666, 6692 (remarks of Rep. Harlow). Advocates of the solid waste plan touted it as not only environmentally sound but also "economically viable, perhaps the first plan in the country if not the world to provide a format which can . . . provide positive economic benefits." Id. at 6669.

Even as the DEP was working out the plan's final details, the Connecticut General Assembly, deeming the plan's general strategy both sound and inevitable, passed implementing legislation during its 1973 session, rather than

[2] The transcript of this Connecticut Senate floor debate (hereinafter "Sen. Tr.") was included in the Joint Appendix.

[3] The transcript of this Connecticut House of Representatives floor debate (hereinafter "H. Rep. Tr.") was included in the Joint Appendix.

delay the solid waste crisis another year. See id. at 6659, 6667-78. This legislation created the Connecticut Resources Recovery Authority ("CRRA") as a "necessary **[**9]** state structure, which can take initiative and appropriate action to provide the necessary systems, facilities, technology and services for solid waste management and resources recovery." *Conn.Gen.Stat. § 22a-258*.

The Connecticut General Assembly rejected the landfill system in favor of an "appropriate governmental structure, processes and support . . . so that effective state systems and facilities for solid waste management and large-scale resources recovery [could] be developed," *Conn.Gen.Stat. § 22a-259(3)*, and so that "solid waste disposal services [could] be provided for municipal and regional authorities and private persons in the state, at reasonable cost, by state systems and facilities . . . in accordance with the statewide solid waste management plan." *Conn.Gen.Stat. § 22a-259(6)*.

The Connecticut General Assembly hoped that, by creating this state-wide authority to implement the DEP plan, Connecticut would benefit from an economy of scale, allowing more efficient and affordable development of necessary systems and technologies. See **[*64]** *Conn.Gen.Stat. § 22a-258* (finding that. "coordinated large-scale processing of solid wastes may be necessary in order **[**10]** to achieve maximum environmental and economic benefits for the people of the state" and that "the development of systems and facilities and the use of the technology necessary to initiate large-scale processing of solid wastes have become logical and necessary functions to be assumed by state government").

A. CRRA's Self-Sustained Operation

CRRA was to fund itself by issuing $ 250 million in self-liquidating bonds. Sen. Tr. at 3751 (remarks of Sen. DeNardis). It was critical to the General Assembly that CRRA would repay these bonds through sales of its waste disposal services and recovered energy. See, e.g., H. Rep. Tr. at 6687 (remarks of Rep. Dice) ("I'm not . . . in favor of the state under-writing or ever subsequently having to pay from the state's funds as a whole to subsidize these matters from the towns. This is supposed to be a self-liquidating program."). See also *Conn.Gen.Stat. § 22a-262(2)* (directing CRRA to generate "revenues sufficient to provide for the support of the authority and its operations on a self-sustaining basis").

While the legislation creating CRRA did not preclude cities and towns from choosing alternatives to the CRRA-operated facilities, **[**11]** it was clear that once the CRRA facilities became operational the DEP would at last be free to enforce clean air and landfill regulations. see Sen. Tr. at 3761-62 (remarks of Sen. Costello). This enforcement would eliminate most, if not all, of CRRA's competition from landfills. Indeed, the bill creating CRRA was passed over objections that CRRA would simply condemn all of its private competitors. See id.; H. Rep. Tr. at 6686 (remarks of Rep. Camp); H. Rep. Tr. at 6698 (remarks of Rep. Varis); H. Rep. Tr. at 6699 (remarks of Rep. Pearson).

The Connecticut General Assembly further protected CRRA's financial stability by restricting the development of new waste-to-energy plants that would compete with CRRA for the supply of waste. See*Conn.Gen.Stat. §§ 22a-208d(a)*, *22a-208d(c)(1)(I)* (forbidding construction or expansion of disposal facilities that would create an excess capacity for municipal solid waste).

B. The Diverted Waste Problem

Since its creation, CRRA has developed four of Connecticut's six resource recovery facilities, eleven transfer stations, and five landfills, enabling it to serve more than one hundred municipalities who have entered into long-term contracts **[**12]** committing their solid waste to its facilities. Connecticut General Assembly Legislative Program Review & Investigations Committee, "Connecticut Resources Recovery Authority: Solid Waste

Management Fees" (December 1993) ("Legislative Report"), at i, 1, 11. [4] The facilities charge a "tipping" fee for each ton of waste they accept and process, and derive energy from the processed waste, which they then sell to utility companies. This revenue sustains the facilities' continued operation, and helps maintain their role in Connecticut's waste management system. Id. at 1, 19-20, 51-54. Several other towns are instead using the CRRA and private facilities on a spot basis. Id. at 11. These towns are essentially speculating on short-term price fluctuations in the "spot market," instead of committing to a set long-term price. See id. at 15-17, 35, 39.

[13]** In the years preceding the events leading to the complaint, CRRA was faced with a dwindling supply of contracted waste delivered to its facilities, caused by such unforeseen factors as economic recession and mandatory recycling programs enacted in the late 1980s and early 1990s. Id. at ii, 6-7, 32-34, 39. The shortage of contracted waste increased the demand and competition for **[*65]** spot waste. As a result, the rates charged for spot waste plummeted to "historic lows", falling below those charged for contractually committed waste. Id. at 15, 34-35. In 1994, for example, while CRRA's Mid-Connecticut facility charged a $ 51 per ton tipping fee for committed waste, its spot fees ranged from $ 32 to $ 34. At the Southeast plant, spot prices averaged $ 40 per ton, in contrast to fees of $ 98 per committed ton. Id. at 15.

Rather than pay the higher fees required by the towns' long-term contracts, some waste haulers simply delivered the towns' waste to whichever waste management facility was cheapest in the spot market. See id. at 15-17, 34, 39. This practice exacerbated the shortages in committed waste delivery.Id. at ii, 17, 34, 39. This case arose from CRRA's **[**14]** effort to ensure that it received the waste to which it was contractually entitled without interference from waste haulers.

C. The Settlement Agreement

Despite the overcapacity of waste-to-energy plants in Connecticut, the DEP issued a permit to the Wheelabrator defendants to open a sixth waste-to-energy plant in Lisbon. CRRA challenged the need for the new plant by intervening in the proceedings before the DEP, where it argued that the new facility would result in the "substantial excess capacity" forbidden by *Conn.Gen.Stat. § 22a-208d*. While the DEP ultimately decided to grant the permit for the Lisbon plant, it was not disputed that this facility would add to the then existing overcapacity in Connecticut. See *Connecticut Resources Recovery Authority v. Commissioner of the Department of Environmental Protection, 1994 Conn. Super. LEXIS 418*, *15, 1994 WL 60061, at *5 (Conn. Super. Feb. 16, 1994) ("The Lisbon plant will undoubtedly reduce the availability of waste for each of these plaintiffs, the impact being greatest upon . . . [the] plant in Preston [which] is operating well below its capacity for lack of sufficient waste."), appeal **[**15]** dismissed, *233 Conn. 486, 659 A.2d 714 (1995)*. Nevertheless, the DEP chose to permit the Lisbon facility because it determined that the added capacity would become necessary by 1998--a matter that was also the subject of some controversy. See, e.g., Legislative Report at 60-61 (recommending review of Lisbon decision and DEP decision-making process).

CRRA then commenced litigation seeking to overturn the DEP's decision and enjoin the plant's operational permitting. See *Connecticut Resources Recovery Authority v. Commissioner of the Department of Environmental Protection, 1994 Conn. Super. LEXIS 418, 1994 WL 60061*. After holding that CRRA had standing to invoke the benefits of *§ 22a-208d*, the Connecticut Superior Court accepted the DEP's finding that, although the plant was not yet necessary, it would become necessary by 1998. Nevertheless, the Superior Court found that the permit, contained an invalid condition intended to limit the processing of out-of-state waste at the Lisbon facility. Because this invalid condition was "inextricably intertwined" with the DEP's determination of need, the case was remanded to the DEP to reconsider whether it would **[**16]** adhere to its conclusion that the Lisbon facility would become

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[4] The Legislative Report was attached by the Wheelabrator defendants to the memorandum in support of their motion to dismiss. They argued, without apparent contradiction by plaintiffs, that it "may be considered by the Court without converting this motion into one for summary judgment." Mem. at 7 n.2. The Legislative Report was also included in the Joint Appendix. We decline to consider it in determining whether the district court properly dismissed the complaint. Rather, we refer to it here solely to provide a background for this controversy that is not inconsistent with the facts alleged in the amended complaint.

necessary. Id. at *16. Both CRRA and Wheelabrator attempted, unsuccessfully, to reopen the remand order. See *Connecticut Resources Recovery Authority v. Commission of the Department of Environmental Protection, 1994 Conn. Super. LEXIS 1195, 1994 WL 197398* (Conn. Super. May 2, 1994); *Connecticut Resources Recovery Authority v. Commissioner of the Department of Environmental Protection, 1994 Conn. Super. LEXIS 1176, 1994 WL 197381* (Conn. Super. May 3, 1994). The parties then appealed the remand order to the Connecticut Supreme Court, which dismissed the appeal on June 13, 1995, because the remand was not a final judgment. *Connecticut Resources Recovery Authority v. Commissioner of Environmental Protection, 233 Conn. at 496-502, 659 A.2d at 719-22*.

At this point, CRRA and Wheelabrator entered into the July 19, 1995 settlement agreement at issue in this case. Article VI of the settlement agreement reads, in pertinent part:

> A. Deliveries of Waste Committed to Other Projects. [Wheelabrator] shall not accept and shall in fact reject deliveries of any waste **[**17]** known by [Wheelabrator] to be committed to any of the AUTHORITY'S Projects by written agreement (hereinafter the "Committed Waste") at any of the **[*66]** following [Wheelabrator] or [Wheelabrator-affiliated] facilities: Lisbon, Connecticut, Bridgeport, Connecticut, Peekskill, New York, Millbury, Massachusetts, and North Andover, Massachusetts. . . . This obligation shall extend to any deliveries of such Committed Waste by private haulers where the AUTHORITY or SCRRA have contracts with municipalities requiring the delivery of all waste within those municipalities. . . .
> The AUTHORITY shall not accept and shall in fact reject deliveries of any waste known to the AUTHORITY to be committed to projects operated by [the Wheelabrator defendants] by written agreement with any Connecticut municipality . . . . This obligation shall extend to any deliveries of such . . . waste by private haulers where [the Wheelabrator defendants] have contracts with municipalities requiring the delivery of all waste within those municipalities. . . .
>
> B. Notification to Reject Waste. If the AUTHORITY notifies . . . [Wheelabrator] at any time that it reasonably believes . . . that an **[**18]** identified hauler or one or more of its Affiliates is delivering Committed Waste to any [Wheelabrator] facility, then [Wheelabrator] shall refuse to accept such delivery of waste from such hauler or its Affiliate. . . . If on three occasions in any three-month period the AUTHORITY so identifies a hauler or its Affiliates delivering Committed Waste to any [Wheelabrator] Facility, and the identified deliveries are not so certified by an independent person, or if on three occasions in any three-month period, the AUTHORITY provides reasonably evidence that waste from a transfer station that has accepted Committed Waste has been delivered to a [Wheelabrator] Facility, then [Wheelabrator] shall refuse to accept any and all deliveries from such hauler and its Affiliates or from such transfer station, as the case may be, for a period of no less than three months. [5]

[19]** Thus, the settlement agreement requires both CRRA and the Wheelabrator defendants to respect one another's municipal contracts by rejecting deliveries of any waste committed to one another. In addition, if a hauler delivers waste to Wheelabrator facilities three times within a three month period when that waste is committed to CRRA, the Wheelabrator defendants must refuse all deliveries of waste from that hauler for the next three months. Put simply, the settlement agreement bars both parties from accepting diverted waste, and requires the Wheelabrator defendants to shun haulers for three months if they divert committed waste.

In exchange for the agreement, CRRA took steps to withdraw its legal action against the permitting of the Lisbon facility, and agreed that it would take no action to re-enter or re-institute the same or similar proceedings in the future. See Settlement Agreement, Art. VII; *Connecticut Resources Recovery Authority v. Commissioner of the Department of Environmental Protection, 1995 Conn. Super. LEXIS 2564, 1995 WL 548711* at *2 (Conn. Super. Sept. 7, 1995) (noting July 31, 1995 filing of stipulation consenting to dismissal of CRRA's appeal **[**20]** from the DEP decision to permit the opening of the Lisbon facility). CRRA also agreed to "take no further action which

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[5] The "SCRRA" to which the settlement agreement refers is the Southeastern Connecticut Regional Resources Recovery Authority, a regional resources recovery facility comprised of the towns of East Lyme, Griswold, Groton, Ledyard, Montville, New London, North Stonington, Norwich, Sprague, Stonington, and Waterford.

reasonably could be construed as opposing the permitting, construction or operation of the Lisbon Facility," and to urge other parties engaged in litigation opposing the permitting to similarly withdraw their opposition. Settlement Agreement, Art. VII(C). Moreover, CRRA agreed to join Wheelabrator in seeking the permit, and to urge the other parties to do the same Id.

On May 3, 1996, plaintiffs, ten affiliated waste hauling companies, were notified that they were being "locked out" of the Wheelabrator defendants' facilities pursuant to the settlement agreement, for attempting three times within a three-month period to deliver waste to Wheelabrator facilities when that waste had been committed to CRRA. On May 6, 1996, roughly ten months after the settlement agreement was signed, plaintiffs **[*67]** filed an action against the Wheelabrator defendants in the District of Connecticut, alleging that the settlement agreement violated the antitrust laws. The district court entered an ex parte temporary restraining order, enjoining the defendants from carrying out **[**21]** the agreement, and scheduled a hearing on an order to show cause for May 13, 1996. On that date, CRRA was permitted to intervene in the action as a defendant. Plaintiffs amended their complaint on May 17, 1996, adding a claim that the settlement agreement violated the *Commerce Clause* on the ground that it "unreasonably restrained free trade and interstate commerce." Amended Complaint P 13(h). On August 30, 1996, the complaint was dismissed on the grounds that, even if the settlement agreement was anticompetitive, it was exempt from the Sherman Act under the state action immunity doctrine of *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, and because it did not discriminate against or unduly burden interstate commerce.

Discussion

HN1[] We review the grant of a motion under *Fed.R.Civ.P. 12(b)(6)* de novo, and must construe in plaintiffs' favor factual allegations in the complaint. *Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991)*. Our consideration, like the district court's, is limited to facts stated on the face of the complaint and in documents appended to the complaint or incorporated in the complaint by reference, **[**22]** as well as to matters of which judicial notice may be taken. Id. ***HN2***[] Dismissal of the complaint is proper only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* (footnote omitted).

A. The Antitrust Cause of Action

Plaintiffs claim that CRRA "developed and maintained a vast system of [waste-to-energy] solid waste management projects, under a Solid Waste Management Plan" that "virtually eliminated" landfilling in favor of waste-to-energy disposal. Amended Complaint P 7. This has allegedly given CRRA a "virtual monopoly over waste incineration and disposal in the State of Connecticut." Id. P 10. Plaintiffs further allege that CRRA and the Wheelabrator defendants then engaged in a "per se Sherman Act violation, by conspiring to maintain the CRRA monopoly via a "total lock-out," or boycott, of the plaintiffs' business "to enforce flow-control contracts between municipalities and CRRA against private haulers . . . [who] were not parties to or bound by those contracts." Brief of Plaintiffs-Appellants **[**23]** at 10, 17; Amended Complaint P 15.

CRRA's "virtual monopoly" over waste disposal is the result of the Connecticut General Assembly's decision, discussed above, to phase out landfills in favor of more environmentally friendly waste-to-energy disposal. Connecticut's Solid Waste Management Plan, which promoted this monopoly, was promulgated not by CRRA, but by Connecticut's Department of Environmental Protection. Indeed, federal law tightened the grip of this "virtual monopoly," by further requiring Connecticut to abandon its landfill system. See 40 C.F.R. pt. 258 (1998) (detailing stricter environmental standards for landfills); Legislative Report at 7 ("One RCRA provision that is having a significant impact on waste management methods in Connecticut and other states requires that landfills meet stricter environmental protection standards or close by October 1, 1993 . . . . A number of landfills, particularly those owned by municipalities, are planning to close rather than institute costly improvements and operating procedures required by RCRA.").

Plaintiffs acknowledge that the source of the monopoly CRRA allegedly enjoys is the Solid Waste Disposal Plan adopted by the DEP pursuant **[**24]** to a legislative directive. Specifically, paragraph seven of the Amended Complaint alleges that

> CRRA has developed and maintained a vast system of solid waste management projects, under a Solid Waste Management Plan, which include waste-to-energy plants and transfer stations. This Plan has abandoned landfilling in favor of transporting waste . . . to trash-to-energy plants for ultimate disposal. By doing so, **[*68]** this Plan has virtually eliminated every available solid waste disposal site in the State of Connecticut in favor of trash-to-energy plaints [sic].

Indeed, the basis of the complaint is not the alleged monopoly, but the settlement agreement to boycott committed waste. See id. P 11.

While plaintiffs allege that this agreement "further tightened the grip" of this monopoly, Plaintiffs' Amended Complaint P 10, it does this, according to plaintiffs' own characterization, merely to ensure that CRRA receives the benefit of the municipal waste disposal contracts that CRRA had lawfully acquired. Brief of Plaintiffs-Appellants at 17 (arguing that CRRA entered into the agreement with the Wheelabrator defendants "to enforce flow-control contracts **[**25]** between municipalities and CRRA").

The defendants' motion to dismiss the antitrust cause of action relied solely on the state action immunity defense and did not challenge the complaint on the ground that it was otherwise insufficient to allege a violation of the Sherman Antitrust Act. Under these circumstances, we too assume the sufficiency of the antitrust cause of action, and follow the practice of deciding the state action immunity defense ahead of the substantive antitrust issue. See 1 P. Areeda & H. Hovenkamp, ***ANTITRUST LAW*** P 224, at 407 (1997).

1. The State Action Immunity Defense

In *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, the Supreme Court first articulated what has become known as the state action defense to the Sherman Act. We need not examine here the entire gloss that the Supreme Court has added to the Parker doctrine over the last 55 years. Indeed, we need go no further than the Supreme Court's holding in *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*. That case involved Sherman Act claims by and against two electric utility systems **[**26]** operating in Louisiana. The plaintiffs were two cities organized under the laws of the State of Louisiana, which granted them power to own and operate electric utility systems both within and beyond their city limits. The defendants were competitors who filed Sherman Act cross-claims against the two cities, referred to here as the municipal defendants. The latter, invoking the Parker doctrine, moved to dismiss the cross-claims.

The Supreme Court rejected the claim that the municipal defendants were state actors whose anticompetitive conduct was exempt from the Sherman Act, although they did enjoy what may loosely be described as a qualified exemption. Specifically, as Justice Brennan observed, ***HN3***[] "the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions; pursuant to state policy to displace competition with regulation or monopoly public service." *City of Lafayette, 435 U.S. at 413*.

In explaining why municipalities operating a public utility enjoyed immunity only if they acted pursuant to such state policies, Justice Brennan observed that the state action doctrine proceeded **[**27]** from the premise that given our "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id. at 421* (quoting *Parker, 317 U.S. at 351*). This policy of deference did not apply to municipalities as a general matter because "cities are not themselves sovereign" and "have not been treated as equivalents of the States themselves." *435 U.S. at 412*.

Moreover, it could not be assumed that actions taken by municipalities "with substantially less than statewide jurisdiction" necessarily reflected state policy. *Id. at 414*. "When cities, each of the same status under state law, are- equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State. . . . To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought **[**28]** to achieve by those laws . . . without furthering **[*69]** the policy underlying the Parker 'exemption.'" *Id. at 414-15*.

These concerns required that municipalities satisfy a more stringent test in order to invoke Parker immunity for their anticompetitive behavior. *Id. at 415*. Nevertheless, Justice Brennan explained that "this does not mean . . . that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit." Id. [6] Instead; Justice Brennan articulated a foreseeability standard, holding that "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the [state] legislature contemplated the kind of action complained of.'" Id. (quoting *City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434* (5th Cir. (La.) 1976)). See Phillip Areeda, Antitrust Immunity for "State Action" after Lafayette, 95 Harv. L. Rev. 435, 445-46 (1981). **[**29]**

Subsequent cases would refer to City of Lafayette as requiring a "clearly articulated and affirmatively expressed policy" to displace competition. See, e.g., *New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978)* (citing *City of Lafayette, 435 U.S. at 410*); *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, 445 U.S. 97, 104, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)* (same). In the passage cited by these cases, Justice Brennan used this phrase to discuss the scheme at issue in *Bates v. State Bar of Arizona, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977)*, **[**30]** an earlier Supreme Court case, rather than to set the standard for applying the state action exemption to anticompetitive acts by municipal market participants. *City of Lafayette, 435 U.S. at 410*. Nevertheless, the "clear articulation" label is not quite the hurdle that its language suggests, because it has always been construed as synonymous with the foreseeability test articulated above. See, e.g., *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 372-73, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*; *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*; *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032*; 1042 (2d Cir. 1986) ("The [Supreme] Court thus indicated the test should be one of foreseeability-whether the legislature could foresee the anticompetitive effects that would follow from the express authority the state had delegated to its cities.").

More significantly, however it is labeled, the City of Lafayette test does not apply to anticompetitive actions undertaken by a State rather than a municipality. On **[**31]** the contrary, it is clear that, if the State of Louisiana, rather than two of its municipalities, had operated the electric utility systems, it would have enjoyed an unqualified exemption from the antitrust laws. See *Cine 42nd Street, 790 F.2d at 1042*; *Limeco, Inc. v. Division of Lime, 778 F.2d 1086 (5th Cir. 1985)*. Indeed, four Justices in City of Lafayette argued that even the municipalities enjoyed such immunity. See *City of Lafayette, 435 U.S. at 427-41* (Stewart, J., dissenting). [7]

[32] 2. CRRA's Status for Parker Immunity Purposes**

CRRA is "a body politic and corporate, constituting a public instrumentality and political subdivision of the state of Connecticut established and created for the performance of an essential public and governmental function." *Conn.Gen.Stat. § 22a-261(a)*. The **[*70]** General Assembly has conferred upon CRRA the power of eminent domain bonding authority, and tax exempt status, *Conn.Gen.Stat. §§ 22a-269*, *22a-270*, *22a-276*, and vested in it "all powers necessary" to carry out its legislatively mandated responsibilities. *Conn.Gen.Stat § 22a-262*. The status

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[6] Contrary to plaintiffs' arguments, see Brief of Plaintiffs-Appellants at 13-14, the Supreme Court reaffirmed this standard in *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)* ("Requiring such explicit authorization by the State might have deleterious and unnecessary consequences.").

[7] Only Chief Justice Burger would have required municipalities engaged in proprietary activities to show more than the state authorization required by the City of Lafayette, plurality. See *City of Lafayette, 435 U.S. at 425 n.6* (Burger, C.J., concurring). Nevertheless, he joined the plurality's judgment and the directions of the remand, "because they represent at a minimum what [the Chief Justice believed] we should demand of petitioners." *Id. at 426 n.6*.

of such entities was not directly addressed in City of Lafayette. Nevertheless, there are compelling reasons for concluding that CRRA should be treated as the State itself rather than as a municipality.

Unlike the Cities of Lafayette and Plaquemine, which had "substantially less than statewide jurisdiction," *City of Lafayette, 435 U.S. at 414*, CRRA was created to implement a uniform statewide waste disposal policy. As the Supreme Court of Connecticut observed, after summarizing the legislative scheme creating CRRA that we have already canvassed:

> These **[**33]** statutes evidence a legislative intent to commit the difficult regional problems of solid waste disposal to regional and statewide solution. The legislature could reasonably have determined that only a decision-making body with a mandate to consider the needs of more than one community could adequately balance the competing concerns of various localities within the state. Local zoning regulations . . . which operate to exclude the facilities that the CRRA has found necessary, and the DEP has found environmentally acceptable, frustrate the explicit purposes of the state statutes and are therefore preempted.

Shelton v. Commissioner, of the Department of Environmental Protection, 193 Conn. 506, 518, 479 A.2d 208, 215 (1984) (emphasis added). This is the antithesis of the scheme in City of Lafayette which left "cities, each of the same status under state law, . . . equally free to approach a policy decision in their own way" without any indication that the anticompetitive restraints adopted as policy reflected the State's preferences rather than those of the municipalities. *City of Lafayette, 435 U.S. at 414* (emphasis added).

[34]** CRRA is not only a statewide entity that undertakes state functions," it is "politically accountable to the State, and by extension, to the electorate." *Hess v. Port Authority Trans-Hudson Corp. 513 U.S. 30, 61, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994)* (O'Connor, J., dissenting). As Justice O'Connor continued in Hess: -

> The critical inquiry, then, should be whether and to what extent the elected state government exercises oversight over the entity. If the lines of oversight are clear and substantial--for, example, if the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings--then the entity should be deemed an arm of the State for *Eleventh Amendment* purposes.

Id. See also 1 P. Areeda & H. Hovenkamp, ***ANTITRUST LAW*** P 224, at 411 (1997) ("Presumptively, we would reserve the 'state itself' designation only for government agencies that are both statewide in their jurisdiction and have no particular susceptibility to capture by a particular business group.") (emphasis in original). The issue in Hess was whether a bi-state agency was an arm of the State for *Eleventh Amendment* **[**35]** purposes. The Supreme Court, dividing five to four, held that the decisive factor in determining the agency's status should be the impact of any adverse judgment on the State's treasury, rather than the control exercised by the elected state government. Justice O'Connor's discussion of the latter issue is helpful here, because the degree of control exercised by the State is a critical factor in determining whether the conduct of a state agency is that of "the State itself" for the purposes of the Parker doctrine. *Cine 42nd Street, 790 F.2d at 1044*.

Here, CRRA's 13-member board of directors now includes the Commissioners of Transportation and Economic Development, the Secretary of the Office of the Office of [Policy and Management, four gubernatorial appointees, and six legislative appointees (who may themselves be members of the general assembly). *Conn.Gen.Stat. § 22a-261(b)*. Two of the gubernatorial appointees must be first selectmen, mayors, or managers from Connecticut municipalities, and the other two must be "public members." *Conn.Gen.Stat.* ***[*71]*** *§ 22a-261(c)*. The chairman serves at the pleasure of the Governor, id., and any board member may **[**36]** be removed by the Governor, "for inefficiency, neglect of duty or misconduct in office." *Conn.Gen.Stat. § 22a-261(k)*.

More significantly, CRRA is not simply a statewide agency making policy on its own. Rather, it is a "creature of the General Assembly" of Connecticut, and, "the mechanism of carrying out the concept of a statewide plan of dealing with solid waste." H. Rep. Tr. at 6673 (comments of Rep. Ratchford); Sen. Tr. at 3754 (remarks of Sen. Costello). The Solid Waste Management Plan--CRRA's' basic charter--is promulgated by the Commissioner of Environmental Protection, who must also approve CRRA's annual plan of operations. *Conn.Gen.Stat. § 22a-264*. Indeed, the Commissioner was actually a member of CRRA's board until 1989, when the General Assembly recognized that, because "the role of CRRA changed from developer to operator, the Department's regulatory role had become more significant and must be perceived to fully independent." See Conn. Joint Standing Committee Hearings, Environment, 1989 Sess., p. 2680 (testimony of Leslie Carothers, Commissioner of Environmental Protection).

In contrast to Cine 42nd Street, where we held that New York's Urban Development Corporation **[**37]** ("UDC") "cannot claim that it is the state," because it had "nearly absolute operational autonomy," and because a "high level of participation by the state [was] missing," *Cine 42nd Street, 790 F.2d at 1036, 1044* & n.3, the opposite is true here. While CRRA, like the UDC, has the authority to operate free of the bureaucratic red tape that binds most state agencies, see *Shelton, 193 Conn. at 511-15, 479 A.2d at 211-13*, [8] it lacks "absolute operational autonomy." Instead, its operation is subject to regulation by the Commissioner of Environmental Protection. See *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc., 1996 Conn. Super. LEXIS 2634, 1996 WL 601997*, *5 (Conn.Super. Oct. 8, 1996) (rejecting challenge by plaintiffs to the CRRA-Wheelabrator settlement agreement at issue here under the Connecticut Unfair Trade Practices Act, because "CRRA's plan of operation is administered by the commissioner of environmental protection").

[38]** Under these circumstances, there is a basis for suggesting that its acts should be considered acts of the State of Connecticut, and that the settlement agreement should be exempt from the antitrust laws, without a further finding that the settlement agreement was contemplated by the Connecticut General Assembly "from the authority given [CRRA] to operate in a particular area." *City of Lafayette, 435 U.S. at 415*. We do not, however, decide the case on the ground that CRRA is itself the State of Connecticut, and leave this question open. If CRRA is not the State itself, it is at least a political subdivision of Connecticut, and its alleged anticompetitive behavior is exempt under the City of Lafayette foreseeability standard; either as we "generously" applied that standard to the UDC, or under a more rigorous analysis that Judge Newman suggested would be applied if the anticompetitive conduct there was engaged in by a municipality. *Cine 42nd Street, 790 F.2d at 1049* (Newman, J., concurring).

3. Authorization of the Settlement Agreement

The "anticompetitive conduct" alleged here is an agreement that ensures that CRRA will receive the **[**39]** waste that is committed to it pursuant to long-term contracts with the municipalities it services. CRRA was authorized to enter into these long-term contracts, and they are vital to carrying out CRRA's mandate to conduct its resource recovery operations in a manner "sufficient to provide for the support of the authority and its operations on a self-sustaining basis." *Conn.Gen.Stat § 22a-262[2)*. While the Connecticut General Assembly may not have had the precise terms of this settlement agreement in mind, it is not precluded by the **[*72]** legislative mandate CRRA was given, and it is a reasonably foreseeable consequence of CRRA's specific direction to operate a financially solvent waste-to-energy system. As the Court of Appeals for the Eighth Circuit observed in a closely analogous case:

> We believe that the Iowa legislature did indeed contemplate these restrictions on competition. Chapter 28F expressly authorizes municipalities to finance collective projects by issuing revenue bonds. When ascertaining what was in the minds of the legislators, we cannot ignore the realities of the municipal bond market in the mid 1970's. The legislature surely realized the importance of assuring **[**40]** a source of repayment in order to make the bonds marketable. Common sense and experience suggest that the Iowa legislature must have intended Metro to have the latitude necessary to impose restrictions on competition if Metro believed such restrictions necessary to promote the sale of the bonds. The bond experts had convinced Metro that the restrictions were essential for marketing the bonds. In short, even though the legislation does not speak to the precise question whether restraints of trade could be employed to guarantee the financial vitality of Metro, the comprehensive legislative scheme favoring the development of solid waste facilities demonstrates that the

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[8] CRRA was given this freedom in 1984 when the General Assembly amended ***Conn.Gen.Stat. § 22a-261(a)*** to provide that CRRA "shall not be construed to be a department, institution or agency of the state." The purpose of this language was to codify case law holding that CRRA was not a state agency subject to Connecticut's Uniform Administrative Procedure Act. See *Shelton, 193 Conn. at 514-15, 479 A.2d at 213*.

> legislature intended the localities to have broad authority to act in furtherance of the legislative mandate. Thus, we believe that the restraint on competition was a "necessary or reasonable consequence" of engaging in the authorized activity of constructing a waste disposal facility with funds raised by revenue bonds.

Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419, 427 (8th Cir. 1983), cert. denied, *471 U.S. 1003, 85 L. Ed. 2d 158, 105 S. Ct. 1864 (1985)* **[**41]** (footnote omitted).

The Central Iowa analysis is equally applicable here, and is consistent with our own holding in *Cine 42nd Street, 790 F.2d at 1044-46*. The present case, however, is far stronger than Central Iowa or Cine 42nd Street, because there is a clearly articulated policy of the State of Connecticut to limit competition in the waste-to-energy market in order to protect CRRA's financial integrity.

There is ample evidence, which we have already detailed, that the State of Connecticut intended to replace failing (and illegal) landfills with a state-mandated system coordinated by CRRA. At the very least, the General Assembly contemplated CRRA's potential to displace competition when it passed the implementing legislation over objections that CRRA would simply condemn all of its private competitors. More significantly, the General Assembly's willingness to supplant competition is explicit in its subsequent decision to forbid the construction or expansion of disposal facilities that would create an excess capacity, or demand, for municipal solid waste. Specifically, *Conn.Gen.Stat. § 22a-208d(a)* requires that "the Commissioner of Environmental **[**42]** Protection shall not issue a permit under *section 22a-208a* to construct or expand a resources recovery facility . . . unless said commissioner makes a written determination that such facility . . . is necessary to meet the solid waste disposal needs of the state and will not result in substantial excess capacity of resources recovery facilities." Section 208d(c)(1)(I) similarly requires "[a] demonstration that the throughput capacity of the proposed facility, when combined with the throughput capacity of all other resources recovery facilities . . ., shall not exceed the total throughput capacity of resources recovery facilities . . . needed to process waste generated in the state."

One of the purposes, although not the only purpose, of the certificate of need requirement was concern over the consequences of overbuilding. As Representative Mushinsky, the Chairman of the Environmental Committee, explained in defending the original certification of need legislation that was enacted in 1987:

> Over-building of Resource Recovery Plants[,] which are very expensive to back financially, may cause some plants to be under capacity, and that would cause them to fail financially. It **[**43]** is in the State's best interest not to have any of these plants fail, so we don't wind up being the . . . payer of debt of last resort. It is up to the **[*73]** State to build wisely and not overdo it, so that all these plants make it financially.

30 (H-463) H. R. Proceedings, Pt. 14, 1987 Sess., p. 5094; see also id. at 5084 (explaining that proposed plant would be denied a certificate of need if it would create overcapacity that would result in "stealing waste from other plants, which then put those plants under capacity"); 30 (H-472) H. R. Proceedings, Pt. 23, 1987 Sess., p. 8381 (explaining that related language in former *Conn.Gen.Stat. § 22a-208a* was intended to accomplish similar purpose, and to permit plants to serve only Connecticut's needs).

Moreover, in the very case that gave rise to the settlement agreement, Justice David M. Shea, a retired Justice of the Supreme Court of Connecticut, relied on *§ 22a-208a* in holding that CRRA had standing to challenge the DEP decision to permit the Lisbon facility:

> One of the purposes the legislators probably had in mind in directing the commissioner to consider the capacity of existing [solid waste resources recovery] **[**44]** facilities when making a determination of need was the financial impact of a new competitor for municipal waste, because the state has a significant interest in maintaining the financial viability of these [solid waste resources recovery] facilities operated by CRRA . . . .

Connecticut Resources Recovery Authority v. Commissioner of the Department of Environmental Protection, 1994 Conn. Super. LEXIS 418, 1994 WL 60061, at *4 (Conn. Super. Feb. 16, 1994), appeal dismissed, *233 Conn. 486, 659 A.2d 714 (1995)*. See also Legislative Report at 60 (criticizing decision to permit Lisbon facility and recommending "five-year moratorium on making a written determination of need for a resources recovery facility as provided under *C.G.S. Sec. 22a-208d*"). [9]

[45]** Rather than stifling competition by denying a permit to open the Lisbon facility, however, the settlement agreement merely conditions the opening on Wheelabrator's agreement not to compete for CRRA's contractually committed waste supply. Of course, as plaintiffs argue, the Commissioner of Environmental Protection did not condition the Lisbon permit on Wheelabrator's agreement not to compete for waste contractually committed to CRRA. Nevertheless, CRRA had independent standing to sue to enforce *§ 22a-208d*, and the settlement agreement gave relief that, if otherwise impermissibly anticompetitive, was simply of a lesser magnitude than that explicitly contemplated by the General Assembly.

In the face of this compelling case for the application of the Parker doctrine, plaintiffs rely on language in *Federal Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 636, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)*, suggesting that "state-action immunity is disfavored)," and essentially ask us to ignore binding Supreme Court and Second Circuit precedent. A careful reading of Ticor shows that neither its holding nor its cautionary language applies to the present case. **[**46]** Ticor was a private price-fixing case which revolved around the degree of active state supervision that was required to justify such anticompetitive behavior by private parties. See *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, 445 U.S. 97, 104-05, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. Indeed, the Federal Trade Commission had conceded that the challenged conduct was foreseeable and contested only the adequacy of the "state participation in the rate setting scheme." *Ticor, 504 U.S. at 639*. Such participation "by governmental actors" was necessary to ensure "that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Id. at 634-35*.

[*74] More significantly, the Supreme Court expressly limited its holding in Ticor to private "horizontal price fixing under a vague imprimatur in form and agency inaction in fact." *Id. at 639*. After observing that "no antitrust offense is more pernicious than price fixing," the Supreme Court concluded:

> Our decision should be read in light of the gravity **[**47]** of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices.

Id.

Ticor has no relevance here; the present case does not involve price fixing. Nor is the close supervision test applied in Ticor applicable to state agency conduct. *Cine 42nd Street, 790 F.2d at 1047* (citing *Hallie, 105 S. Ct. at 1720 n.10*). This case is, therefore, an easy one in every respect. There is a compelling argument that CRRA should be treated in the same way as the State of Connecticut for the purposes of the Parker doctrine. More significantly, the settlement agreement meets the "broad test of forseeability [sic]" that plaintiffs acknowledge was adopted in Cine 42nd Street and which their argument would require us to overrule. Brief of Plaintiffs-Appellants at 26. Indeed, even under a soreseeability standard far more narrow than these cases require, the alleged anticompetitive conduct was simply conduct of a lesser magnitude than that authorized by **[**48]** the General Assembly.

Accordingly, the settlement agreement into which CRRA entered with Wheelabrator does not subject it to liability under the Sherman Act. Moreover, our conclusion that CRRA can avail itself of the Parker doctrine also compels the conclusion that the Wheelabrator defendants are shielded from antitrust liability. Subjecting them to antitrust

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[9] The Lisbon facility itself may have been an issue at the time the certificate of need requirement was first enacted. Richard Adams, who testified against the legislation on behalf of Regional Disposal Systems., Inc., defended the Lisbon proposal against what he perceived as a possible concern that it would process out-of-state waste. Conn. Joint Standing Committee Hearings, Environment, Pt. 2, 1987 Sess., p. 497. Mr. Adams also argued that excess capacity "wouldn's necessarily be a bad idea," because it "might generate some actual competition for tipping fees in Connecticut, reducing the cost to the communities and the industries that are looking to dispose of solid waste." *Id. at 498*.

liability would effectively block CRRA's efforts to carry out its mandate through contracts with private parties. See *Cine 42nd Street, 790 F.2d at 1048* (holding that "private appellees acting in concert with the UDC are also entitled to state immunity. . . . Allowing successful tangential attacks on the UDC's activities through suits against the third parties would effectively block the efforts of the UDC."). See also Southern Motor carriers *Rate Conference, Inc. v. United States, 471 U.S. 48, 56-57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*.

B. The *Commerce Clause* Cause of Action

HN4[] The *Commerce Clause* provides that "Congress shall have the Power . . . to regulate Commerce with foreign nations and among the several States." *U.S. Const. Art. I., § 8., cl. 3*. A "dormant" or "negative" **[**49]** aspect of this grant of power is that a State's power to impinge on interstate commerce is limited *Hughes v. Oklahoma, 441 U.S. 322, 326, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979)*. ***HN5***[] The processing and disposal of solid waste is "commerce" under the *Commerce Clause*. *C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994)*; *City of Philadelphia v. New Jersey, 437 U.S. 617, 622, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978)*.

The Supreme Court has held that ***HN6***[] the first step in analyzing any law subject to judicial scrutiny under the dormant *Commerce Clause* is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Hughes, 441 U.S. at 336*. In this context, "'discrimination' . . . means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994)*. ***HN7***[] If a restriction on commerce is discriminatory, **[**50]** it may be applied only if it is "demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma, 502 U.S. 437, 454, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992)*. In contrast, nondiscriminatory regulations that have only "incidental" effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc., 397 U.S. 137, 142,* ***[*75]*** *25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)*.

"We have explained that ***HN8***[] the 'incidental burdens' to which Pike refers 'are the burdens on interstate commerce that exceed the burdens on intrastate commerce.'" *Gary D. Peake Excavating Inc. v. Town Bd. of Town of Hancock, 93 F.3d 68, 75 (2d Cir. 1996)* (quoting *USA Recycling v. Town of Babylon, 66 F.3d 1272, 1287 (2d Cir. 1995)*, cert. denied, *517 U.S. 1150, 116 S. Ct. 1452 (1996))*; New York State Trawlers Ass'n v. Jorling, *16 F.3d 1303, 1308 (2d Cir. 1994)*. ***HN9***[] Where a regulation does not have this disparate impact on interstate commerce, then "we must conclude that . . . [it] **[**51]** has not imposed any 'incidental burdens' on interstate commerce that 'are clearly excessive in relation to the putative local benefits.'" *USA Recycling, 66 F.3d at 1288* (quoting *Pike, 397 U.S. at 142*). Thus, the minimum showing required to succeed in a *Commerce Clause* challenge to a state regulation is that it have a disparate impact on interstate commerce. The fact that it may otherwise affect commerce is not sufficient. *66 F.3d at 1287* (rejecting *Commerce Clause* challenge to Town of Babylon's takeover of local garbage market notwithstanding "relatively minor effects on both interstate and local commerce," because it did "not impose any different burdens on nonlocal as opposed to local garbage haulers"). See also *National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1131* (7th Cir.) (Easterbrook, J.), cert. denied, *515 U.S. 1143, 132 L. Ed. 2d 829, 115 S. Ct. 2579 (1995)*.

Plaintiffs' *Commerce Clause* cause of action fails for several reasons. Plaintiffs' claim appears to be a vaguely pleaded effort to invoke the Supreme Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994)*, **[**52]** that an ordinance that deprives out-of-state businesses access to a local market for processing of garbage "discriminates against interstate commerce." In reaching this conclusion, the Supreme Court observed that "what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Carbone, 511 U.S. at 390-91*. The Clarkstown ordinance discriminated with respect to this stream of commerce because "it allowed only the favored operator to process waste that [was] within the limits of the town." *Id. at 391*. The fatal flaw of the ordinance--like those the

Supreme Court had previously struck down--was that it hoarded a local resource . . . for the benefit of local businesses that treated it." *Id. at 392*. Specifically, it "hoarded solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." Id. This case is not Carbone. The settlement agreement does not prevent out-of-state waste processors from operating **[**53]** in Connecticut or from accepting waste generated there. Nor is the complaint about the differential treatment of in-state and out-of-state waste haulers. Plaintiffs concede here that the agreement does not facially discriminate against interstate commerce. Brief of Plaintiffs-Appellants at 35. While they argue that the settlement agreement has the practical effect of doing so, this argument cannot survive careful scrutiny. The status quo ante, which plaintiffs seek to have restored by enjoining enforcement of the settlement agreement, was one in which waste produced in Connecticut was processed in Connecticut. The local waste would remain in state because the overcapacity in Connecticut created such a competitive spot market that it actually attracted significant waste from out-of-state producers, Legislative Report at 17 ("About one half . . . the 651,000 tons of spot waste delivered to CRRA facilities in FY 93 came from generators located outside of Connecticut."); and because waste-to-energy plants located in Connecticut are inherently more attractive for Connecticut waste haulers, who do not have to incur additional transportation costs and delay. See Reply Brief of Plaintiffs-Appellants **[**54]** at 21 n.10.

Under these circumstances, it is not surprising that the specific damage plaintiffs allege they suffered as a result of the settlement agreement is that they "have been **[*76]** forced to travel longer distances, expend additional and unnecessary wear and tear on their vehicles, pay additional wages and overtime, devote substantial efforts to reroute their trucks, suffer delay and harassment, and pay higher prices for waste disposal" than they otherwise would have incurred. Amended Complaint P 14.

Plaintiffs do not allege that, but for the settlement agreement, they would haul waste to processors out-of-state. On the contrary, they expressly disclaim any desire to do so. Reply Brief of Plaintiffs-Appellants at 21 n.10 ("Article VI [of the settlement agreement] presents plaintiffs with an anticompetitive ultimatum: deliver as CRRA chooses in Connecticut, or incur increased travel costs transporting waste out of state."). Indeed, the equitable relief plaintiffs seek is simply the freedom to deliver waste as they choose inside Connecticut, rather than the freedom to push it -into the stream of interstate commerce.

Thus, the practical effect of the settlement agreement, **[**55]** as plaintiffs' complaint and arguments here confirm, is to control the intrastate flow of a particular segment of waste generated in Connecticut between CRRA and the Wheelabrator defendants (who are incorporated in Delaware and have their principal place of business in New Hampshire). This particular segment of waste is committed to them by contracts for which out-of-state processors could have bid. Like the automobile hulks in *Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 49 L. Ed. 2d 220, 96 S. Ct. 2488 (1976)*, the in-state processing of which was subsidized by the State of Maryland, the waste generated in Connecticut remains in Connecticut "in response to market forces." *Id at 810*.

We do not suggest that the settlement agreement may not have some effect on interstate commerce. Specifically, the Wheelabrator defendants not only agreed to refuse committed waste at their Connecticut facilities, but also agreed to refuse committed waste at their inconveniently located waste-to-energy plants in Peekskill, New York (on the Hudson River, Millbury, Massachusetts (near Worcester), and Andover, Massachusetts (near New Hampshire). The Wheelabrator **[**56]** defendants also agreed to turn away for a three-month period all waste delivered, whether it is committed or not, by haulers who attempted to deliver committed waste three times in the preceding three months.

The provision requiring the three-month exclusion of uncommitted waste at Wheelabrator's three out-of-state facilities does not appear to be of any practical consequence, because the settlement agreement does not restrict plaintiffs from depositing this waste at the spot market rate in four of the six waste-to-energy plants inside Connecticut. Under the circumstances, it would be counter to plaintiffs' expressed economic interest to incur the additional expense of hauling uncommitted waste to distant locations outside of Connecticut.

Nevertheless, there is one scenario in which Wheelabrator's agreement to turn committed waste away from its three out-of-state facilities would affect interstate commerce. If Wheelabrator only turned plaintiffs away from its Connecticut facilities, it is possible that plaintiffs could profitably dispose of the committed Connecticut waste at

Wheelabrator's out-of-state facilities, albeit at a smaller profit. The claim that this constitutes an **[**57]** "incidental" burden on interstate commerce sufficient to invoke the Pike balancing standard, however, ignores the reason why plaintiffs would have any reason to haul committed waste outside of Connecticut for processing.

Plaintiffs remain free to deposit committed waste at CRRA and Wheelabrator waste-to-energy facilities in Connecticut by paying the contractually arranged tipping fees. Indeed, even during the three-month "penalty period" during which Wheelabrator is obligated to turn away even waste contractually committed to itself, plaintiffs concede that four of the six trash-to-energy facilities in Connecticut remain available to them, although they would be forced to "pay CRRA's above-market prices for *all* its waste for that time, or close their doors." Brief of Plaintiffs-Appellants at 7 (emphasis in original). The need, if any, to haul waste outside of Connecticut derives from plaintiffs' desire to obtain cheaper tipping fees than those available in **[*77]** Connecticut because of the settlement agreement.

The settlement agreement may very well affect commerce if it forces plaintiffs to haul committed waste from Connecticut to out-of-state processors. Nevertheless, **[**58]** because it cannot be said that "the flow of interstate commerce will be reduced, and thereby burdened," *USA Recycling, 66 F.3d at 1287*, the settlement agreement "has not imposed any 'incidental burdens' on interstate commerce that 'are clearly excessive in relation to the putative local benefits.'" *Id. at 1288* (quoting *Pike 397 U.S. at 142*). On the contrary, assuming that plaintiffs can still earn a profit by hauling committed waste for processing outside of Connecticut, the net effect of the settlement agreement is to increase the use of out-of-state processors for committed waste, even if three of Wheelabrator's out-of-state facilities will be closed to plaintiffs. [10] Indeed, this is presumably what plaintiffs have been doing since the settlement agreement was executed. See Amended Complaint P 14.

[59]** Moreover, even if the settlement agreement did have an "incidental effect" on interstate commerce, it is doubtful that plaintiffs could show that the burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Pike, 397 U.S. at 142*. Here, the putative local benefit is the preservation of CRRA's interest in "the security and integrity of contractual relations" into which it has entered with local municipalities. 2 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, THE LAW OF TORTS § 6.5, at 302 (2d ed. 1986). Indeed, the particular contracts at issue here are sufficiently critical to the operation of an effective solid waste disposal system that Congress has specifically provided that "no State or local government within the State shall be prohibited under State or local law" from entering into them. *42 U.S.C. § 6943(a)(5)*.

On the other side of the scale, plaintiffs have not alleged or suggested facts that establish that any incidental effect that the settlement agreement may have on interstate commerce is excessive in relation to the benefit achieved. Instead, their only argument with respect to **[**60]** the Pike standard is that the settlement agreement is unreasonable because plaintiffs are not parties to the municipal contracts that CRRA seeks to keep free from plaintiffs' interference. Brief of Plaintiffs-Appellants at 40-41. This argument confuses the burden of the settlement agreement on plaintiffs with a burden on interstate commerce. Cf. *Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978)* ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.") . Since any effort to prevent a third party from interfering with a contract must be directed at that third party, the settlement agreement is not invalid solely for that reason, even if it affects interstate commerce. In sum, as Judge Easterbrook recently put it: "No disparate treatment, no disparate impact, no problem under the dormant *commerce clause*." *National Paint & Coatings, 45 F.3d at 1132*.

Nor is the settlement agreement invalid per se "because it has the practical effect of regulating commerce occurring wholly outside" the **[**61]** borders of the State of Connecticut. Brief of Plaintiffs-Appellants at 36. The *Commerce Clause* "precludes the application of a state statute to commerce that takes place wholly outside of the State's

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[10] The complaint does not make clear why plaintiffs cannot use out-of-state facilities and transfer stations other than the three Wheelabrator waste-to-energy plants. See *Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46, 49 (2d Cir. 1998)* (discussing deposits of Connecticut waste at transfer stations in Rhode Island); Legislative Report Appendix A (noting migration of some Connecticut waste "to out-of-state landfills").

borders, whether or not the commerce has effects within the State." *Edgar v Mite Corp., 457 U.S. 624, 642-43, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982)* (emphasis added). As the Supreme Court continued in Edgar:

> The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt" 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister **[*78]** States and exceed the inherent limits of the State's power."

Id. at 643 (quoting *Shaffer v. Heitner, 433 U.S. 186, 197, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977))*.

This case does not involve a direct assertion of the legislative power of the State of Connecticut to regulate conduct outside of its borders. Instead, it involves an agreement by Wheelabrator to refuse plaintiffs' delivery of waste at its New York and Massachusetts facilities. While the **[**62]** agreement affects the conduct of the Wheelabrator defendants outside of Connecticut, it is the antithesis of "direct" regulation of the kind that is per se invalid. Indeed, the analogy the Supreme Court drew in Edgar to the territorial limits on the jurisdiction of state courts is equally apposite here.

Although the State of Connecticut is without power to directly legislate restrictions on Wheelabrator's freedom to conduct business in New York and Massachusetts, the *Commerce Clause* does not act as an inflexible bar against Wheelabrator's agreement to place certain restrictions on its activities there. Of course, the fact that Wheelabrator and CRRA have entered into an agreement does not necessarily insulate it from scrutiny under the *Commerce Clause*. See *South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 97 n 10, 99, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984)*. While we discuss this scrutiny in the context of the market participant doctrine, here it suffices to say that such analysis would not require the per se invalidation of the settlement agreement that plaintiffs seek.

2. Status of CRRA as a Market Participant

This brings us to **[**63]** the complete defense CRRA asserts against plaintiffs' *Commerce Clause* claim. Specifically, CRRA argues that because the settlement agreement was negotiated by two market participants, any undue burden the agreement imposes on interstate commerce does not implicate the *Commerce Clause*. ***HN10***[] Under the market participant doctrine, which distinguishes between the direct exercise of a State's sovereign powers and a State's actions in the more general capacity of a market participant, only the former actions are subject to the limitations of the dormant *Commerce Clause*. *New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 277, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988)*. Thus, for example, when a State chooses to manufacture and sell cement, its business methods, including those that favor its residents, are of no greater constitutional concern than those of a private business. See *Reeves, Inc. v. Stake, 447 U.S. 429, 438-439, 65 L. Ed. 2d 244, 100 S. Ct. 2271 (1980)*.

The long-term waste disposal contracts that CRRA has negotiated with Connecticut municipalities as a vendor of waste disposal services are clearly market participation. See *USA Recycling, 66 F.3d at 1272*; **[**64]** *SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995)*, cert. denied, *516 U.S. 1112, 517 U.S. 1150, 133 L. Ed. 2d 842, 116 S. Ct. 911 (1996)*. The CRRA-Wheelabrator agreement to protect these contracts from interference by plaintiffs similarly involves the conduct of market participants, rather than the kind of regulatory power exercised by the State as a sovereign. Indeed, plaintiffs argue that CRRA "is without regulatory powers." Brief of Plaintiffs-Appellants at 10.

Moreover, the Commissioner of Environmental Protection, who had the power to decline to permit the Lisbon facility, did not condition his permit decision on Wheelabrator's consent to the terms of the settlement agreement. Rather, the settlement agreement arose out of a judicial proceeding in which CRRA was authorized to participate in order to ensure that the judgment of the Commissioner was exercised in a manner consistent with *Conn.Gen.Stat. § 22a-208d(a)*. See *Connecticut Resources Recovery Authority v. Commissioner of the Department of Environmental Protection, 1994 Conn. Super. LEXIS 418, 1994 WL 60061*. The exercise of CRRA's right to obtain judicial review **[**65]** of the Commissioner's determination does not render the subsequent settlement agreement a regulatory act of the State of Connecticut. Nor do plaintiffs argue to the contrary.

Instead, plaintiffs' only challenge to the market participant defense is that the settlement agreement affects conduct in "the **[*79]** trash hauling market," in which CRRA "is not a participant." Brief of Plaintitfs-Appellants at 42. This artificial dissection of the municipal waste processing market is inconsistent with plaintiffs' claim of "antitrust injury" essential to their standing to press their antitrust cause of action. "The requirement that the alleged injury [to plaintiff] be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors." *Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir. 1985)*; see *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 539, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (denying antitrust standing to party that was "neither a consumer nor a competitor in the market in which trade was restrained").

[66]** This consideration aside, *South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984)*, upon which plaintiffs rely, does not avail the plaintiffs here. That case involved a state program of selling timber from state-owned forests at a significantly reduced price on the condition that buyers agree to process that timber at in-state facilities prior to export. The Supreme Court held that "although the State may [have been] a participant in the timber market, it [was] using its leverage in that market to exert a regulatory effect in the processing market, in which it [was] not a participant." *Id. at 98*. The Court observed that a private seller of goods would have had no proprietary interest in what the buyer later did with those goods when the seller was not a participant in the downstream market. See *id. at 96*. Because the State retained no proprietary interest in the timber after the point of sale, it could not be considered the market participant in the downstream processing market. Id.

In contrast, here the "article of commerce is not so much the solid waste itself, but rather **[**67]** the service of processing and disposing of it." *Carbone, 511 U.S. at 391*. CRRA is in that business, and it is absurd to suggest that it does not have an interest in obtaining the waste generated by municipalities who have contracted with CRRA to process and dispose of their waste. Moreover, the fact that the settlement agreement protects the integrity of CRRA's municipal contracts by indirectly thwarting the efforts of waste haulers, who were not parties to either the municipal contracts or the agreement itself, does not render it "regulatory" within the meaning of the *Commerce Clause*. ***HN11***[] When it acts as a market participant, a state agency may "impose restrictions that reach beyond the immediate parties with which the government transacts business." *White v. Massachusetts Council of Construction Employers, 460 U.S. 204, 211 n.7, 75 L. Ed. 2d 1, 103 S. Ct. 1042 (1983)*. Indeed, the Supreme Court has held that "the *Commerce Clause* does not require the [State] to stop at the boundary of formal privity of contract." Id.

HN12[] Only if the actions of a State, "whether by statute, regulation, or contract," have a "substantial regulatory effect outside of **[**68]** the particular market" in which the State is a participant, do they offend the dormant *Commerce Clause*. *South-Central Timber, 467 U.S. at 97*. This case does not cross that line.

The waste haulers here are essential participants in the waste processing and disposal market; they pick up waste from municipalities who are contractually to have it delivered to CRRA for disposal. The settlement agreement's impact on plaintiffs is simply a necessary consequence of CRRA's right to contractually procure a supply of municipal waste.

C. The Alleged Inconsistency Between the Antitrust and *Commerce Clause* Defenses

Plaintiffs' final argument is that CRRA cannot claim both the market participant exception from the *Commerce Clause* and state action immunity from the antitrust laws. Such a dual exception, plaintiffs argue, "would unfairly permit CRRA to compete as a private party without being subject to antitrust liability like private parties." Brief of Plaintiffs-Appellants at 46. In *SSC Corp., 66 F.3d at 517-18*, we expressly rejected the argument that, if the challenged contractual agreement entered into by the Town of **[*80]** Smithtown constituted **[**69]** market participation, rather than regulation, the Town could not avail itself of the state action immunity from the Sherman Act. Nevertheless, plaintiffs argue that we did so without "directly address[ing] the potential conflict between the market participant exception to the dormant *commerce clause*, on the one hand, and state action immunity to antitrust laws, on the other." Brief of Plaintiffs-Appellants at 48 n.13.

We see no reason to question the soundness of our holding in SSC. Corp., nor do we perceive "a potential conflict" between the Parker and market participant doctrines that would automatically render a market participant a regulator of interstate commerce, even though it lacked any regulatory power, if it invoked the Parker exemption from antitrust scrutiny. The unfairness plaintiff perceives derives from giving undue weight to one of the policies underlying the market participant doctrine. In *Reeves v. Stake, 447 U.S. at 439*, the Supreme Court suggested that because "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants[,] . . . [e]venhandedness suggests that, **[**70]** when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the *Commerce Clause*." Plaintiffs argue that, because CRRA has invoked the Parker immunity doctrine, which shields CRRA from the antitrust laws "imposed on private market participants," CRRA may not invoke the principle of "evenhandedness" elucidated in Reeves.

Were evenhandedness the only rationale supporting the market participant doctrine, plaintiffs' argument might have some merit. The Reeves Court, however, identified several policy considerations underlying the market participant doctrine that largely mirror those underlying the Parker immunity doctrine. The most important of these rationales is that of "state sovereignty, [and] the role of each State 'as guardian and trustee for its people.'" *Reeves, 447 U.S. at 438* (citations and footnotes omitted). The Supreme Court observed that an "ad hoc" inquiry into the burden on interstate commerce caused by a state's marketplace activities "would unduly interfere with state proprietary functions if not bring them to a standstill." *Id. at 438 n.10* **[**71]** (quoting *American Yearbook Co. v. Askew, 339 F. Supp. 719, 725 (M.D.Fla. 1972))*. Indeed, the Court noted that, even where the State's actions in the marketplace did not involve "integral operations in areas of traditional government functions," the State still "may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." Id. The Reeves Court concluded that because "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional *Commerce Clause* analysis[,] . . . the adjustment of interests in this context is a task better suited for Congress." *447 U.S. at 439*.

Thus, like the Parker doctrine, the market participant doctrine reflects at its core a respect for state sovereignty. See *Parker, 317 U.S. at 350-51*. Indeed, after rejecting the Sherman Act claim in Parker, the Supreme Court rejected a *Commerce Clause* challenge, citing almost identical federalism concerns. *Id. at 362-63*. As Chief Justice Stone wrote in Parker:

> When **[**72]** Congress has not exerted its power under the *Commerce Clause*, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved.

Id. at 362. While Parker did not involve the market participant exception, it is clear that this doctrine is one example of the means by which the Supreme Court has accommodated the federalism concerns articulated in Parker.

This accommodation would be undermined by a rule that would automatically prevent its beneficiaries from availing themselves of the **[*81]** Parker doctrine exemption from the Sherman Act. The only support for plaintiffs' argument is a passing suggestion of a "possible market participant exception" to the Parker immunity doctrine. *Omni Outdoor Advertising, 499 U.S. at 379* ("We reiterate that, with the possible market participant exception, any action that qualifies as state action is ipso facto . . . exempt from **[**73]** the operation of the antitrust laws." (punctuation and citation omitted)." Whether such an exception in fact existed and what its scope would be, the Court did not say." 1 P. Areeda & H. Hovenkamp, ***ANTITRUST LAW*** P 224, at 443 (1997).

More significantly, it is difficult to reconcile such an exception to the Parker doctrine with City of Lafayette in which eight Justices favored at least a qualified exemption from the antitrust laws for a municipal market participant. Indeed, in *Paragould Cablevision v. City of Paragould, 930 F.2d 1310 (8th Cir. 1991)*, cert. denied, *502 U.S. 963,* *116 L. Ed. 2d 450, 112 S. Ct. 430 (1992)*, the Court of Appeals for the Eighth Circuit declined an invitation to create the market participant exception to the Parker doctrine that the Omni Court suggested was "possible." Specifically, the Court of Appeals held that "the market participant exception is merely a suggestion and is not a rule of law." *Id. at 1313*. "Until such a transformation occurs," it would continue to apply the City of Lafayette standard for determining whether a municipal market participant was exempt from the Sherman **[**74]** Act. Id. We, too, see no reason to depart from our prior rejection of the same claim raised by plaintiffs here. *SSC. Corp., 66 F.3d at 517-18*. See also *Four T's, Inc. v. Little Rock Municipal Airport Comm'n, 108 F.3d 909 (8th Cir. 1997)*; *Limeco v. Division of Lime, 778 F.2d at 1087*; *James Emory, Inc. v. Twiggs County, 883 F. Supp. 1546, 1562 (M.D.Ga. 1995)*; *LeFrancois v. Rhode Island, 669 F. Supp. 1204, 1212 (D.R.I. 1987)*; *Transport Limousine of Long Island, Inc. v. Port Authority of New York and New Jersey, 571 F. Supp. 576, 588 (E.D.N.Y. 1983)*.

Conclusion

Over a quarter of a century ago, Connecticut developed a scheme for disposing of trash in a way that the private market was then unwilling or unable to undertake. Because we see no merit to plaintiffs' Sherman Act and *Commerce Clause* challenges to the exceedingly limited steps taken by CRRA to preserve its lawfully acquired contracts from interference, we affirm the order of the district court dismissing the complaint.

End of Document

Eleven Line v. North Tex. State Soccer Ass'n

United States District Court for the Northern District of Texas, Dallas Division

August 25, 1998, Decided ; August 26, 1998, Filed; August 27, 1998, Entered on Docket

CA-3-95-CV-3120-R

Reporter

1998 U.S. Dist. LEXIS 13868 *; 1998 WL 574893

ELEVEN LINE, INC. d/b/a PERMIAN BASIN SPORTS CENTER, a Texas CORPORATION, Plaintiff, vs. NORTH TEXAS STATE SOCCER ASSOCIATION, INC., a Texas Non-Profit Corporation, MIDLAND SOCCER ASSOCIATION, INC., a Texas Non-Profit Corporation, and ODESSA SOCCER ASSOCIATION, INC., a Texas Non-Profit Corporation, Defendants.

Disposition: **[*1]** Defendants' Motion for Judgment as a Matter of Law DENIED, and the verdict issued by the jury on February 27, 1998 stand.

Core Terms

defendants', antitrust, damages, soccer, coaches, players, matter of law, Sherman Act, conspiracy, relevant market, per se violation, group boycott, violations, amateur, Sports, rights

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Trials, Judgment as Matter of Law**

The court may grant judgment as a matter of law under *Fed. R. Civ. P. 50* only when there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN2[] **Private Actions, Standing**

Antitrust rights are assignable.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN3[] **US Department of Justice Actions, Criminal Actions**

The standard for proving antitrust damages is quite lenient. It is very difficult to prove antitrust damages, and an exacting burden of proof would render nugatory the value of private enforcement of the antitrust laws and would reward antitrust violators for particularly egregious conduct. As a result, the burden for establishing the amount of antitrust damages is relaxed. Under this relaxed burden, a jury verdict may stand on less evidence than is normally required to support a damage award in civil cases. While rank speculation will not be tolerated, evidence sufficient to support a just and reasonable inference of damages suffices.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Where boycotters are politically rather than economically motivated, their behavior is protected from the application of the Sherman Act by the *First Amendment* and the Noerr-Pennington Doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The injury of a non-competitor by another non-competitor who carries out a boycott for political reasons is not a violation of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A vertical restraint is not illegal per se unless it includes some agreement on price or price levels.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

The essential factor for determining whether a defendant's actions will be found to be an unreasonable restraint of trade is whether the challenged restraint enhances or reduces competition. The Fifth Circuit has stated that the competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. The purpose of the analysis is to form a judgment about the competitive significance of the restraint. It is the factfinder who must weigh these various factors.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Sherman Act, Claims**

One necessary requirement to establish a claim under § 2 of the Sherman Act is that defendants have monopoly power in the relevant market. The plaintiff must define the relevant market, which must include all products that are reasonably interchangeable and must be plausible.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9[] **Regulated Practices, Market Definition**

The ultimate determination of the proper definition of the relevant market is for the jury.

Counsel: For ELEVEN LINE INC, plaintiff: Barbara L Emerson, Steven Kelley DeWolf, Attorneys at Law, Bellinger & DeWolf, Dallas, TX USA.

For NORTH TEXAS STATE SOCCER ASSOCIATION INC, MIDLAND SOCCER ASSOCIATION, ODESSA SOCCER ASSOCIATION, defendants: Robert B Cousins, Jr, Attorney at Law, Glast Phillips & Murray, Dallas, TX USA.

LOUIS J WEBER, ADR Provider, Pro se, Dallas, TX USA.

Judges: CHIEF JUDGE JERRY BUCHMEYER, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS.

Opinion by: JERRY BUCHMEYER

Opinion

MEMORANDUM OPINION

This case involves claims that the defendants, youth and adult amateur outdoor soccer organizations in the Midland/Odessa area, conspired with their players and coaches to carry out a group boycott of plaintiff's facility, the Permian Basin Sports Center. Plaintiff alleged that defendants' activities constituted an illegal restraint of trade in violation of the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.* A jury trial was held from February 16-27, 1998. The jury found for the plaintiff on each **[*2]** of plaintiff's claims, and awarded $ 100,000 in damages. Now before the

Court is defendants' Motion for Judgment as a Matter of Law, filed February 23, 1997. Plaintiff subsequently field a response to the motion, and defendants fild a reply. For the reasons set out below, defendants' motion is DENIED, and the jury's verdict shall stand.

A. Standard

HN1[] The Court may grant judgment as a matter of law under *Federal Rule of Civil Procedure 50* only when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Because a jury verdict has been returned in this case, the Court may allow that judgment to stand, order a new trial, or direct entry of judgment as a matter of law.

Defendants make four basic arguments in support of their Motion. They will be discussed in turn below.

B. Plaintiff's Antitrust Standing

1. Connection Between Antitrust Violations and Harm to Plaintiff--Defendants' first argument is that plaintiff, Eleven Line Inc., is not a successor-in-interest or assignee of Seven Line, Inc. Seven Line is the California corporation that owned and operated the Permian Basin Sports Center ("Permian Basin") during **[*3]** November and December of 1995, the time period in which the alleged violations occurred. Eleven Line, a Texas corporation, purchased the corporate assets of Seven Line but, defendants argue, this purchase did not also transfer potential antitrust causes of action to Eleven Line.

Plaintiff's response is persuasive. ***HN2***[] Antitrust rights are assignable. [1] Eleven line's purchase of Seven Line caused a complete and total transfer of all corporate assets of Seven Line, including any potential rights of action such as the pending antitrust claims. [2] Seven Line did not retain any rights or assets at all. The assignment document, dated December 12, 1995 (pl.'s ex. 406), states that "Seller shall convey, transfer and assign to Purchaser . . . all tangible and intangible assets of Seven Line, Inc. [and] any claims, choses in action, goodwill and other intangible interests in the business of Seven Line, Inc."

[*4] This document may not be phrased in the exact language that has previously been recognized by courts as transferring antitrust claims, [3] but it was clearly intended to transfer all rights and claims, including antitrust claims. Tom Higginson, the president of both Seven Line and Eleven Line, testified that he intended to have the antitrust rights transferred by this document. Furthermore, on February 24, 1997, the president of Seven Line and all of the shareholders executed a "Confirmation of Conveyance of Interests and Rights" (pl.'s ex. 201). This confirmation specifically confirms that the conveyance of Permian Basin included the assignment of "all causes of action, claims and demands of whatsoever nature, including any claims arising from the operations of Permian Basin Sports Center and including but not limited to any claims arising under the state and federal ***antitrust law***." Plaintiff is therefore the proper successor-in-interest to bring the instant case.

[*5] Defendants also argue that there was no evidence to show there was a causal link between defendants' actions and plaintiff's injury; specifically, that there was no evidence of a common agreement or understanding among any of the players, coaches, referees and the defendants. This is a question of whether or not plaintiff

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[1] *See Martin v. Morgan Drive Away, Inc., 665 F.2d 598, 603 n.3 (5th Cir. 1982)*.

[2] Both cases cited by defendants involved transfers of particular, limited assets. The transferors desired to bring antitrust actions, but the defendants argued that the right to do so had been transferred to others. The factual situations are not, therefore, particularly parallel. *See Sullivan v. National Football League, 34 F.3d 1091, 1106 (1st Cir. 1994)*; *Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 431, 437-40 (3rd Cir. 1993)*.

[3] *See, e.g., Sullivan, 34 F.3d at 1106*.

presented sufficient evidence on a particular issue, which is a factual determination for the jury. In this instance the jury found that there was evidence of such an agreement, and that the agreement caused harm to the plaintiff. There were sufficient facts alleged for the jury to reach this conclusion. There is no reason to set aside the verdict on this question.

2. Speculative Damages--Second, defendants argue that plaintiff did not provide evidence to establish lost profits as a measure of plaintiff's damages. In particular, defendants point to the fact that Permian Basin did not make a profit in the five years of its operation prior to the alleged antitrust violations. Defendants also challenge the methodology of plaintiff's expert, who calculated the projected "net cash flow" of Permian Basin for years 6-15 of its operation, by using a revenue growth **[*6]** curve derived from the first five years of operation of similar facilities. This comparison is not merely apples and oranges, they claim, but "lemons and broccoli."

HN3[] The standard for proving antitrust damages is quite lenient. The Fifth Circuit has repeatedly stated that it is very difficult to prove antitrust damages, and that an exacting burden of proof would "render nugatory the value of private enforcement of the antitrust laws and would reward antitrust violators for particularly egregious conduct." [4] As a result, the burden for establishing the amount of antitrust damages is relaxed. "Under this relaxed burden, a jury verdict may stand on less evidence than is normally required to support a damage award in civil cases. While rank speculation will not be tolerated, evidence sufficient to support a just and reasonable inference of damages suffices." [5]

[*7] The owner of plaintiff company, Tom Higginson, testified on the performance of Permian Basin, as well as the performance of other similar companies. He also testified about his plans to increase income at the facility. An expert witness supported Mr. Higginson's estimates, and presented his method for evaluating future profits based on the performance of similar facilities. Defendants made their arguments challenging the sufficiency of evidence on damages to the jury, [6] but did not put on an opposing expert to challenge plaintiff's methodology. Evaluating the claims and the evidence, the jury concluded that plaintiff should be awarded $ 100,000 in actual damages. This verdict was not based on speculation alone, so it will not be set aside.

C. Sherman Act Section One

1. Group Boycott--In their first argument against plaintiff's Section One claim defendants argue that as a matter of law there was no group boycott. This Court previously held in its **[*8]** ruling on defendants' Motion to Dismiss that the three defendants constituted a single entity for purposes of Sherman Act analysis. [7] That opinion went on to uphold plaintiff's allegations that defendants entered into a combination or conspiracy with each other and with their registered players and coaches to restrain competition. The players and coaches can be participants in the unlawful conspiracy even if they acted unwillingly and without any intention to harm competition. [8]

In their motion for judgment as a matter of law, defendants reallege the same arguments that the players and coaches cannot participate in a group boycott as a matter of law because they are a single unit with defendants, or

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[4] *See* *Pierce v. Ramsey Winch Co., 753 F.2d 416, 434 (5th Cir. 1985)*.

[5] *Id. at 435* (internal quotation marks and citations omitted); *see also* *Lehrman v. Gulf Oil Corp., 464 F.2d 26, 46 (5th Cir. 1972)* ("In short, the law is clear: the courts are to take a charitable view of the difficulties of proving damages in a case when a treble-damage plaintiff must try to prove what would have accrued to him in the absence of the defendant's anticompetitive practice.") (citing *Cherokee Lab., Inc. v. Rotary Drilling Servs., Inc., 383 F.2d 97, 106 (5th Cir. 1967))*.

[6] *See* *Pierce, 753 F.2d at 441*.

[7] *See* *Eleven Line, Inc. v. North Texas State Soccer Ass'n, 1998 U.S. Dist. LEXIS 581, 1998 WL 25566*, at *2 (N.D. Tex. Jan 13, 1998).

[8] *See id.* at *3.

because they have no economic interest in harming competition. The players and coaches do not form a single entity with defendants. As **[*9]** stated in the earlier opinion, "they do not form a single economic unit, they do not have a complete unity of interest, and defendants do not have ultimate control over the players' and coaches' actions." [9]

The second component of defendants' argument is that the players and coaches are the ultimate consumers of defendants' products, and do not stand to profit financially from the defendants' alleged anticompetitive acts. Thus, defendants state, as a matter of law they cannot participate in a conspiracy. There is no case law to support this argument. The cases cited by defendants are not analogous. In *NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914-915, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982)* the Supreme Court held that because ***HN4***[] the boycotters were politically rather than economically motivated, their behavior was protected from the application of the Sherman Act by the *First Amendment* and the *Noerr-Pennington* Doctrine. Similarly, **[*10]** in *Missouri v. National Organization for Women, 620 F.2d 1301, 1315-16 (8th Cir. 1980)*, the court held that ***HN5***[] the injury of a non-competitor by another non-competitor who carried out a boycott for political reasons was not a violation of the Sherman Act. [10] Defendants' actions in this case were not motivated by political interests, and do not fall under the protection of the *Noerr-Pennington* Doctrine. Contrary to defendants' assertions, the cited cases do not stand for the proposition that consumers with no potential financial benefit from the boycott can never participate in a conspiracy in violation of the Antitrust Act.

Therefore, there is no need to consider the lack of economic motive of the players and coaches. Even without such an economic motive, they are still capable of **[*11]** willingly or unwillingly participating in the alleged illegal restraint of trade. They did so to protect other, non-financial interests, namely their ability to play in defendants' outdoor soccer leagues, the only outdoor leagues in the region. [11] Because the other participants in the conspiracy (defendants) had a financial interest in lessening competition, the Court finds that this claim was sufficiently alleged to go to the jury, which subsequently found that there had been an illegal conspiracy among defendants and their players and coaches.

[*12] 2. Injury to Competition--Defendants' next argument is that the plaintiff did not present any evidence of harm to competition, but only of harm to its own business. Rather than harming competition, they argue, Rule II promotes the sport of soccer and makes it an effective competitor against other activities available to adults and children. [12] Plaintiff did present evidence that Rule II decreased competition in the market for amateur soccer in Midland/Odessa. Specifically, Rule II decreases the options available to consumers. Owners and operators of other indoor soccer arenas also testified that Rule II did not make soccer a superior product, but did force them to join the defendant organizations, out of economic necessity and against their wishes. The Court finds that there was sufficient evidence of damage to competition to uphold the jury's verdict on this issue.

3. Per Se Violation--Defendants next reassert **[*13]** an argument that was previously made in their Motion to Dismiss. They say that the alleged conspiracy was a vertical non-price restraint, and that as such, it cannot constitute a per se violation of Section One of the Sherman Act. In ruling on the Motion to Dismiss, this Court held that the alleged conspiracy *was* a vertical non-price restraint, but that it *did* constitute a per se violation. Relying on

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[9] *Id.* at *3; *see also* cases cited in n.8, n.9.

[10] Defendants also cite *Allied Tube & Conduit Corp. v. Indian Head, Inc. 486 U.S. 492, 508, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)* for its brief discussion of the *Claiborn Hardware* case.

[11] Courts have upheld Section One claims in a few other cases in which some of the conspirators had interests that were not financial. *See, e.g., Volvo North America Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 71 (2nd Cir. 1988)* (tennis players protecting their ability to play in major tennis competitions); *James Julian, Inc. v. Raytheon Co., 557 F. Supp. 1058, 1064-65 (D. Del. 1983)* (trade association members sought to keep others from hiring a subcontractor (plaintiff) because its employees were represented by a different union); *Feminist Women's Health Ctr. v. Mohammad, 415 F. Supp. 1258, 1267 (N.D. Fla. 1976)* (doctors boycotted a health center that provided abortions).

[12] This argument overlaps with defendants Section Two argument, *see* Section D below.

McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178 (5th Cir. 1972) and Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985), the Court found that defendants' efforts to persuade or coerce customers to boycott plaintiff's competing business constituted a group boycott that was a per se violation of Section One.

Defendants correctly point out, however, that in Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 734, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988), the Supreme Court held that ***HN6***[] "a vertical restraint is not illegal per se unless it includes some agreement on price or price levels." [13] **[*15]** The case involved **[*14]** a situation in which a dealer of Sharp products threatened to break off his relationship with the company unless Sharp terminated the dealership of another dealer in the same area who was cutting prices and hurting the first dealer's business. Sharp agreed and terminated the price-cutting dealer. The *Business Electronics* case thus dealt with facts that were very different from those of the case at hand, and this Court is not entirely persuaded that the reasoning applied there would lead to the same conclusion in this case. [14] The Supreme Court's holding, however, is very broadly written, and seems to bind this Court's decision. For that reason, this Opinion holds that defendants' alleged conspiracy cannot be a per se violation of the Sherman Act. [15]

[*16] Despite this conclusion, the jury verdict must stand. Plaintiff's allegations under Section One satisfy the alternative rule-of-reason test. As a matter of law, plaintiff sufficiently alleged that defendants' activities had an anti-competitive effect and were thus unreasonable. [16]

Furthermore, the jury found **[*17]** that defendants' conduct was an unreasonable restraint of trade and was the proximate cause of injury to plaintiff's business, as a matter of fact. ***HN7***[] The essential factor for determining whether a defendant's actions will be found to be an unreasonable restraint of trade is whether the challenged restraint enhances or reduces competition. [17] The Fifth Circuit has stated that the competitive effect "can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was

[13] *See also* Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379, 1382-83 (5th Cir. 1994) (holding that "vertical nonprice restraints are generally not subject to per se analysis," but tying arrangements, which are a type of vertical nonprice restraint, are sometimes per se illegal); Matrix Essentials, Inc. v. Emporium Drug Mart, Inc., 988 F.2d 587, 594 (5th Cir. 1993) (vertical restraints not dealing with price fixing are subject to rule of reason).

[14] For example, the Court explained: "Our approach to the question presented in the present case is guided by the premises of *GTE Sylvania* [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)] and *Monsanto [v.* Spray-Rite Svc. Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)]: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*."

[15] Accordingly, this opinion vacates and supplants the Court's earlier opinion in this case, Eleven Line, 1998 WL 25566, at *3-*5 only insofar as it held that the alleged conspiracy was a per se violation of Section One. The Court is not persuaded by plaintiff's argument that defendants' activity was in fact a horizontal restraint. *See* Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 730, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.").

[16] *See* Plueckhahn v. Farmers Ins. Exch., 749 F.2d 241, 246 (5th Cir. 1985) (citing GTE Sylvania, 433 U.S. at 49). Defendants argue that as a matter of law Rule II is not unreasonable, relying on the cases dealing with NCAA football rules. Unlike in those cases, however, Rule II is not a restraint on competition in amateur soccer in Midland/Odessa which is "essential if the product is to be available at all." McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1344 (5th Cir. 1988); National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 101, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984).

[17] *See* McCormack, 845 F.2d at 1344.

imposed. . . . The purpose of the analysis is to form a judgment about the competitive significance of the restraint." [18] It is the factfinder who must weigh these various factors.

Defendants argued to the jury that Rule II promotes competition by improving and maintaining the quality of defendants' product **[*18]** (amateur soccer) and thus making it competitive with other activities available to participants. The jury assumedly weighed these alleged pro-competitive effects against the alleged anticompetitive effects to reached its conclusion.

Plaintiff thus sufficiently stated a claim for an unreasonable restraint of trade under Section One of the Sherman Act. The Jury's conclusion, based on the evidence, that defendants' conduct did amount to such an unreasonable restraint will not be set aside.

D. Sherman Act Section Two

HN8[] One necessary requirement to establish a claim under Section Two of the Sherman Act is that defendants have monopoly power in the relevant market. The plaintiff must define the relevant market, which must include all products that are reasonably interchangeable and must be plausible. [19] Defendants argue that plaintiff's definition of the relevant product market as amateur youth and adult soccer in Midland/Odessa is too narrow. They feel that other activities such as other sports, boy and girl scouts, and church choir, all are reasonably interchangeable with amateur soccer.

[*19] This argument was also ruled on in the earlier opinion on the Motion to Dismiss. [20] Defendants have merely realleged the same exact arguments. As a legal matter, plaintiff was only required to give defendants notice of their definition of the relevant market, and the claims based thereon. [21] Plaintiff did so. The definition was not overly vague or confusing, and it was not implausible. [22]

HN9[] The ultimate determination of the proper definition of the relevant market is for the jury. [23] The jury in this case heard arguments from plaintiff and defendants on the relevant market. Plaintiff offered testimony on market shares, the numbers of participants, and other competitors, as well as testimony of consumers on the interchangeability of soccer with other products. The jury found that defendants did have monopoly power over the relevant market, and that defendants leveraged their power **[*20]** over a relevant market or submarket (outdoor soccer, Plaintiff argued) to acquire or maintain monopoly power over indoor soccer. The Court sees no reason to set aside this verdict.

E. Tortious Interference

Lastly, defendants argue that there was no case to submit to the jury on tortious interference with business relations because plaintiff failed to make out a prima facie case of liability or to establish damages. Defendants' argument relies on the allegation that there was no *unlawful* act done with malice by the defendants, because the antitrust

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[18] *National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

[19] *See* *Theatre Party Assoc. v. Shubert Org., Inc., 695 F. Supp. 150, 153-54 (S.D.N.Y. 1988)*; *see also* *Eleven Line, 1998 U.S. Dist. LEXIS 13868, 1998 WL 25566*, at *5 & cases cited in n.21-22.

[20] *See* *Eleven Line, 1998 WL 25566*, at *5.

[21] *See id.* at *5 & n.22.

[22] *See id.* at *5 & n.24.

[23] *See id.* at *5 & n.23.

claims were not established. Since the Court is upholding the jury's verdict on the antitrust violations, this argument is moot. Furthermore, to support their claim that tortious interference damages were not established, defendants simply refer back to their argument on antitrust damages. That question was addressed in Section B(2) above.

CONCLUSION

For the reasons stated herein, defendants' Motion for Judgment as **[*21]** a Matter of Law is **DENIED**, and the verdict issued by the jury on February 27, 1998 shall stand. An order entering Final Judgment shall be issued separately.

ENTERED: Aug 25, 1998

CHIEF JUDGE JERRY BUCHMEYER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

End of Document

Granite Partners, L.P. v. Bear, Stearns & Co.

United States District Court for the Southern District of New York

August 25, 1998, Decided ; August 26, 1998, Filed

96 Civ. 7874 (RWS)

Reporter

17 F. Supp. 2d 275 *; 1998 U.S. Dist. LEXIS 13267 **; 41 Fed. R. Serv. 3d (Callaghan) 1345; 1998-2 Trade Cas. (CCH) P72,301; 36 U.C.C. Rep. Serv. 2d (Callaghan) 1238

GRANITE PARTNERS, L.P., GRANITE CORPORATION and QUARTZ HEDGE FUND, by and through the Litigation Advisory Board of Granite Partners, L.P., Granite Corporation and Quartz Hedge Fund, Plaintiffs, - against - BEAR, STEARNS & CO. INC., BEAR, STEARNS CAPITAL MARKETS INC., HOWARD RUBIN, DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, ELIZABETH COMERFORD and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, Defendants.

Disposition: [1]** Brokers' motion for partial dismissal of Complaint granted in part and denied in part.

Core Terms

Brokers, Funds, repo, liquidation, alleges, transactions, bearish, bullish, interest rate, portfolios, pari delicto, inappropriate, parties, contracts, motion to dismiss, tortious interference, misrepresentation, seller, breach of fiduciary duty, contractual, mortgage, representations, breached, buyer, secured loan, good faith, broker-dealers, purchases, unjust enrichment, collateralized

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In considering a motion to dismiss, the facts alleged in the complaint are presumed to be true and all factual inferences must be drawn in the plaintiff's favor and against the defendants.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN2[] **Motions to Dismiss, Failure to State Claim**

In deciding the merits of a motion to dismiss for failure to state a claim, all material allegations composing the factual predicate of the action are taken as true, for the court's task is to assess the legal feasibility of the complaint, not assay the weight of the evidence which might be offered in support thereof. Thus, where it is beyond doubt that plaintiff can prove no set of facts in support of his or her claim which would warrant relief, the motion for judgment on the pleadings must be granted.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Judicial Notice > General Overview

HN3[] **Defenses, Demurrers & Objections, Motions to Dismiss**

On a *Fed. R. Civ. P. 12(b)(6)* motion, consideration is limited to the factual allegations in the complaint, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiff's possession or of which plaintiff had knowledge and relied on in bringing suit.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN4[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) requires that in all allegations of fraud, the circumstances constituting the fraud must be stated with particularity. The pleading must be sufficiently particular to serve the three goals of *Rule 9(b)*, which are (1) to provide a defendant with fair notice of the claims against him; (2) to protect a defendant from harm to his reputation or goodwill by unfounded allegations of fraud; and (3) to reduce the number of strike suits.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN5[] **Business Torts, Fraud & Misrepresentation**

Allegations of fraud must adequately specify the statements made that were false or misleading, give particulars as to the respect in which it is contended that the statements were fraudulent, and state the time and place the statements were made and the identity of the person who made them.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN6[] **Pleadings, Heightened Pleading Requirements**

A pleading must give notice to each opposing party of its alleged misconduct. Thus, a claim may not rely upon blanket references to acts or omissions by all the defendants, for each defendant named is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he is individually charged. This requirement facilitates the preparation of an adequate defense while protecting a party's reputation from groundless accusations. It also serves to prevent abuse of process and gratuitous disruption of normal business activity.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN7[] **Pleadings, Heightened Pleading Requirements**

There are five elements necessary to sustain a claim of fraud under New York law: (1) misrepresentation of a material fact; (2) the falsity of that misrepresentation; (3) scienter, or intent to defraud; (4) reasonable reliance on that representation; and (5) damage caused by such reliance. Additionally, the plaintiff must comply with the heightened pleading standard of *Fed. R. Civ. P. 9(b)*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN8[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In evaluating a motion to dismiss, a court need not accept a complaint's legal conclusions and unwarranted factual deductions.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN9[] **Business Torts, Fraud & Misrepresentation**

Statements cannot support a fraud claim as a matter of law because they are simply not representations of fact.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN10[] **Business Torts, Fraud & Misrepresentation**

Fraud pleadings generally cannot be based on information and belief. The exception to this rule is that fraud allegations may be so pleaded as to facts peculiarly within the opposing party's knowledge; even then, however, the allegations must be accompanied by a statement of facts upon which the belief is founded. This exception to the general rule must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN11[] **Business Torts, Fraud & Misrepresentation**

An asserted reliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud.

Governments > Fiduciaries

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN12[] **Governments, Fiduciaries**

Under New York law, a party entering into a transaction has a duty to conduct an independent appraisal of the risk it is assuming and a duty to investigate the nature of its business transactions. In evaluating whether plaintiff has adequately alleged justifiable reliance, a court may consider, inter alia, plaintiff's sophistication and expertise in finance, the existence of a fiduciary relationship, and whether plaintiff initiated the transaction.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN13[] **Business Torts, Fraud & Misrepresentation**

A duty is imposed on sophisticated investors to obtain documentation of information material to their investment decisions. Where sophisticated businessmen engaged in major transactions enjoy access to critical information, but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.

Securities Law > Blue Sky Laws > Offers & Sales

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN14[] **Blue Sky Laws, Offers & Sales**

New York's Martin Act, N.Y. Gen. Bus. Law, art 23-A, §§ 352 et seq., governs fraud and deception in the sale of securities and provides for the attorney general to regulate and enforce New York's securities laws. There exists no private right of action for claims that are within the purview of the Martin Act. Plaintiff cannot convert a nonexistent Martin Act claim into another state law cause of action by artful pleading.

Governments > Fiduciaries

Securities Law > Blue Sky Laws > Offers & Sales

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

HN15[] **Governments, Fiduciaries**

The Martin Act, N.Y. Gen. Bus. Law, art 23-A, §§ 352 et seq., prohibits various fraudulent and deceitful practices in the distribution, exchange, sale, and purchase of securities but does not require proof of intent to defraud or scienter. As a result, claims for breach of fiduciary duty and negligent and innocent misrepresentation, for example, which do not require plaintiff to plead and prove intentional deceit, are covered by the Martin Act and cannot be asserted by private litigants.

Contracts Law > Breach > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN16[] **Contracts Law, Breach**

To state a claim for tortious interference with contractual relations under New York law, plaintiff must allege (1) the existence of a valid contract between itself and a third party for a specific term; (2) defendant's knowledge of that contract; (3) defendant's intentional procuring of its breach; and (4) damages. Additionally, plaintiff must assert that defendant's actions were the but for cause of the alleged breach of contract, that is, that there would not have been a breach but for the activities of defendant. The pleadings may not be conclusory; rather they must be supported by sufficient allegations of fact.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Torts > ... > Commercial Interference > Contracts > General Overview

HN17[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Conclusory allegations of the legal status of defendant's acts need not be accepted as true for the purposes of ruling on a motion to dismiss.

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN18[] **Contracts Law, Breach**

Once plaintiff alleges facts establishing that the breaching party was predisposed toward breaching its agreement, the claim for tortious interference must be dismissed for failure to plead but for causation.

Torts > ... > Elements > Causation > Causation in Fact

Torts > ... > Commercial Interference > Contracts > General Overview

HN19[] **Causation, Causation in Fact**

A claimant must allege but for causation for each individual and cannot satisfy that requirement merely by alleging that two or more individuals acted in concert to cause a breach in allegations of tortious interference with contracts.

Antitrust & Trade Law > Sherman Act > General Overview

HN20[] **Antitrust & Trade Law, Sherman Act**

See Sherman Act *§ 1*, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

HN21[] **Antitrust & Trade Law, Sherman Act**

To withstand a motion to dismiss, plaintiff in a Sherman Act *§ 1*, *15 U.S.C.S. §1* conspiracy claim must allege a concerted action by two or more persons that unreasonably restrains interstate or foreign trade or commerce. Plaintiff must do more than merely allege that a conspiracy exists, it must provide some factual basis for that allegation. For example, plaintiff must identify the relevant product market, the co-conspirators, and describe the nature and effects of the alleged conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Per Se Rule & Rule of Reason, Per Se Violations**

Except in narrow classes of per se violations of the Sherman Act, plaintiff must show that defendants acted to restrain competition. To allege unreasonable restraint of trade, something more than a private dispute must be alleged. The relevant product market must be identified, and plaintiff must allege how the net effect of the alleged violation is to restrain trade in the relevant market, and that no reasonable alternative source is available to consumers in that market. The economic impact in the relevant market must be specified, and plaintiff must show that the alleged restraint of trade tends or is reasonably calculated to prejudice the public interest.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN23[] **Regulated Practices, Price Fixing & Restraints of Trade**

Per se violations of the Sherman Act are certain types of conduct so destructive of competition that they almost always result in unreasonable restraints of trade. Such characterization, however, is reserved for manifestly anticompetitive practices. Only a narrow class of practices warrants classification as per se violations.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] **Per Se Rule & Rule of Reason, Per Se Violations**

It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act *§ 1*, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

HN25[] **Antitrust & Trade Law, Sherman Act**

A rigid per se classification is especially inappropriate where the complained-of practice is novel or unique. A per se rule is used in the relatively narrow circumstance where courts have sufficient experience with the activity to recognize that it is plainly anticompetitive and lacks any redeeming virtue.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN26[] **Horizontal Refusals to Deal, Boycotts**

The per se standard under the Sherman Act *§ 1*, *15 U.S.C.S. § 1*, should not be extended to alleged restraints of ambiguous effect; any departure from the rule of reason standard must be based upon demonstrable economic effect, rather than from formalistic line drawing.

Antitrust & Trade Law > Sherman Act > General Overview

HN27[] **Antitrust & Trade Law, Sherman Act**

New York's ***antitrust law***, the Donnelly Act, is modeled on the Sherman Act, *15 U.S.C.S. § 1*, and should be construed in light of federal precedent.

Banking Law > Bank Activities > Securities > Retail Repurchase Agreements

Securities Law > Blue Sky Laws > Offers & Sales

HN28[] **Securities, Retail Repurchase Agreements**

A repurchase agreement, by its terms, involves two separate but related transactions: (1) a sale by a party of securities in exchange for cash and (2) an agreement by the seller to repurchase the same or equivalent securities for a specified price at a future date. In a reverse repurchase agreement, the party initially buys the securities in exchange for cash, and incurs a forward obligation to resell them. Every repurchase is also a reverse repurchase; that is, a reverse repurchase agreement is simply a repurchase agreement viewed from the perspective of the buyer.

Commercial Law (UCC) > Secured Transactions (Article 9) > General Provisions > Applicability of Provisions

Commercial Law (UCC) > Secured Transactions (Article 9) > General Overview

Commercial Law (UCC) > Secured Transactions (Article 9) > General Provisions > General Overview

Commercial Law (UCC) > ... > Definitions > Collateral > Commercial Paper

HN29[] **General Provisions, Applicability of Provisions**

N.Y. U.C.C. Art. 9 applies only to a transaction which is intended to create a security interest in personal property.

Commercial Law (UCC) > Secured Transactions (Article 9) > Attachment, Effectiveness & Rights > General Overview

HN30[] **Secured Transactions (Article 9), Attachment, Effectiveness & Rights**

To determine whether the parties to a transaction intended to create a security interest, courts look to the agreement governing the transaction. Where the parties' intention is clearly and unambiguously set forth in the agreement, effect must be given to the expressed intent.

Commercial Law (UCC) > Secured Transactions (Article 9) > Attachment, Effectiveness & Rights > General Overview

HN31[] **Secured Transactions (Article 9), Attachment, Effectiveness & Rights**

Where the agreement is clear, courts should look to the terms expressed in the contract itself, rather than to extrinsic evidence of terms that were not expressed or judicial views on what terms might be preferable.

Commercial Law (UCC) > Secured Transactions (Article 9) > Attachment, Effectiveness & Rights > General Overview

HN32[] **Secured Transactions (Article 9), Attachment, Effectiveness & Rights**

The objective intent of the parties expressed or apparent in the writing controls the agreement's interpretation, while the undisclosed, subjective intent of the parties has no bearing on the construction of the contract.

Banking Law > Bank Activities > Securities > Retail Repurchase Agreements

HN33[] **Securities, Retail Repurchase Agreements**

The unequivocal language of purchase and sale in the repurchase and reverse repurchase agreements at issue is strong prima facie evidence that the parties intended the transactions to be treated accordingly.

Banking Law > Bank Activities > Securities > Retail Repurchase Agreements

HN34[] **Securities, Retail Repurchase Agreements**

The mere presence of secured loan characteristics in repurchase and reverse repurchase agreements is not enough to negate the parties' voluntary decision to structure the transactions as purchases and sales.

Banking Law > Bank Activities > Securities > Retail Repurchase Agreements

HN35[] **Securities, Retail Repurchase Agreements**

In contexts such as commercial law and the antifraud provisions of the federal securities law, repurchase agreements generally are viewed as purchases and sales. For other purposes, such as taxes, they are typically viewed as financings.

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Judges: ROBERT W. SWEET, U.S.D.J.

Opinion by: ROBERT W. SWEET

Opinion

[*281] OPINION

Sweet, D.J.

Defendants Donaldson, Lufkin & Jenrette Securities Corporation ("DLJ"), Bear, Stearns & Co. Inc., Bear, Stearns Capital Markets Inc. (collectively, "Bear Stearns"), Howard Rubin ("Rubin), and Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") (together with DLJ, Bear Stearns, and Rubin, the "Brokers") have moved for partial dismissal of the First Amended Complaint ("Complaint") pursuant to *Rules 12(b)(6)* and *9(b) of the Federal Rules of Civil Procedure* for failure to state a claim upon which relief can be granted and for failure to plead fraud with particularity. Specifically, the Brokers move to dismiss the following claims against them: (1) inducing and participating in breach of fiduciary duty (Count I), (2) tortious interference with contract (Counts II, XII, and XXI, which is against Merrill Lynch), (3) rescission of unauthorized trades (Count III), (4) breach of duty due to wrongful margin calls and liquidation (Count V), (5) conversion (Count VI), (6) violations of the Sherman and Donnelly **[**3]**

Acts (Counts VII and VIII), (7) prima facie tort against Bear Stearns (Count IX), (8) breach of contract due to commercially unreasonable liquidations (Count X), (9) breach of duty to liquidate in a commercially reasonable manner (Count XI), (10) common law fraud (Count XIII), (11) negligent misrepresentation (Count XIV), (12) innocent misrepresentation (Count XV), (13) breach of express warranty (Count XVI), (14) unjust enrichment (Count XVII), and (15) equitable subordination (Count XX).

[*282] For the reasons set forth below, the Brokers' motion will be granted in part and denied in part.

Parties

Plaintiff Granite Partners, L.P. ("Granite Partners"), a Delaware limited partnership, was established in January 1990 as an investment fund to invest primarily in mortgage-related securities on behalf of individuals and entities subject to United States taxation.

Plaintiff Granite Corporation ("Granite Corp."), a Cayman Islands corporation, was organized in January 1990 to invest primarily in mortgage-backed securities on behalf of offshore investors and domestic tax-exempt entities, including foundations and pension funds.

Plaintiff Quartz Hedge Fund **[**4]** ("Quartz") (collectively with Granite Partners and Granite Corp, the "Funds"), a Cayman Islands corporation, was established in January 1994 as a vehicle to invest primarily in mortgage-related securities on behalf of offshore investors and others exempt from United States taxation.

The Funds bring this action by and through the Litigation Advisory Board (the "LAB"), which was given the exclusive authority on behalf of and in the name of the Funds' estates to commence, prosecute, settle, or otherwise resolve all unresolved claims and causes of action of the Funds' estates by order of the United States Bankruptcy Court for the Southern District of New York.

DLJ, Bear Stearns, and Merrill Lynch, all Delaware corporations with their principal places of business in New York City, are broker-dealers that transacted business with the Funds.

Rubin, a resident of New Jersey, was at all relevant times a senior managing director and the head CMO trader at Bear Stearns.

Relevant Nonparties

At all relevant times to this action, nonparty Askin Capital Management, L.P. ("ACM"), a Delaware limited partnership, was a registered investment advisor; whose exclusive place of business **[**5]** was New York City. ACM was, at all relevant times, controlled by nonparty David J. Askin ("Askin"), who owned and controlled ACM's sole general partner, Dashtar Corporation. Askin also served as ACM's sole limited partner, president, chief executive officer, and chief financial officer. ACM became the investment advisor to Granite Corp. and Granite Partners (and Granite Partners' sole general partner) on January 26, 1993. ACM has been the investment advisor to Quartz since its formation.

Prior Proceedings

On April 7, 1994, the Funds filed petitions for relief under chapter 11 of the United States Bankruptcy Code. The chapter 11 trustee for the Funds (the "Trustee") initially filed this action in the United States Bankruptcy Court for the Southern District of New York on September 12, 1996. The case was referred to this Court on October 18, 1996. On consent, this Court withdrew the reference from the Bankruptcy Court on December 3, 1996.

On January 27, 1997, the Trustee submitted a Third Amended Joint Plan of Liquidation for the Funds (the "Plan"). Following the Bankruptcy Court's confirmation of the chapter 11 Plan on March 2, 1997, this action has been pursued by **[**6]** the LAB, appointed pursuant to the Liquidation Plan.

The LAB filed the Complaint in this action on August 4, 1997, naming, in addition to Bear Stearns, Rubin, DLJ, and Merrill Lynch as defendants.

In the Complaint, the LAB asserts the following claims: breach of contract, inducing and participating in breach of fiduciary duty, tortious interference with contracts, rescission of unauthorized trades, breach of duty, conversion, federal and state antitrust violations, prima facie tort, common law fraud, negligent and innocent misrepresentation, breach of express warranty, unjust enrichment, objection to claims and interest, and equitable subordination.

Merrill Lynch and DLJ filed their motions to dismiss on November 10, 1997, and Bear Stearns filed its motion on November 12, 1997. Oral argument was heard on May 20, 1998, at which time the motions were deemed fully submitted.

On March 24, 1998, the Bond Market Association (the "BMA") moved for leave to file a memorandum of points and authorities as amicus curiae for the purpose of bringing to the Court's attention its views regarding the **[*283]** treatment of repurchase agreements ("repos") under the applicable state law **[**7]** and informing the Court of the importance of repos to the debt capital markets. The motion was granted on May 20, 1998.

Facts

HN1[] In considering a motion to dismiss, the facts alleged in the complaint are presumed to be true and all factual inferences must be drawn in the plaintiff's favor and against the defendants. See *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*; *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993)*; *Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989)*; *Dwyer v. Regan, 777 F.2d 825, 828-29 (2d Cir. 1985)*. Accordingly, the factual allegations considered here and set forth below are taken primarily from the LAB's Complaint and do not constitute findings of fact by the Court. They are presumed to be true only for the purpose of deciding the present motion.

This case arises out of the collapse in early 1994 of the Funds that were managed by Askin and ACM. The major claims brought in this lawsuit fall into two categories: (1) that the Brokers injured the Funds by selling to them inappropriate securities purchased by Askin and ACM, and (2) that **[**8]** the Brokers injured the Funds by making improper margin calls and liquidating the Funds' reverse repurchase positions when the margin calls were not satisfied.

The Funds invested primarily in collateralized mortgage obligations ("CMOs") created by the Brokers and other broker-dealers. ACM, through its president, Askin, purchased the securities for the Funds. The Brokers are alleged to be "among the principal sellers of CMOs to the Funds." (Compl. P 4.)

CMOs are bonds created from and collateralized by mortgage-backed securities formed from pools of residential mortgages or securities backed by such mortgages. They are divided into various classes, or "tranches," each of which is entitled to a different portion of the principal and/or interest payments made by the underlying mortgage obligors. The tranches differ from one another with respect to their sensitivity to interest rate changes and the certainty with which their reaction to such changes can be predicted. The Brokers referred to the riskiest tranches - those most prone to large and unpredictable swings in value - as "toxic" or "nuclear waste."

The two larger Funds, Granite Partners and Granite Corp., were designed to invest **[**9]** in "market-neutral" portfolios of high-quality CMOs. They were intended to acquire balanced holdings of "bullish" bonds and "bearish" bonds. A bullish security is likely to increase in value when interest rates fall and decrease in value when interest rates rise. A bearish security is likely to decrease in value when interest rates fall and increase in value when interest rates rise. By purchasing offsetting positions in predictable securities, the Funds would enjoy the high returns associated with rate-sensitive CMOs while hedging against the risk attendant upon interest rate fluctuations. Quartz was intended to be "market-directional" - to maintain a bullish or bearish portfolio depending on the predicted direction of interest rates.

Askin and ACM, the Funds' investment advisor, had fiduciary and contractual duties to the Funds to make investments with due care and in accordance with the Funds' stated investment objectives. ACM was to accomplish these respective goals by rigorously and continuously analyzing each proposed acquisition for each Fund with a sophisticated, proprietary computer model that would allow ACM and Askin to determine the impact of interest rate changes on **[**10]** the price and value of each bond.

Askin and ACM, however, managed the Funds negligently and repeatedly breached their contractual and fiduciary duties. They did not perform a rigorous analysis of the securities they bought, and they were unable to gauge how those securities would respond to interest rate movements. Moreover, they did not use, or even have, sophisticated computerized analytical techniques. In fact, "ACM and Askin often made purchase decisions based on little or no analysis or research. They instead relied on Broker recommendations, representations, valuations, and reports, Askin's 'instincts,' and unsophisticated analysis to select the Funds' securities. **[*284]** " (Compl. P 70.) As a result, ACM and Askin failed to create market-neutral portfolios for Granite Partners and Granite Corp., instead creating portfolios that were dramatically bullish, and that contained a number of highly volatile, unpredictable, toxic CMOs. Similarly, at the time when Askin believed that interest rates would rise, he constructed an inappropriate bullish portfolio for Quartz.

The Complaint alleges that throughout 1993 and early 1994, the Brokers took advantage of Askin's shortcomings. **[**11]** Although they knew of Askin's obligation to create market-neutral portfolios for Granite Partners and Granite Corp., knew of Askin's inability to analyze the impact of interest rate changes on esoteric CMO tranches, and knew of the Funds' dangerous bullish tilt, the Brokers induced Askin to buy inappropriate, toxic, bullish CMOs that eroded in value when short-term interest rates rose in early 1994. For example, from January 1993 to February 1994, the Brokers sold the Funds $ 34 million in bearish CMOs but $ 740 million in inappropriate securities. The Complaint maintains that the Brokers misrepresented many of these strongly bullish and toxic securities as bearish or only slightly bullish.

The Brokers sold these toxic and inappropriate securities to the Funds because it was profitable for them to do so. The sale of the toxic tranches of a CMO offering makes the entire offering economically feasible. The Brokers are committed to buying any unsold tranches for their own accounts, and they do not wish to own nuclear waste themselves. Accordingly, they are unwilling to market a new offering unless they are assured they will be able to sell the toxic securities. For this reason, the toxic **[**12]** tranches are referred to as the "deal drivers."

To generate demand for the more volatile tranches of their CMO offerings, the Brokers cultivated relationships with a small number of managers of investment funds, including ACM. They steered investors to ACM to enable ACM to purchase the more volatile, esoteric CMOs from the Brokers and granted ACM extensive credit (at times in violation of their own internal credit guidelines) to increase the amount of such CMOs that ACM could purchase. ACM, acting on the Funds' behalf, became one of the largest volume purchasers of these volatile and esoteric tranches from the Brokers. In early 1994, the Funds owned, in the aggregate, more than $ 1.5 billion of such CMOs, approximately half of which were purchased from the three Brokers (and another quarter from Kidder, Peabody & Co. Inc. ("Kidder")). In short, the Brokers all were "in bed" with ACM. (Compl. P 40.)

As a result of the Brokers' sales of numerous inappropriate securities to the Funds, by the beginning of 1994 the Funds' portfolios were dangerously "tilted" in a way that exposed the Funds to substantial losses in the event of an increase in interest rates. When interest rates rose in **[**13]** February and March 1994, the Funds experienced an erosion in value. In March 1994, the Brokers issued improper margin calls on the Funds, based on arbitrary security valuations.

The Funds acquired most of their securities pursuant to repos, a financing mechanism that allowed the Funds to pay only a fraction of the cost of each CMO in cash, borrowing the balance from the Brokers. In such a transaction, one party to the agreement agrees to sell a security to a buyer/lender for a given sum (the "repo amount") and to buy the security back from the buyer/lender at a later date (the "buy-back date") for the repo amount plus a market rate of interest (the "repo rate"). In effect, the Complaint alleges that the repos were collateralized loans - the Brokers loaned the Funds most of the purchase price for each CMO and took possession of the bonds as collateral. The use of repos benefitted the Brokers, allowing the Funds to increase their purchases from the Brokers.

The contracts between the Funds and the Brokers [1] allowed the Brokers to make margin calls on the Funds if the value of the **[*285]** securities on repo fell below the amount that the Funds had borrowed (plus an agreed-upon "haircut"). **[**14]** In that instance, a "margin deficit" exists. In making margin calculations, the market value of the securities must be the price obtained from a "generally recognized source agreed to by the parties or the most recent closing bid quotation from such a source," plus accrued income not included therein. (Compl. P 55.) In March 1994, however, the Brokers issued a blizzard of margin calls that were not based on fair market prices, but on unreasonably low, manipulated valuations.

When the Funds were unable to meet the Brokers' improper margin calls, the Brokers liquidated the Funds' portfolios. **[**15]** Under the PSA Agreements, if a proper margin call is not met, the broker-dealer may liquidate the collateral upon one business day's notice, including by selling the securities to itself in a "deemed" sale and crediting the customer in an amount equal to the price of the securities obtained from a generally recognized source or the most recent closing bid quotation from such a source. According to the Complaint, the liquidations were not conducted in good faith and in a commercially reasonable manner. Instead of seeking to maximize the prices paid for the Funds' securities in the liquidations by soliciting bids from their retail customers, the Brokers in nearly all cases simply "deemed" the CMOs sold to themselves, at unreasonably low prices.

The Brokers agreed to facilitate each other's liquidations by providing each Broker with sham bids for the Fund securities that each of them held. These were not bona fide offers to purchase the securities at market prices, but artificially low "accommodation" bids solicited and provided in an effort to justify the prices at which the Brokers then deemed the Funds' CMOs sold to themselves.

The Complaint alleges that by selling the inappropriate **[**16]** toxic securities to the Funds, by generating artificial and improper margin calls, and then by liquidating the portfolios in a commercially unreasonable and collusive manner, the Brokers netted profits, whereas the Funds lost more than $ 400 million.

Discussion

I. Legal Standards

A. *Rule 12(b)(6)*

HN2[] In deciding the merits of a motion to dismiss for failure to state a claim, all material allegations composing the factual predicate of the action are taken as true, for the court's task is to "assess the legal feasibility of the complaint, not assay the weight of the evidence which might be offered in support thereof." *Ryder Energy Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984)* (quoting *Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980))*. Thus, where it is beyond doubt that plaintiff can prove no set of facts in support of his or her claim which would warrant relief, the motion for judgment on the pleadings must be granted. See *H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 250, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989)*; *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*; **[**17]** *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*.

Additionally, ***HN3***[] on a *Rule 12(b)(6)* motion, consideration is limited to the factual allegations in the complaint, "to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied on in bringing suit." *Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993)*; see *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991)*.

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[1] Each of the Funds entered into a Public Securities Association Master Repurchase Agreement ("PSA Agreement") with Bear Stearns and DLJ. Merrill Lynch entered into a PSA Agreement with Quartz, but not with Granite Partners or Granite Corp. In connection with its repurchase transactions with those funds, Merrill Lynch issued trade confirmations that purported to grant Merrill Lynch a security interest in the repoed securities.

B. *Rule 9(b)*

HN4[] *Federal Rules of Civil Procedure 9(b)* requires that in all allegations of fraud, the circumstances constituting the fraud must be stated with particularity. See *Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1127 (2d Cir. 1994)*; *In re Time Warner, Inc. Sec. Litig., 9 F.3d 259, 265 (2d Cir. 1993)*; *Shemtob v. Shearson, Hammill & Co., 448 F.2d 442, 444-45 (2d Cir. 1971)*. The pleading must be sufficiently particular to serve the three goals of *Rule 9(b)*, **[**18]** which are (1) to **[*286]** provide a defendant with fair notice of the claims against him; (2) to protect a defendant from harm to his reputation or goodwill by unfounded allegations of fraud; and (3) to reduce the number of strike suits. See *Di Vittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987)*; *O'Brien v. Price Waterhouse, 740 F. Supp. 276, 279 (S.D.N.Y. 1990)*, aff'd, *936 F.2d 674 (2d Cir. 1991)*.

The Court of Appeals has required that ***HN5***[] allegations of fraud adequately specify the statements made that were false or misleading, give particulars as to the respect in which it is contended that the statements were fraudulent, and state the time and place the statements were made and the identity of the person who made them. See *McLaughlin v. Anderson, 962 F.2d 187, 191 (2d Cir. 1992)*; *Cosmas, 886 F.2d at 11*.

HN6[] The pleading must give notice to each opposing party of its alleged misconduct. Thus, a claim may not rely upon blanket references to acts or omissions by all the defendants, for each defendant named is entitled to be apprised of the circumstances surrounding **[**19]** the fraudulent conduct with which he is individually charged. See *Jacobson v. Peat, Marwick, Mitchell & Co., 445 F. Supp. 518, 522 n.7 (S.D.N.Y. 1977)*. This requirement facilitates the preparation of an adequate defense while protecting a party's reputation from groundless accusations. See de *Atucha v. Hunt, 128 F.R.D. 187, 189 (S.D.N.Y. 1989)*, aff'd, *979 F.2d 846 (2d Cir. 1992)*; *Posner v. Coopers & Lybrand, 92 F.R.D. 765, 768 (S.D.N.Y. 1981)*, aff'd, *697 F.2d 296 (2d Cir. 1982)*. It also serves to prevent abuse of process and gratuitous disruption of normal business activity. See *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975)*.

II. Count XIII Alleging Common Law Fraud Against the Brokers Is Dismissed

HN7[] There are five elements necessary to sustain a claim of fraud under New York law: (1) misrepresentation of a material fact; (2) the falsity of that misrepresentation; (3) scienter, or intent to defraud; (4) reasonable reliance on that representation; and (5) damage caused by such reliance. *May Dep't Stores Co. v. International Leasing Corp., 1 F.3d 138, 141 (2d Cir. 1993)*; **[**20]** *Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966, 970-71 (2d Cir. 1987)*; *Red Ball Interior Demolition Corp. v. Palmadessa, 874 F. Supp. 576, 584 (S.D.N.Y. 1995)*. Additionally, the plaintiff must comply with the heightened pleading standard of *Rule 9(b), Fed. R. Civ. P.*

The Complaint alleges that, to sell the Funds the toxic, "deal driver" tranches of their CMO offerings, the Brokers 2 misrepresented certain securities, particularly inverse IOs, [2] as bearish or only slightly bullish when, in fact, they were strongly bullish or their reaction to interest rate changes was impossible to predict. In reliance on the Brokers' misrepresentations, the Funds purchased securities that they would not otherwise have, and they held onto securities that they would otherwise have sold.

[21]** Because some of the allegations do not meet the requirement of *Rule 9(b)*, and the remaining fail to adequately allege justifiable reliance, the fraud claim must be dismissed.

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[2] One of the tranches of CMOs is the inverse IO. The response of inverse IOs to changes in interest rates is difficult to predict. For example, an increase in short-term rates would lead to a decrease in the coupon rate paid on an inverse IO whose coupon rate formula was based on LIBOR. The Complaint states that the decrease could be dramatic if leverage was involved. The decrease in the coupon rate on the inverse IO would tend to depress its value. If, however, the increase in short-term rates was accompanied by an increase in long-term rates, prepayments might decline, extending the payment stream on the inverse IO. This would tend to increase its value, perhaps enough to offset the decline in value caused by the reduction in the coupon rate. The difficultly in predicting the impact of interest rate changes on inverse IOs makes them risky securities. Inverse IOs are particularly toxic when they are leveraged. (Compl. P 32.)

A. Allegations of Fraud Specific to Bear Stearns Do Not Meet the Pleading Requirements of *Rule 9(b)*

There are three fraudulent allegations set forth in the Complaint particular to Bear Stearns. Because they do not comply **[*287]** with *Rule 9(b)*, Bear Stearns' motion to dismiss is granted.

The LAB invokes the deposition testimony of Askin in another matter as one of its allegations of fraud against Bear Stearns. Askin testified at a January 5, 1995, deposition:

> A: It's also not my testimony that each inverse IO shown to ACM by any or all dealers were bearish, but rather that some of the inverse IOs that were represented to ACM by some of the dealers were represented as bearish securities.
> Q: Was Kidder, Peabody one of the brokers who misrepresented an inverse IO as bearish?
> A: Kidder Peabody is one of the brokers that on more than one occasion represented that the inverse IOs that it wanted to sell were bearish. . . .
>
> Q: Does your last answer apply to Bear Stearns as well? **[**22]**
> A: I believe it does, yes.

(Compl. P 77.)

This exchange lacks the specificity required under *Rule 9(b)*. It not only fails to allege a statement by Bear Stearns, but it also fails to state the time and place the statement was made, as well as the identification of the speaker. See *Primavera Familienstiftung v. Askin, 173 F.R.D. 115, 123 (S.D.N.Y. 1997)*. Such a vague reference cannot form the basis for a fraud claim under *Rule 9(b)*.

The LAB also alleges that on March 31, 1993, "Bear Stearns faxed marketing materials to ACM indicating that four inverse IO residual CMOs were '1000 basis points cheap to benchmark I/Os' and that these same bonds were '25% cheaper than Trust IOs.'" (Compl. P 79.) The same fax allegedly included the sentence, "I would suggest a smaller long position (as the off-setting hedge) than we have been using in the IO analysis." (Id.) The LAB contends that upon translation of the broker's jargon Bear Stearns is representing that the four inverse IOs are less expensive substitutes for benchmark and Trust IOs, both well known to be bearish securities. According to the LAB, these statements mean that Bear Stearns advised ACM to purchase **[**23]** these securities as a hedge against Granite Corp. and Granite Partners' bullish securities.

Whereas the LAB maintains that Bear Stearns made a representation about the fundamental properties of inverse IOs upon which the Funds relied to their detriment, Bear Stearns asserts that the statements in the fax do not constitute a "representation" at all, much less a "misrepresentation" that certain securities are bearish. The first portion of the alleged statement, maintains Bear Stearns, is a relative price quotation, and the second part is, by its own terms, a suggestion - a statement of opinion.

The plain words of the allegation do not support the LAB's contention. The first portion of the fax states that four particular bonds are cheaper than certain other classes of bonds. The LAB does not claim that the statement was false - that the bonds were not, in fact, cheaper than the other classes of bonds. Instead, the LAB explains that this was a misrepresentation about the fundamental characteristics of these four securities. This is not a reasonable inference to be drawn in the LAB's favor since it requires the Court to take words that are concededly accurate and interpret them into a **[**24]** misrepresentation. See *Cohen v. Litt, 906 F. Supp. 957, 961 (S.D.N.Y. 1995)* ("***HN8***[] In evaluating a motion to dismiss, a court need not accept a complaint's legal conclusions and unwarranted factual deductions.").

The second portion of the fax is, as stated by Bear Stearns, a suggestion rather than a representation of fact. See *Schlaifer Nance & Co., Inc. v. Estate of Warhol, 927 F. Supp. 650, 661 (S.D.N.Y. 1996)* (finding that "***HN9***[] statements cannot support a fraud claim as a matter of law because they were simply not representations of fact"), aff'd, *119 F.3d 91 (2d Cir. 1997)*. [3] **[**25]** Additionally, the alleged statement does not indicate the type of security

[3] Bear Stearns notes that if the suggestion implies anything, it is that the four bonds are more bullish than the other classes of securities, not that they were more bearish, since the suggested hedge is to be smaller.

[*288] the suggested "offsetting hedge" would be. Because there can be no fraud without a misrepresentation, see *Cumberland Oil Corp. v. Thropp, 791 F.2d 1037, 1044 (2d Cir. 1986)*, this allegation cannot form the basis for fraud against Bear Stearns. [4]

Finally, the LAB alleges on information and belief that Bear Stearns described one of the forwards [5] as bearish in order to induce ACM to purchase it. Yet "***HN10***[] fraud pleadings generally cannot be based on information and belief." *Stern v. Leucadia Nat'l Corp., 844 F.2d 997, 1003 (2d Cir. 1988)*. The exception to this rule is that "fraud allegations may be so pleaded as to facts peculiarly within the opposing party's knowledge; even then, however, the allegations must be accompanied by a statement of facts upon which the belief is founded." Id.; see *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 664 (2d Cir. 1997)*; see also *Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990)* ("This exception to the general rule must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. Where pleading is permitted on information and belief, **[**26]** a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.").

The LAB represents that its basis for belief is that Bear Stearns described the identical security as bearish in written marketing materials faxed to the Clinton Group, another purchaser of CMOs. However, an alleged statement by Bear Stearns to a **[**27]** third party unrelated to the Funds cannot form the basis for LAB's fraud claim. It is nowhere alleged that the Funds ever heard or relied on this alleged misrepresentation, nor that the same representation was ever made to them. Furthermore, this specific allegation is not "peculiarly" within the defendant's knowledge, as it must for a fraud pleading premised on "information and belief," see *Campaniello Imports. Ltd., 117 F.3d at 664*, because the LAB must allege that the Funds heard it and relied on it. Thus allegation must also be dismissed for failure to meet the specificity required by *Rule 9(b)*.

B. The Fraud Claim Against the Brokers Will Be Dismissed Because the Lab Has Not Adequately Pleaded Reasonable Reliance

Under New York law, the LAB must establish actual, direct reliance upon the representations of bearishness made by the Brokers. See *Golden Budha Corp. v. Canadian Land Co., 931 F.2d 196, 202 (2d Cir. 1991)*; *Belin v. Weissler, 1998 U.S. Dist. LEXIS 10492*, *No. 97 Civ. 8787, 1998 WL 391114*, at *5 (S.D.N.Y. July 14, 1998); *Turtur v. Rothschild Registry Int'l, Inc., 1993 U.S. Dist. LEXIS 11939*, **[**28]** *No. 92 Civ. 8710, 1993 WL 338205*, at *6 (S.D.N.Y. Aug. 27, 1993); *Devaney v. Chester, 709 F. Supp. 1255, 1264 (S.D.N.Y. 1989)*. Once allegations of actual, direct reliance are adequately pleaded, the inquiry does not stop there. Under New York law, "***HN11***[] the asserted reliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud." *Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 157 N.E.2d 597, 599-600, 184 N.Y.S.2d 599, 603 (1959)*; see *Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1541* (2d Cir.) (stating that "in order to sustain a claim of fraud, a party must establish, inter alia, justifiable reliance"), cert. denied, *139 L. Ed. 2d 112, 118 S. Ct. 169 (1997)*; *Palmadessa, 874 F. Supp. at 588* (dismissing common law fraud claim in part because plaintiff failed to show that "he was justified in taking action in reliance" upon defendant's representations).

[*289] As against DLJ, the LAB asserts as an allegation of fraud that on February 1, 1994, DLJ's salesperson represented that "an inverse **[**29]** IO being offered by DLJ, GECMS 1993 16-A6, was 'a good bearish bond.'"

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[4] This allegation, if it were a proper misrepresentation, would nonetheless fail for inadequately pleading reasonable reliance, as discussed below.

[5] In addition to buying on repo, ACM also purchased CMOs for the Funds on a forward-settling basis, i.e., for settlement (payment by the Funds) in the future. In the CMO market, broker-dealers attempt to "pre-sell" certain tranches of CMOs before the CMO has been issued and settled. Frequently, these so-called "forwards" do not settle until several weeks or months after the buyer has committed to purchase them. The length of this lead time arises from the need of broker-dealers to assemble the collateral for and pre-sell much of the CMO deal, which may involve numerous adjustments to the very complex, multitranche structures.

(Compl. P 82.) However, the LAB concedes that the Funds never purchased that security. Thus, the LAB has failed to allege actual, direct reliance upon this representation of bearishness.

Also regarding DLJ, the LAB alleges that in September 1993, DLJ provided the Funds with a portfolio valuation analysis stating that three inverse IOs had a negative effective duration -- as per the LAB, an explicit representation that they were bearish; this proved to be false in March 1994 when, in a rising interest rate environment, DLJ marked each of these securities down from 40 to 61%. (*Id. P 105, 110)*. Similarly, as against all of the Brokers, the LAB maintains that at the end of February 1994, each of the Brokers ascribed values - or "marks" - to the Funds' inverse IOs. The LAB contends that the marks were tantamount to a misrepresentation that those securities were bearish or only slightly bullish when they were actually very bullish or unpredictable. In purported reliance on such representations, the LAB claims that the Funds retained the securities rather than selling them and subsequently purchased other, unidentified, **[**30]** securities. As to these allegations, the Funds' reliance was neither justified nor reasonable.

Before reaching the issue of justifiable reliance, the question of whether the marks constitute representations as to bearishness must be addressed. According to the Brokers, the LAB does not allege that any of the February marks were incorrect, much less fraudulently made. Rather, the LAB claims that the manner in which the prices changed from one month to another constituted a representation about the characteristics of the securities. The Brokers continue that the LAB is engaging in an Alice-in-Wonderland effort to create representations where none exist, for the February marks - simple price quotations without explanation for all of the bonds the Funds had with the Brokers - simply do not constitute representations as to bearishness. The marks were nothing more than the Brokers' valuation of the securities at that time, in the context of existing market conditions. Indeed, the LAB never alleges in the Complaint that the Brokers actually described any of these bonds as bullish or bearish - in other words, the Brokers never used the terms "bearish" or "bullish" in describing the bonds.

[31]** On the other hand, the LAB urges that the marks ascribed to the securities at the end of February constituted strong representations of bearishness because at the time of rising interest rates, the Brokers marked the securities as higher in value, or only slightly lower, than the previous month. As per the LAB, the marks were representations that these securities were in fact bearish or only slightly bullish. The LAB further contends that a month later, in March 1994, the representations were proven false when, with interest rates still rising, the Brokers lowered their marks for the same bonds, triggering the margin calls and liquidations that wiped out the Funds. Moreover, contends the LAB, because interest rates rose both in February and March, there was no economic or "market" basis for the Brokers' inconsistent approach to valuing these inverse IOs.

Because of the subsequent valuations in March, the LAB infers that the February marks were a misrepresentation of bearishness. However, as DLJ points out, the marks only indicate that the Brokers valued these securities at a certain price in February 1994 and that this valuation was lower - after a sea change in the market - in March **[**32]** 1994.

The LAB's allegation that the marks were affirmative representations of bearishness is debatable. Regardless, the fraud claim fails because if misrepresentations of bearishness were made, the LAB's reliance on them was neither justified nor reasonable as a matter of law.

HN12[] Under New York law, a party entering into a transaction has a duty to conduct an independent appraisal of the risk it is assuming and a duty to investigate the nature of its business transactions. See *Abrahami v. UPC Constr. Co. Inc., 224 A.D.2d 231, 234, 638 N.Y.S.2d 11, 14* (1st Dep't 1996); **[*290]** see also *Belin, 1998 WL 391114*, at *5-*8. In evaluating whether a plaintiff has adequately alleged justifiable reliance, a court may consider, inter alia, the plaintiff's sophistication and expertise in finance, the existence of a fiduciary relationship, and whether the plaintiff initiated the transaction. See *Brown v. E.F. Hutton Group, Inc., 991 F.2d 1020, 1032 (2d Cir. 1993)*.

The Second Circuit addressed the requirement for reasonable reliance in *Lazard Freres, 108 F.3d at 1542-43*. The defendant in that case asserted as an affirmative **[**33]** defense to the plaintiff's breach of contract claim that it reasonably relied upon plaintiff's characterization of the contents of a report that defendant considered material to its decision to enter into a deal. Id. Defendant further claimed that plaintiff had structured the deal in such a way that defendant had to rely on plaintiff's characterization and commit to the deal before it had the opportunity to review the report itself. *Id. at 1543*. In fact, defendant alleged that it was forced to rely on plaintiff's representations or lose the chance to be a part of the transaction. Nonetheless, the Second Circuit found that the defendant in Lazard Freres "was under a further duty to protect itself from misrepresentation." Id.

Lazard Freres imposes ***HN13***[] a duty on sophisticated investors to obtain documentation of information material to their investment decisions. Id. As the court proclaimed, "'where sophisticated businessmen engaged in major transactions enjoy access to critical information, but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.'" *Id. at 1541* **[**34]** (quoting *Grumman Allied Indus., Inc. v. Rohr Indus., Inc., 748 F.2d 729, 737 (2d Cir. 1984))*.

In evaluating the characteristics of complex derivative securities, DLJ maintains that no reasonable investor could rely solely on short-hand phrases like "bullish" or "bearish," or month-end valuations or portfolio analyses made after the purchase without conducting some independent due diligence. [6] Furthermore, the Funds cannot allege justifiable reliance in light of their representations that Askin and ACM - their sole decisionmakers - were sophisticated and experienced investors.

[35]** The LAB, however, states that Askin lacked the tools to model CMOs and to determine their response to interest rate changes and that Askin relied on the Brokers for that information; therefore, the extent of Askin's ability to determine the performance characteristics of the esoteric CMO tranches he was buying, and the reasonableness of his reliance on the Brokers in light of that ability, present fact questions that cannot be resolved in the instant motion.

Although the reasonableness of a plaintiff's reliance certainly can be, and often is, a factual issue, whether a plaintiff has adequately pleaded justifiable reliance is a proper subject for a motion to dismiss. See *Brown, 991 F.2d at 1032-33* (affirming the district court's dismissal of plaintiffs' common law fraud claim, holding that plaintiffs failed to plead justifiable reliance as a matter of law); *Independent Order of Foresters, 919 F. Supp. at 154* (dismissing plaintiff's fraud claim, holding that the plaintiff alleged reliance on statements in defendant's sales brochure was unreasonable as a matter of law). Indeed, the LAB does not contend that the Funds' receipt of the Brokers' valuation **[**36]** of securities in February 1994 satisfied the Funds' duty to conduct some independent due diligence.

Justifiable reliance is insufficiently pleaded. The LAB cannot use Askin and ACM's breach of duty to shift the responsibility for properly managing the Funds to the Brokers. As the Complaint states, it was the duty of Askin and ACM "to predict correctly a CMO's response to changes in interest **[*291]** rates - that is, to determine accurately whether the CMO would perform bullishly or bearishly - and then to have an appropriate balance of bullish and bearish securities or (in the case of Quartz) an appropriately directional portfolio." (Compl. P 46.) Askin and ACM "had committed themselves to making extensive use of proprietary computerized models to analyze CMOs by modeling cash flows, prepayment expectations, and yields across numerous interest rate scenarios." (*Id. P 67*.)

Askin and ACM were not novices. They cannot be held to the standard of an ordinary investor in terms of the type and amount of diligence that would be expected prior to making a purchase or investment. Indeed, the Funds collectively possessed close to $ 400 million in assets in March 1994, and Askin and ACM **[**37]** were their sole advisors. Accepting as true the LAB's allegation that ACM could not effectively model the CMOs, ACM was nonetheless bound by its contractual and fiduciary duties to the Funds to analyze the securities it purchased, and it had the means to hire someone to perform the necessary analysis if it could not. Additionally, the Complaint itself asserts that Askin and ACM based purchasing decisions on little or no analysis and research, but instead relied on

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[6] See generally *Independent Order of Foresters v. Donaldson, Lufkin & Jenrette Inc., 919 F. Supp. 149, 154 (S.D.N.Y. 1996)* (dismissing plaintiff's complaint and holding as a matter of law that no reasonable investor, trading millions of dollars in CMOs, would rely on information in a sales brochure in light of the volumes of other information available in highly regulated securities transactions); *McCoy v. Goldberg, 883 F. Supp. 927, 936 (S.D.N.Y. 1995)* (dismissing complaint for failure to establish justifiable reliance where plaintiffs ignored information in prospectus and instead relied on information in summaries).

Broker "recommendations, representations, valuations, and reports, Askin's 'instincts,' and unsophisticated analyses to select the Funds' securities." (*Id. P 70*.) The lack of due diligence and investigation on Askin's part belies any representation that Askin's reliance on the February marks or DLJ's September 1993 valuation was justifiable or reasonable. Moreover, there is no allegation of the existence of a special or fiduciary relationship between the Brokers and the Funds such that wholesale reliance on the Brokers would border on reasonable. Thus, the fraud claim against the brokers is dismissed. [7]

[38] III. Counts XIV and XV for Negligent and Innocent Misrepresentation Are Precluded By the Martin Act**

HN14[] New York's Martin Act, N.Y. Gen. Bus. Law, art 23-A, §§ 352 et seq., governs fraud and deception in the sale of securities. It provides for the attorney general to regulate and enforce New York's securities laws. It is well established that there exists no private right of action for claims that are within the purview of the Martin Act. See, e.g., *Vannest v. Sage, Rutty & Co, Inc., 960 F. Supp. 651, 657 n.6 (W.D.N.Y. 1997)*; *Independent Order of Foresters, 919 F. Supp. at 153*; *CPC Int'l Inc. v. McKesson Corp., 70 N.Y.2d 268, 276, 514 N.E.2d 116, 519 N.Y.S.2d 804, 807 (1987)*; *Rego Park Gardens Owners v. Rego Park Gardens Assocs., 191 A.D.2d 621, 595 N.Y.S.2d 492* (2d Dep't 1993). Thus courts have dismissed state law claims "covered" by the Martin Act on the grounds that permitting them to proceed "would be equivalent to permitting a private claim" under the Act. *Vannest, 960 F. Supp. at 657 n.6*; see *Independent Order of Foresters, 919 F. Supp. at 153-54*. Additionally, **[**39]** a plaintiff cannot convert a nonexistent Martin Act claim into another state law cause of action by artful pleading. See id.; *Horn v. 440 East 57th Co., 151 A.D.2d 112, 119, 547 N.Y.S.2d 1, 5* (1st Dep't 1989).

HN15[] The Martin Act prohibits various fraudulent and deceitful practices in the distribution, exchange, sale, and purchase of securities but does not require proof of intent to defraud or scienter. See *CPC Int'l, 70 N.Y.2d at 276, 514 N.E.2d at 118, 519 N.Y.S.2d at 807*. As a result, claims for breach of fiduciary duty and negligent and innocent misrepresentation, for example, which do not require a plaintiff to plead and prove intentional deceit, are covered by the Martin Act and cannot be asserted by private litigants. [8] See *Independent Order of Foresters, **[*292]** 919 F. Supp. at 153-54* (dismissing plaintiff's breach of fiduciary duty and negligent misrepresentation claims arising from defendant's alleged misdescription of CMOs in its sales brochures as an impermissible effort to bring a private action under the Martin Act); *Horn, 151 A.D.2d at 119, 547 N.Y.S.2d at 5* (affirming the dismissal of plaintiffs' **[**40]** negligent misrepresentation and breach of fiduciary duty claims based on alleged oral misrepresentations in connection with the purchase of co-op shares); *Rego Park, 191 A.D.2d at 622, 595 N.Y.S.2d at 492* (upholding the dismissal of a claim for negligent misrepresentation "because this cause of action sought, in essence, to pursue a private cause of action under the Martin Act"); see also *Vannest, 960 F. Supp. at 657 n.6* (noting that plaintiffs' breach of fiduciary duty and negligent misrepresentation claims, which were predicated on defendant's representations to plaintiffs before they purchased limited partnership interests, could be dismissed as violating the Martin Act).

[41]** According to the LAB, however, the language and the legislative history of the Martin Act cannot be interpreted to preclude the assertion of the common law remedies. Yet this conclusion ignores the case law, cited

[7] The LAB's claims for negligent and innocent misrepresentation, discussed below, may also be dismissed for lack of adequately pleading justifiable reliance. See generally *Kimmell v. Schaefer, 89 N.Y.2d 257, 263-64, 675 N.E.2d 450, 454, 652 N.Y.S.2d 715, 719 (1996)* (discussing negligent misrepresentation); *Heard v. New York, 82 N.Y.2d 66, 74-75, 623 N.E.2d 541, 545-46, 603 N.Y.S.2d 414, 418-19 (1993)* (same); *Dygert v. Leonard, 138 A.D.2d 793, 794, 525 N.Y.S.2d 436, 438* (3d Dep't 1988) (stating that if the "element of scienter is subtracted from a cause of action for fraud, the remainder constitutes innocent misrepresentation").

[8] The Martin Act does not preclude private litigants from bringing common law fraud claims because such claims require a plaintiff to prove intent or scienter. Therefore, courts allow these claims to proceed while simultaneously dismissing negligent misrepresentation and breach of fiduciary duty claims. See e.g., *Whitehall Tenants Corp. v. Estate of Olnick, 213 A.D.2d 200, 623 N.Y.S.2d 585* (1st Dep't), appeal denied, ***86 N.Y.2d 704, 631 N.Y.S.2d 608 (1995)***.

above, to the contrary in which courts have held that the Martin Act precludes common law claims negligent misrepresentation and breach of fiduciary duty that are predicated on securities transactions.

The LAB also maintains that much of the cited precedents, particularly Horn, Rego Park, and Whitehall, are inapplicable because their effect is limited to claims relating to cooperatives and condominiums. The Martin Act, however, is not limited to cooperatives and condominiums, and these state cases did not limit their holdings to such circumstances. Moreover, the LAB's distinction ignores the decision in Independent Order of Foresters, which explicitly holds that the Martin Act precludes claims for misrepresentation and breach of fiduciary duty arising out of the sale of CMOs and limited partnership interests. See *Independent Order of Foresters, 919 F. Supp. at 153*; see also *Vannest, 960 F. Supp. at 657 n.6*.

In Independent **[**42]** Order of Foresters, the plaintiff had alleged a variety of claims in connection with its purchases of CMOs. As in the instant case, the plaintiff claimed that the defendants made false representations to the plaintiff regarding the securities. *919 F. Supp. at 151-52*. On defendant's motion to dismiss, the court concluded as a matter of law that plaintiff's negligent misrepresentation claim could not be sustained. The court found that

> any claim that is covered by the Martin Act is therefore not actionable by a private party; otherwise, the party essentially would be permitted to bring a private action under the Martin Act. It is established that actions for negligent misrepresentation and breach of fiduciary duty, without intentional deceit, are covered by the Martin Act. . . . Plaintiff has brought both actions. Hence, these cause[s] of action are hereby dismissed.

Id. at 153-54 (citations and footnotes omitted). A similar result is mandated here.

In the instant case, Counts XIV and XV allege that the Brokers negligently and innocently misrepresented the bullish/bearish nature of certain CMOs. As asserted in the Complaint, the misrepresentations **[**43]** were made in connection with the purchase of CMOs by the Funds. Because the Martin Act precludes these causes of action, they are dismissed.

IV. The Brokers' Motion to Dismiss Counts II and XII Alleging Tortious Interference With Contracts Is Granted

HN16[] To state a claim for tortious interference with contractual relations under New York law, a plaintiff must allege "(1) the existence of a valid contract between itself and a third party for a specific term; (2) defendant's knowledge of that contract; (3) **[*293]** defendant's intentional procuring of its breach; and (4) damages." 150 *East 58th St. Partners, L.P. v. Wilkhahn Wilkening & Hahn GmbH & Co., 1998 U.S. Dist. LEXIS 1701*, No. 97 Civ. 4262, 1998 WL 65992, at *1 (S.D.N.Y. Feb. 17, 1998) (quoting *Riddell Sports Inc. v. Brooks, 872 F. Supp. 73, 77 (S.D.N.Y. 1995))*; see *Jews for Jesus, Inc. v. Jewish Community Relations Council of N.Y., Inc., 968 F.2d 286, 292 (2d Cir. 1992)*; *Union Carbide Corp. v. Montell N.V., 944 F. Supp. 1119, 1136 (S.D.N.Y. 1996)*; *Foster v. Churchill, 87 N.Y.2d 744, 749-50, 665 N.E.2d 153, 156, 642 N.Y.S.2d 583, 586 (1996)*. **[**44]** Additionally, the plaintiff must assert that defendant's actions were the "but for" cause of the alleged breach of contract - that is, that there would not have been a breach but for the activities of the defendant. See *Sharma v. Skaarup Ship Management Corp., 916 F.2d 820, 828 (2d Cir. 1990)*; *Michele Pommier Models, Inc. v. Men Women N.Y. Model Management, Inc., 1997 U.S. Dist. LEXIS 18294*, *No. 97 Civ. 6837, 1997 WL 724575*, at *3 (S.D.N.Y. Nov. 18, 1997); *Demalco Ltd. v. Feltner, 588 F. Supp. 1277, 1280 (S.D.N.Y. 1984)*; *Washington Ave. Assocs., Inc. v. Euclid Equip., Inc., 229 A.D.2d 486, 487, 645 N.Y.S.2d 511, 512* (2d Dep't 1996). The pleadings may not be conclusory; rather they must be supported by sufficient allegations of fact. See 150 East 58th St., 1998 WL 65992, at *2; *S.A.E. Motor Parts Co., Inc. v. Tenenbaum, 226 A.D.2d 518, 519, 640 N.Y.S.2d 615, 616 (2d Dept. 1996)*.

Because the Complaint does not adequately plead "but for" causation, the tortious interference with contracts claims against the Brokers must be dismissed.

A. Count II Alleging Tortious [**45] Interference With Contracts Between the Funds and ACM

LAB's Complaint alleges that, despite their knowledge that ACM's investment advisory agreements with the Funds obligated ACM to create and maintain market-neutral portfolios (or an appropriately directional portfolio for Quartz), and despite their knowledge of the Funds' decidedly bullish tilt, the Brokers induced ACM to breach its contracts by purchasing a great volume of toxic securities that were bullish or whose responses to interest rate changes were impossible to predict, and as a direct result of the interference by the Brokers with ACM's performance of its obligations to the Funds, the Funds have been damaged.

Despite the words "direct result" in the Complaint, the facts alleged negate the possibility that the Brokers' alleged actions were the "but for" cause for the alleged breaches of contract. After all, the LAB maintains that numerous dealers, including nonparties, were selling inappropriate securities to the Funds. (See Compl. P 4 (acknowledging that the Brokers were "among" the principal sellers of CMOs to the Funds).) Thus, according to the Complaint, even if ACM had not purchased CMOs from each of the **[**46]** Brokers, it would have breached its contractual obligations to the Funds by making purchases from other broker-dealers.

The LAB contends that it is mere speculation that ACM would have breached its investment advisory agreements with the Funds absent the Brokers' involvement and proposes that the Brokers are injecting a trial issue into a motion to dismiss. However, the LAB must allege facts which, if proven, would show "that there would not have been a breach but for the activities of defendant." *Sharma, 916 F.2d at 828*; see also *In re American Express Co. Stockholder Litig., 39 F.3d 395, 400-01 n.3 (2d Cir. 1994)* (stating that "***HN17***[] conclusory allegations of the legal status of the defendant's acts need not be accepted as true for the purposes of ruling on a motion to dismiss"). Here, the LAB has not alleged facts showing "but for" causation. Indeed, the LAB's own allegations are fatal to its tortious interference with contracts claim. The LAB alleges that in early 1994 one-half of the "volatile and esoteric" CMOs that the Funds owned were purchased from dealers other than Bear Stearns, DLJ, and Merrill Lynch. (See Compl. P 40.) Thus if the **[**47]** Brokers had not sold the "volatile and esoteric" CMOs to the Funds, ACM would have - and did - purchase them from other brokers.

HN18[] Once a plaintiff alleges facts, as does the LAB in the case at bar, establishing that the breaching party was predisposed toward breaching its agreement, the claim for tortious **[*294]** interference must be dismissed for failure to plead "but for" causation. See *Special Event Entertainment v. Rockefeller Ctr., Inc., 458 F. Supp. 72, 78 (S.D.N.Y. 1978)*; see also *Rapp Boxx, Inc. v. MTV, Inc., 226 A.D.2d 324, 642 N.Y.S.2d 228* (1st Dep't 1996). In dismissing a claim for tortious interference with contract, the court in Special Event Entertainment took note of plaintiff's allegations that the breaching parties "were not disposed toward honoring their alleged commitment even before [they] entered the negotiations." *Special Event Entertainment, 458 F. Supp. at 78*.

In the instant case, it cannot be said that if a specific Broker had not acted as it allegedly did the Funds would have purchased only appropriate securities. Because the LAB's allegations indicate that ACM was predisposed toward breaching **[**48]** its agreements with the Funds and would have done so independently of each of the Broker's actions or participation, the LAB has failed to allege causation. Indeed, the Complaint goes beyond alleging predisposition since ACM, in fact, purchased the "volatile and esoteric" CMOs from other broker-dealers. Thus Count II is hereby dismissed.

B. Count XII Alleging Tortious Interference With Contracts Between the Funds and the Brokers

As to Count XII, the Complaint alleges that despite the existence of the PSA Agreements and other contracts that required liquidation of the Funds' portfolios in a commercially reasonable manner and each Broker's knowledge of those contracts, each Broker intentionally interfered with the other Brokers' contracts through the provision of lowball accommodation bids, which caused commercially unreasonable liquidations in breach of the agreements.

According to the LAB, the causation requirement has been met because "but for" the Brokers' accommodation bids, the Brokers would not have breached their PSA and other agreements. Yet this conclusory allegation without any relevant supporting facts is insufficient to state a cause of action **[**49]** for tortious interference with contractual relations against the Brokers. See Euclid Equip., Inc., 229 A.D.2d at 487, 654 N.Y.S.2d at 512.

Additionally, the Complaint alleges that "as an integral part of its plan to purchase for itself the Funds' securities at prices well below fair market value, Bear Stearns entered into an agreement with Kidder, DLJ, Merrill Lynch, and other broker-dealers" to submit lowball bids. (Compl. P 130.) Furthermore, elsewhere in the Complaint, the Brokers are alleged to have engaged in "an unlawful combination and conspiracy in restraint of interstate trade and commerce" in connection with the very same activity. (*Id. P 210*.)

However, ***HN19***[] the LAB must allege "but for" causation for each individual Broker and cannot satisfy that requirement merely by alleging that two or more Brokers acted in concert to cause the breach. See Crossland Fed. Sav. Bank v. 62nd and *First Assocs., L.P., 1993 U.S. Dist. LEXIS 14332*, *No. 92 Civ. 4056, 1993 WL 410461*, at *4 (S.D.N.Y. Oct. 12, 1993); *Sharma v. Skaarup Ship Management Corp., 699 F. Supp. 440, 447 (S.D.N.Y. 1988)* [hereinafter Sharma I], **[**50]** aff'd, *916 F.2d 820 (2d Cir. 1990)*; see also *Mina Investment Holdings Ltd. v. Steven W. Lefkowitz, 1998 U.S. Dist. LEXIS 12231, 97* Civ. 1321, slip op. at 8-13 (S.D.N.Y. Aug. 6, 1998) (dismissing tortious interference with contract claim for failure to allege "but for" causation where plaintiffs alleged that defendant conspired or acted in concert with the breaching party, and the allegations demonstrated that the breaching party was not inclined to fulfill its contractual obligations). The reason for this rule is that collusion involving a party to the contract indicates as a matter of law that the party involved was predisposed to breach its contractual obligations; thus, the allegedly interfering party cannot be the "but for" cause of the breach. In fact, as previously stated, a plaintiff who asserts a claim for tortious interference with contract must allege affirmatively that there would not have been a breach but for the activities of the particular defendant. See *Sharma, 916 F.2d at 828*.

The Crossland court dismissed a defendant's counterclaim for tortious interference with contract because defendant's assertion that **[**51]** "plaintiff participated in efforts 'to conspire **[*295]** with Cineplex to breach or repudiate its Lease with [defendant]'" failed to establish "but for" causation. *Crossland, 1993 WL 410461*, at *4. The court reasoned that plaintiff's activities with the Cineplex "in no way forecloses other reasons" for Cineplex's decision to violate its contract with defendant. Id.

In Sharma I, the district court dismissed a claim for tortious interference with contractual relations where the complaint alleged that "the Skaarup defendants procured the breach 'by conspiring and acting with Chemical to make it impossible for plaintiffs to arrange the necessary financing, which Chemical was obligated to allow and encourage.'" *Sharma I, 699 F. Supp. at 447*. The court found that "the allegation that the Skaarup defendants acted in concert with Chemical implies that Chemical would have breached its obligations even without the involvement of the Skaarup defendants." Id. "In no way do plaintiffs allege that Skaarup defendants were the motivating force behind Chemical's breach." Id.

In the instant case, the allegation that the Brokers engaged in collusive **[**52]** conduct consisting of the same activity that constituted the alleged breaches of contract precludes the LAB's claim for tortious interference. Each Broker could not have been the cause of another broker's breach because, according to the Complaint, the agreement or conspiracy to liquidate the portfolios through the use of accommodation bids was a result of, and therefore flowed directly from, each Broker's individual decision to breach its agreements. As in Crossland and Sharma I, allegations of conspiracy or collusive conduct do not foreclose the possibility that the broker-dealers would have violated their contracts with the Funds regardless of the participation by the Broker at issue.

Because the LAB cannot allege that each Broker's conduct was the causal force behind the purported breaches of contract by the other broker-dealers, it has not sufficiently alleged "but for" causation, and therefore the tortious interference with contracts claim in Count XII against the Brokers is dismissed.

V. The LAB Has Not Adequately Pleaded Violations of the Sherman and Donnelly Acts

According to the LAB, instead of liquidating the Funds' securities in bona fide auctions, **[**53]** the Brokers agreed to exchange, and did exchange, lowball accommodation bids that allowed each of them, and other broker-dealers, to acquire the securities in their possession at artificially depressed prices. The LAB alleges that by agreeing to forestall a competitive auction the Brokers engaged in a conspiracy in violation of the Sherman Act, *15 U.S.C. § 1*, and New York's Donnelly Act, *N.Y. Gen. Bus. Law § 340*.

Section 1 of the Sherman Act reads, in relevant part:

> HN20[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

15 U.S.C. § 1.

HN21[] To withstand a motion to dismiss, the plaintiff in a Sherman Act conspiracy claim must allege a concerted action by two or more persons that unreasonably restrains interstate or foreign trade or commerce. See In re Nasdaq Market-Makers Antitrust Litig., 894 F. Supp. 703, 710 (S.D.N.Y. 1995); **[**54]** Three Crown Ltd. Partnership v. Caxton Corp., 817 F. Supp. 1033, 1047 (S.D.N.Y. 1993); Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Servs., 746 F. Supp. 320, 325 (S.D.N.Y. 1990); accord International Distrib. Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 793 (2d Cir. 1987). Additionally, the plaintiff "must do more than merely allege that a conspiracy exists, it must provide some factual basis for that allegation." Fort Wayne Telsat v. Entertainment and Sports Programming Network, 753 F. Supp. 109, 115 (S.D.N.Y. 1990); see Garshman v. Universal Resources Holding Inc., 824 F.2d 223, 230 (3d Cir. 1987); Heart Disease Research Found. v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972). For example, the plaintiff must identify the relevant product **[*296]** market, the co-conspirators, and describe the nature and effects of the alleged conspiracy. See In re Nasdaq, 894 F. Supp. at 710; International Television Prods. Ltd. v. Twentieth Century-Fox Television Div. of Twentieth Century-Fox Film Corp., 622 F. Supp. 1532, 1537 (S.D.N.Y. 1985). **[**55]**

HN22[] Except in narrow classes of per se violations, the plaintiff must show that the defendants acted to restrain competition. To allege unreasonable restraint of trade, something more than a private dispute must be alleged. The relevant product market must be identified, and the plaintiff must "'allege how the net effect of the alleged violation is to restrain trade in the relevant market, and that no reasonable alternative source is available' to consumers in that market." International Television Prods., 622 F. Supp. at 1534 (quoting Gianna Enters. v. Miss World Ltd., 551 F. Supp. 1348, 1355 (S.D.N.Y. 1982)); see North Jersey Secretarial School, Inc. v. McKiernan, 713 F. Supp. 577, 583 (S.D.N.Y. 1989). The economic impact in the relevant market must be specified, and the plaintiff must show that "the alleged restraint of trade tends or is reasonably calculated to prejudice the public interest." Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 273 (5th Cir. 1979).

In the instant case, the Brokers maintain that the LAB has not alleged any economic impact on the CMO market but only injury to the Funds **[**56]** and that this failure to plead restraint of trade mandates dismissal of the Sherman Act claim. By contrast, the LAB seeks to neutralize any such inadequacy of its pleadings by urging that the alleged bid-rigging conspiracy is a per se violation and therefore - unlike the "rule of reason" standard utilized in analyzing the sufficiency of an antitrust claim - it is not required to show deleterious impact on competition. The LAB suggests that because a horizontal bid-rigging scheme has been alleged, it is entitled to per se treatment. In support for its proposition, the LAB cites, inter alia, United States v. Koppers Co., 652 F.2d 290, 291, 294 (2d Cir. 1981), where a bid-rigging conviction was upheld without proof of unreasonable restraint of trade because the bid-rigging was found to be illegal per se. However, merely labeling its claim as "bid-rigging" does not entitle the LAB to per se status and the less stringent pleading standards that such status would afford it. Affixing certain labels to alleged conduct is insufficient to invoke per se treatment.

"The Supreme Court has characterized as HN23[] per se violations of the Sherman Act certain types **[**57]** of conduct so destructive of competition that they almost always result in unreasonable restraints of trade. Such characterization, however, is reserved for 'manifestly anticompetitive' practices." Apex Oil Co. v. DiMauro, 713 F. Supp. 587, 595 (S.D.N.Y. 1989) (citing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)). Only a narrow class of practices warrant classification as per se violations. See Gianna Enters., 551 F. Supp. at 1354; see also Continental T.V., 433 U.S. at 49-50; Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958).

In its reluctance to create new categories of per se violations, the Supreme Court has held that "HN24[] it is only after considerable experience with certain business relationships that courts classify them as per se violations." United States v. Topco Assocs., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972); see Apex Oil Co., 713 F. Supp. at 596. Indeed, the Supreme Court has cautioned against an "unthinking application" **[**58]** of the per se categories:

> Easy labels do not always supply ready answers. . . . Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not per se in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing." That will often, but not always, be a simple matter.

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 8-9, 13 n.24, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1971) (citations omitted). It is typically, therefore, necessary to scrutinize a challenged practice and the industry affected before deciding whether **[*297]** the practice is a per se violation. See Apex Oil Co., 713 F. Supp. at 596.

Courts have recognized that HN25[] a rigid per se classification is especially inappropriate where the complained-of practice is novel or unique. See Broadcast Music, 441 U.S. at 9; see Hertz Corp. v. City of New York, 1 F.3d 121, 129 (2d Cir. 1993) **[**59]** (stating that a "per se rule is used in the relatively narrow circumstance where courts have sufficient experience with the activity to recognize that it is plainly anticompetitive and lacks any redeeming virtue"). Because the LAB's allegations in the instant case involve novel business practices and relationships that have not been addressed by the courts in an antitrust context, they preclude the application of per se analysis.

The LAB alleges that the mechanism used by the Brokers for the "purchase, sale, liquidation, and transfer of the securities in the Funds' portfolios" constituted an "unlawful combination and conspiracy in restraint of trade." (Compl. P 210.) The alleged conspiracy involved agreements among the Brokers to supply "collusive, rigged, and lowball accommodation bids that were designed . . . to create the false appearance of competitive bidding for the Funds' securities in the liquidation auctions . . . and to provide a false pricing background for deemed sales . . . ." (Id. P 212.) However, the traditional "horizontal price-fixing" paradigm does not contemplate a business practice and circumstance, such as the one alleged here, in which **[**60]** an unprecedented multibillion dollar liquidation took place in a falling market, where the liquidation was governed by contract under which deemed sales were expressly permitted, where all parties understood that the contract permitted some form of concerted action as a mechanism by which to gauge prices, where there was no "widely distributed or readily available" price quotations for CMOs by which to set a standard price (id. P 33), and where all of the Brokers alleged to have created the market were on the "sell" side.

In contrast, the authority on which the LAB relies present classic textbook examples of price fixing. Because of the unique nature of the circumstances surrounding the liquidations involved at bar, a rigid per se analysis is inappropriate. See Cha-Car, Inc. v. Calder Race Course, Inc., 752 F.2d 609, 613 (11th Cir. 1985) ("HN26[] The per se standard should not be extended to alleged restraints of ambiguous effect; any departure from the rule of reason standard must be based upon demonstrable economic effect, rather than from formalistic line drawing."); cf. Apex Oil Co., 713 F. Supp. at 598 (observing that "what behavior constitutes **[**61]** a horizontal group boycott deserving of per se condemnation under the Sherman Act has been the source of considerable confusion in recent years" (citations omitted)).

Due to the novel and complex nature of the circumstances and market at issue, and the lack of clear precedent or prior consideration of this industry's customs or dynamics, the "rule of reason," requiring the demonstration of restraint of trade and economic impact in the relevant market, is the appropriate standard under which the LAB's antitrust claims will be treated. Under this standard, the Complaint fails to state a cause of action.

The LAB does not allege that the conduct of the Brokers had any economic impact on the CMO market at large or any prejudice to the public interest. Nor does it articulate how the alleged conspiracy during the last week of March 1994 had the effect of substantially lessening the competition in the relevant market. Moreover, the Complaint does not state that the Brokers' actions resulted in a lack of reasonable alternative sources for buyers and sellers of

CMOs. In short, the LAB fails to adequately allege that anyone other than the Funds themselves was injured or prejudiced by the **[**62]** actions of the Brokers. This pleading failure is fatal to the LAB's Sherman Act cause of action. As the court stated in *Jarmatt Truck Leasing Corp. v. Brooklyn Pie Co., Inc., 525 F. Supp. 749 (E.D.N.Y. 1981)*, when it dismissed a Sherman Act *§ 1* claim,

> beyond its bald conclusions as to restraint of trade, the complaint fails to allege facts which show injury to competition, as distinct from injury to a competitor. No violation of *Section 1* of the Sherman Act is possible absent proof of anti-competitive effect beyond the injury **[*298]** to plaintiffs, and facts must be pleaded from which such effect can be inferred.

Id. at 750 (citations omitted).

Instead of articulating a specified economic impact in a relevant market with defined boundaries, the LAB alleges only that "nationwide competition and trade were injured, unreasonably restrained and eliminated in relevant markets under the Sherman Act," (Compl. P 214), and that the Brokers' acts "restrained competition within the State of New York." (*Id. P 221*.) After sifting through the conclusory allegations, the Complaint simply alleges that the Funds were injured as a result **[**63]** of an alleged conspiracy during a two-day liquidation of the Funds' portfolios. That injury can be redressed in the context of the LAB's breach of contracts claims, not through the antitrust laws. Accordingly, Count VII of the Complaint is dismissed.

HN27[] New York's ***antitrust law***, the Donnelly Act, is "modeled on the Sherman Act and should be construed in light of federal precedent." *Kramer v. Pollock-Krasner Foundation, 890 F. Supp. 250, 254 (S.D.N.Y. 1995)*; see *X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 518, 634 N.E.2d 158, 161, 611 N.Y.S.2d 786, 789 (1994)*. Thus, since the LAB has failed to allege a federal antitrust claim against the Brokers, its Donnelly Act claim in Count VIII is also dismissed.

VI. Count XI Alleging Breach of Duty to Liquidate in a Commercially Reasonable Manner Is Dismissed Only as to Bear Stearns and DLJ

The Brokers held most of the securities they liquidated pursuant to repos. The LAB represents that these repos were the functional equivalent of secured loans and that the Brokers, as secured parties, were obligated by Article 9 of the Uniform Commercial Code ("UCC") to exercise their right to liquidate **[**64]** in good faith and a commercially reasonable manner. See N.Y. *U.C.C. § 1-203* (McKinney 1993); id. § 9-594 (McKinney 1990). The Complaint also alleges that the common law applicable to pledgees imposes a duty of commercial reasonableness in liquidation. In Count XI, the LAB alleges that the Brokers violated these statutory and common law duties.

Because Article 9 is only applicable to secured transactions, the maintenance of the instant claim depends upon the characterization of the repos. If they are purchase and sales agreements, the UCC is inapplicable and Count XI must be dismissed. If they are secured loans, the claim stands.

A. Repurchase Agreements Defined [9]

HN28[]

A repurchase agreement, by its terms, involves two separate but related transactions: **[**65]** (1) a sale by a party (the "repo seller") of securities in exchange for cash and (2) an agreement by the repo seller to repurchase the same or equivalent securities for a specified price at a future date. In a reverse repurchase agreement, the party initially buys the securities in exchange for cash, and incurs a forward obligation to resell them. Every repo is also a reverse repo; that is, a reverse repurchase agreement is simply a repurchase agreement viewed from the

[9] The BMA, as amicus curiae, has submitted a memorandum to enlighten the Court about repos in general and their importance to the debt capital markets. The discussion in this subsection is based primarily on the BMA's amicus curiae brief.

perspective of the repo buyer. See *In re Bevill, Bresler & Schulman Asset Management Corp., 67 B.R. 557, 566-67 (D.N.J. 1986)*.

Repos are creatures of the capital markets. Their purchase-and-sale form reflects a value-for-value exchange designed as such for use explicitly in those markets. The legal status of repo agreements is not easily subject to characterization - the purchase-and-sale framework incorporates characteristics of other transactional forms, including financings. For example, as in a financing, the repurchase price for the securities reflects the time value of the cash obtained by the repo seller in the initial sale. However, the repo structure is distinct from that of a loan in other **[**66]** respects. Unlike a lender taking collateral for a secured loan, a repo buyer "take[s] title to the securities received and can trade, sell or pledge them." *SEC v. Drysdale Sec. Corp., 785 F.2d 38, 41 (2d Cir. 1986)*. Such free transferability of repo **[*299]** securities renders repos attractive to securities dealers whose inventories of securities turn over rapidly and who may require securities to be available for a variety of settlement obligations. At the same time, the adjustability of the term of repo agreements makes them an ideal financial management tool for institutional investors investing cash balances. Thus, for "such entities as state and local governments, public and private pension funds, money market and other mutual funds, banks, thrift institutions, and large corporations, repos have become a vital tool of cash management." S. Rep. No. 98-65, at 45 (1983) [hereinafter 1983 Senate Repo Amendments Report].

Repos are the principal method used by securities dealers to fund their acquisition of U.S. Treasury securities. See Department of the Treasury, Sec. and Exch. Comm'n, and Bd. of Governors of the Fed. Reserve Sys., Joint Report on **[**67]** the Government Securities Market at A-11 (Jan. 1992) [hereinafter 1992 Joint Report]. The Treasury relies heavily on primary dealers to absorb new government debt issues, and repos are extensively used by dealers to obtain the cash necessary to permit their underwriting of such issues. See, e.g., Government Securities Act Amendments of 1993, H.R. Rep. No. 255, at 10-11 (1993), reprinted in 1993 U.S.C.C.A.N. 2996, 2997. By maximizing the ease and flexibility with which dealers can acquire and hold inventories of Treasury securities, repo transactions contribute significantly to the depth and liquidity of the secondary market for Treasury securities. See, e.g., 1983 Senate Repo Amendments Report at 45-46. Together with other trading techniques and transactions, repos and reverse repos "have benefitted the market and the taxpayer by increasing liquidity, thereby lowering the government's financing costs." 1992 Joint Report at 1. [10]

[68]** Repo transactions perform a similar function with respect to other fixed-income securities, including federal agency securities such as those issued or guaranteed by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). [11] They are a vital and cost-efficient mechanism for broker-dealers to fund their inventory and dealing activities in these securities. The existence of a repo market in a particular type of securities also adds to the liquidity of the underlying cash market for the securities. CMOs, like those involved in the instant case, are securities where cash flows from a securitized mortgage pool are repackaged into classes of interests with different projected maturities and principal repayment schedules which appeal to a broad range of investors with specific investment needs and objectives. CMOs allow their investors to retain the yield and credit quality advantages of mortgage-backed securities while reducing many of their perceived burdens, particularly those relating to prepayment uncertainty. The ultimate beneficiaries of CMOs and other mortgage-backed securities are residential home buyers who are **[**69]** able to obtain lower-cost mortgages as a result of the cheaper cost of funds to originators. As Congress has recognized, the CMO market, and the repo market for CMOs which enable dealers in these securities to fund their inventory and make markets in

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[10] Repos involving U.S. Treasury securities are also used by the Federal Reserve System as its primary tool for implementation of monetary policy. See *In re Bevill, Bresler & Schulman Asset Management Corp., 878 F.2d 742, 745 (3d Cir. 1989)*.

[11] As stated by the BMA, the repo market fosters important interrelationships among the different types of fixed-income securities. The market for federal agency securities, and the fixed-income markets generally, are closely linked to the market for Treasury securities: the price of an agency security is generally expressed in terms of its "spread" over Treasury securities of comparable maturity, and dealers quickly act on arbitrages between Treasury and agency security markets. See 1992 Joint Report at D-4 to D-5. Rapid movements of securities through repos and reverse repos facilitate this process and are thus among a number of financial mechanisms that contribute to the smooth functioning of the nation's fixed-income markets.

these securities, is, like the repo market in U.S. Treasury securities, important to the national economy. See generally S. Rep. No. 98-293 (1984) (noting that the Secondary Mortgage Market Enhancement Act in 1984 was enacted for the purpose of "encouraging the 'broadening of the market for mortgage-backed securities by encouraging **[*300]** more extensive involvement of the private sector'").

[70] B. Characterization of the Repos**

The key to the inquiry as to whether the repos in this case should be characterized as purchase and sale agreements or secured loans lies in the intention of the parties. Article 9 only applies to transactions in which the parties' intent is to create a security interest. See N.Y. *U.C.C. § 9-102* (McKinney 1990); see also *In re O.P.M. Leasing Servs., Inc., 23 B.R. 104, 115 (Bankr. S.D.N.Y. 1982)* (stating that "***HN29***[] Article 9 applies only to a transaction which is intended to create a security interest in personal property"). ***HN30***[] To determine whether the parties to a transaction intended to create a security interest, courts look to the agreement governing the transaction. Where the parties' intention is clearly and unambiguously set forth in the agreement, effect must be given to the expressed intent. See *John Hancock Mutual Life Ins. Co. v. Amerford Int'l. Corp., 22 F.3d 458, 461 (2d Cir. 1994)* (stating that ***HN31***[] where the agreement is clear, courts should look to the "terms expressed in the contract itself, rather than to 'extrinsic evidence of terms that were not expressed or judicial views on what terms might **[**71]** be preferable'"); In re *O.P.M., 23 B.R. at 116* & n.8 (observing that "it would have been a simple matter for the parties expressly to provide . . . for the grant of a security interest," but because they did not "it is evident that no security interest was ever intended"). ***HN32***[] The objective intent of the parties "expressed or apparent in the writing controls" the agreement's interpretation, while the "undisclosed, subjective intent of the parties has no bearing" on the construction of the contract. *In re Bevill, 67 B.R. at 586*.

In the case at bar, the governing contracts include the PSA Agreements into which Bear Stearns and DLJ entered with each of the Funds, the PSA Agreement into which Merrill Lynch entered with Quartz, and the trade confirmations relied on by Merrill Lynch as to Granite Partners and Granite Corp. [12]

[72] 1. The PSA Agreements**

According to the Brokers, the plain language of the PSA Agreement demonstrates that each of the Brokers was an outright purchaser of bonds from the Funds and not merely a "secured party." The Brokers assert that the intention of the Brokers and the Funds not to engage in secured transactions is made clear by paragraph 6 of the PSA Agreement, which reads, in pertinent part: "the parties intend that all Transactions hereunder be sales and purchases and not loans." Thus, under the PSA Agreement, the securities acquired by the Brokers in reverse repos were sold to the Brokers and were not collateral pledged to secure a loan. Consistent with the parties' intent to effect a transfer of ownership, paragraph 8 of the PSA Agreement states, in relevant part:

> Title to all Purchased Securities shall pass to Buyer and, unless otherwise agreed by Buyer and Seller, nothing in this Agreement shall preclude Buyer from engaging in repurchase transactions with the Purchased Securities or otherwise pledging or hypothecating the Purchased Securities.

Thus, claim the Brokers, this Court need not look beyond the four corners of the PSA Agreement to determine **[**73]** that the repurchase transactions at issue are purchases and sales and not secured loans.

The LAB counters that the contracts reflect the parties understanding that the Funds' repos were the functional equivalent of secured loans, extrinsic evidence will indicate that the Brokers viewed their repos as collateralized

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[12] Consideration of the agreements themselves is appropriate on the motion to dismiss because the LAB must rely on the agreements to prove contractual relations with the Brokers, the LAB had notice of them when the action was filed, and the LAB itself utilizes them in its opposition papers. See *Belin, 1998 WL 391114*, at *3-*4; see also *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 808-09 (2d Cir. 1996)* (permitting consideration of the full text of documents "integral" to plaintiff's claim on motion to dismiss); *Barnum v. Millbrook Care Ltd. Partnership, 850 F. Supp. 1227, 1230* (S.D.N.Y.) (finding reference to the full text of a contract on a motion to dismiss appropriate even though the plaintiff had not formally incorporated it by reference), aff'd, ***43 F.3d 1458 (2d Cir. 1994)***.

loans, and a finding that repurchase agreements are purchases and sales can only be accomplished after a careful consideration **[*301]** of all of the evidence on a more fully-developed record.

In In re Bevill, a bankruptcy court was required to determine whether the securities underlying repo transactions were property of the debtor estates or belonged instead to repo and reverse repo participants. That issue turned on whether the repos constituted purchases and sales or collateralized loans. In determining the parties' intent, the court noted that the trade tickets of each executed repo reported them as purchases and sales, that the standard Repurchase Agreements used the language of "buyer" and "seller" - not lender and borrower - and that under these agreements the buyer could freely rehypothecate the purchased securities. The court concluded that "***HN33***[] the unequivocal **[**74]** language of purchase and sale in the repo and reverse repo agreements at issue . . . is strong prima facie evidence that the parties intended the transactions to be treated accordingly." *In re Bevill, 67 B.R. at 597*. However, despite noting that the repo agreement at issue made no reference to secured loans or to any intention to grant a security interest to the lender, because the agreements contained "terms customarily found in secured loan transactions," the court held that it had to consider extrinsic evidence of the parties' intentions before it could characterize the repos in that case as sales or loans. See *id. at 590*.

In its final analysis, the court in In re Bevill concluded that

> repos and reverse repos are hybrid transactions which do not fit neatly into either a secured loan or purchase and sale classification. There is no question that repo and reverse repo transactions have functional attributes which resemble collateralized loans. The initial taking of margin (the "haircut"), the right of substitution, and the "mark-to-market" provisions are undeniably secured loan characteristics not commonly found in purchase and **[**75]** sale transactions. In addition, principal and/or interest paid on the underlying securities remains the property of the seller. On the other hand, the repo buyer's unrestricted right to trade the securities during the term of the agreement represents an incident of ownership which does not pass to a secured lender in a collateralized transaction.

Id. at 596-97.

Indeed, as the Second Circuit stated in Drysdale, the "'[defendant] ignores a most significant difference between repos and standard collateralized loans. . . . In the latter transaction the lender holds pledged collateral for security and may not sell it in the absence of a default. In contract, repo "lenders" take title to the securities received and can trade, sell or pledge them.'" *Drysdale, 785 F.2d at 41*, quoted in *In re Bevill, 67 B.R. at 593-94*.

Furthermore, stated the court in In re Bevill,

> while the risk of market fluctuations in the value of the underlying securities rests with the original seller, this truism is of no legal consequence. The seller's interest in the market value of the securities is no greater in a secured loan transaction **[**76]** where he retains beneficial ownership of the securities than in a purchase and sale transaction where he is contractually bound to reacquire ownership of them. Clearly, any attempt to determine whether a repo or reverse repo transaction is more like a secured loan than a purchase and sale by weighing economic factors on a finely tuned balance scale would be an essentially formalistic and ultimately unproductive exercise.
>
> In any event, the proper characterization of repo and reverse repo agreements does not rest solely on an evaluation of the economic substance of the individual transactions. Rather, the intent of the parties viewed in the context of the entire market in which these transactions take place is the controlling consideration under . . . New York . . . law. This intent must be gleaned from the express terms employed in the transaction documents as well as relevant extrinsic evidence of intent, including trade custom and usage, market realities and the parties' course of conduct and performance.

In re Bevill, 67 B.R. at 597.

The agreements in In re Bevill differ from the instant PSA Agreements in an important **[*302]** respect such that **[**77]** extrinsic evidence need not be considered: while the agreements in that case used isolated terms of purchase and sale, the PSA Agreements at issue affirmatively state the parties' intent to treat the transaction as such. Thus, claim the Brokers, the LAB cannot point to any place in the PSA Agreements that make their terms ambiguous. Moreover, they continue, the PSA contracts were created after the decision in In re Bevill and after Congress amended the Bankruptcy Code in 1984 to make clear that repos should not be considered secured transactions for bankruptcy purposes. In addition, the court in In re Bevill soundly rejected the contention that the similarities between repos and loans were a basis for construing repo transactions as secured loans. "***HN34***[] The mere presence of secured loan characteristics in repo and reverse repo agreements is not enough to negate the parties' voluntary decision to structure the transactions as purchases and sales." *Id. at 598*.

Because the standard industry documentation for repo transactions prepared by the BMA and used by the Brokers in this case explicitly states that the parties "intend that all Transactions hereunder be sales **[**78]** and purchases and not loans," PSA Agreement P 6, that intention must be honored. [13] Therefore, the repos entered into by Bears Stearns and DLJ with each of the Funds, as well as the PSA agreement entered into by Merrill Lynch with Quartz, are to be treated as a matter of law as purchase and sale agreements and not secured loans subject to Article 9 of the UCC.

[79]** Policy considerations and trade custom and usage support such a finding. Moreover, ignoring the affirmative intent of the parties would inject unpredictability and insecurity in the manner by which major financial institutions obtain credit. The decision by market participants to enter into a repo transaction documented using the PSA Agreement, structured as a purchase and sale, thus carries with it a wide variety of legal and regulatory consequences. Market participants who prefer to enter into secured lending transactions rather than repos may do so (with the attendant legal result that their transaction will be treated as a loan); participants who prefer to enter into a sale and wholly distinct forward purchase (with attendant legal consequences) may also do so. The determination of market participants that elect to enter into a repo transaction has been and should be respected and their settled expectations will not be overturned.

According to the BMA, repos have evolved to fulfill certain market needs and objectives that cannot be served by secured loans. Critical to the usefulness, flexibility, and liquidity of the repo market is the transfer of ownership of the repo securities **[**80]** to the repo buyer and the repo buyer's ability to sell, transfer, or pledge the securities purchased in a repo transaction during its term. The mobility of repo securities is what makes them a key tool of the funding markets, enabling dealers to continuously convert their securities inventory to cash to use to finance the purchase of yet additional securities and thereby make markets. Reverse repos are often used by dealers to obtain securities needed for deliveries when they are "short," thereby avoiding "fails" in the market and facilitating settlements and the smooth functioning of the market. The flexibility of repo buyers with respect to the repo securities also contributes to the popularity of repos as flexible cash management vehicles, thereby bringing a large supply of diverse cash investors to the repo markets.

[*303] Applying to repurchase transactions the provisions of Part 5 of UCC Article 9, asserts the BMA, which governs the disposition of collateral after default, for example, would undermine the requisite flexibility of the repo market. As many of the provisions in Part 5 are not subject to consensual predefault waiver by the parties, see *U.C.C. § 9-501(3)*, **[**81]** repo counterparties would be unable to establish by contract their rights and remedies in a default situation, thereby introducing uncertainties in the repo marketplace. The health and efficiency of the repo market depends on market participants' ability to transact on well-settled understandings and certainty as to the consequences of their transactions and/or failure to perform their transactions. It was this need for certainty in

[13] The operative provisions of the PSA Agreement conform to this stated intention. The parties are denominated "Buyer" and "Seller," they agree that on the "Purchase Date" for a transaction the "Purchased Securities" will be transferred to the "Buyer" or its agent against payment of the "Purchase Price." On the "Repurchase Date," this process occurs in reverse. The parties further acknowledge the difference between their repo transactions and conventional secured indebtedness by agreeing that each "Transaction" is a "repurchase agreement" and a "securities contract" entitled to the benefits of special protective provisions under the Bankruptcy Code. Perhaps most telling, the parties agree that the title to the Purchased Securities passes to the Buyer, who is explicitly permitted to engage in repos with the Purchased Securities or otherwise transfer or hypothecate them. See *Drysdale, 785 F.2d at 41*. Under prevailing market practice, the Buyer, as owner, may sell the Purchased Securities.

expectations, according to the BMA, that led the repo market participants, through the BMA, to publish the PSA Agreement as industry standard contractual documentation and provide a legal framework establishing the rights and obligations of the parties in repo transactions based on market practices. [14]

[82]** Application of Article 9 would additionally cast doubt on the efficacy of certain remedy provisions of the widely used PSA Agreement in cases of default. For example, the Agreement provides that upon default of the repo seller, a repo buyer may elect, in lieu of selling the purchased securities, to engage in a "deemed sale" of the purchased securities and give the defaulting repo seller credit in an amount equal to the price obtained from a generally recognized source. See PSA Agreement P 11. The repo buyer retains its ability to seek payment from the repo seller for any remaining deficiency between the credited "deemed sale" price and the contractually agreed repurchase price (plus any other amounts owing by the defaulting party). Id. In contrast, Article 9 requires a secured party, who under certain circumstances takes in a defaulting debtor's collateral, to receive the debtor's consent and waive its deficiency claim. See *U.C.C. § 9-505*. The BMA proposes that the application of this provision, with its 21-day notice requirement, would nullify the "real world" swift liquidation mechanism that the repo market and its participants require. This sort of uncertainty could **[**83]** have adverse consequences on the repo market.

The LAB concedes that repos play a vital role in providing liquidity, thereby reducing risk and interest rates, but it attempts to distinguish the repos at issue here - which were primarily in securities issued by the government-sponsored agencies Fannie Mae and Freddie Mac - by claiming that they do not play anything like the role of Treasury bills in the nation's financial infrastructure. The LAB thus urges formulation of different rules based on the type of securities involved. Yet the LAB ignores the fact that the PSA Agreement is an industry standard master repo agreement that applies generally to all repo transactions and does not distinguish between Treasuries and other types of securities. Therefore the LAB requests a ruling that the same words in the very same contract should be interpreted differently depending upon the type of security at issue. Identical contracts would sometimes be subject to Article 9 and sometimes not. Such a result fosters unwarranted uncertainty.

Moreover, the market for Fannie Mae and Freddie Mac securities is vitally important not only to the nation's financial markets but also to the nation's housing **[**84]** markets. Congress's goal in creating CMO-issuing National Mortgage Associations like Fannie Mae and Freddie Mac was to

> provide ongoing assistance to the secondary market for residential mortgages . . . by increasing the liquidity of mortgage investments and improving the distribution **[*304]** of investment capital available for residential mortgage financing; and . . . promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing . . . .

12 U.S.C. § 1716. Indeed, the success of Fannie Mae and Freddie Mac and the securities they issue has helped to significantly lower the mortgage rates paid by homeowners in this country. See S. Rep. No. 102-282, at 30-31 (1992) (stating that "most mortgage interest rates are generally thought to be 1/4 to 1/2 of a percentage point lower . . . than they would otherwise be"). "Together, [Fannie 'Mae and Freddie Mac] now provide financing for more than a third of all home loans outstanding . . . ." Id.

Furthermore, the instant ruling is consistent with **[**85]** case law. ***HN35***[] In contexts such as commercial law and the antifraud provisions of the federal securities law, repos generally are viewed as purchases and sales. See *In re Bevill, 67 B.R. 557*, and *Drysdale, 785 F.2d 38*. For other purposes, such as taxes, they are typically viewed as financings. See *Nebraska Dep't of Revenue v. Loewenstein, 513 U.S. 123, 130 L. Ed. 2d 470, 115 S. Ct. 557*

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[14] The BMA also maintains that Article 9 would impinge upon repo participants' rights with respect to repo securities in the nondefault context. The BMA uses, as an example, section 9-207, which prescribes the rights and duties of a secured party holding collateral in its possession. While section 9-207(2)(e) provides that "the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it," it does not permit a secured party to sell or dispose of the collateral in its possession. The application of Article 9 would negate a repo buyer's contractual right to freely sell the repo securities and may hamper the repo buyer's right to rehypothecate the repo securities. These rights of the repo buyer are inherent features of repo transactions, key to their value to the capital markets.

(1994). For accounting purposes, they are viewed either way, depending upon particular factors. In yet other circumstances, such as under *Section 559 of the Bankruptcy Code*, repo transactions have been assigned a distinct legal status which acknowledges their unique attributes.

Because the PSA Agreement is not ambiguous, because it clearly provides that the parties intended the transaction to be treated as a purchase and sale, and because such a finding is consistent with the practices and expectations of the securities industry, see *In re Bevill, 67 B.R. at 598*, Count XI of the Complaint is dismissed as to Bear Stearns and DLJ, and as to Merrill Lynch it is dismissed only with respect to the PSA Agreement into which it entered with **[**86]** Quartz. [15]

2. Trade Confirmations Upon Which Merrill Lynch Relied

Merrill Lynch did not execute PSA Agreements with Granite Partners and Granite Corp. Instead, it relied on trade confirmations for the contract terms applicable to the repo transactions. Those confirmations state:

> THE TRANSFEROR/SELLER SHALL BE DEEMED TO HAVE GRANTED THE TRANSFEREE/PURCHASER, AS OF THE PURCHASE DATE, A SECURITY INTEREST IN THE SECURITIES ("SECURITIES" PLEDGED/SOLD PURSUANT TO A TRANSACTION HEREUNDER) FOR SUCH TRANSACTION (AND IN ALL INCOME AND DISTRIBUTIONS THEREON AND PROCEEDS THEREOF) TO SECURE ITS OBLIGATION TO REPURCHASE SUCH SECURITIES, UNLESS THE SELLER IS IN DEFAULT, THE SELLER SHALL BE ENTITLED TO ALL PAYMENTS OF PRINCIPLE [sic] AND INTEREST ON THE SECURITIES, AND THE PURCHASER SHALL, UPON RECEIPT, REMIT TO THE SELLER ANY SUCH PAYMENTS **[**87]** RECEIVED BY IT, SUBJECT TO ITS OBLIGATION TO RESELL THE SECURITIES (OR EQUIVALENT SECURITIES) TO THE SELLER, THE PURCHASER MAY SELL, PLEDGE OR OTHERWISE TRANSFER THE SECURITIES.

Here, the language is far more ambiguous. Unlike the PSA Agreement, it does not contain an unequivocal expression of intent. In cases where the express terms of a contract or agreement are ambiguous, unclear, or conflicting, and the intended meaning and operation of the contract cannot reasonably be derived from the "four corners of the writing," courts allow the "introduction and examination of extrinsic evidence of intent as an aid in interpretation." *In re Bevill, 67 B.R. at 587*. Consideration of extrinsic evidence of the parties' intent is properly left to a later time, with the benefit of a fully-developed factual record. Therefore, the **[*305]** motion to dismiss Count XI against Merrill Lynch regarding the transactions evidenced by trade confirmations is denied.

VII. Although the Motion to Dismiss Count X Alleging Breach of Contract Due to Commercially Unreasonable Liquidations Is Denied, the Claim Is Hereby Modified

In Count X, the LAB alleges that the Brokers **[**88]** violated the PSA and other agreements by liquidating the Funds' securities at below-market prices. By exchanging lowball accommodation bids and conducting sham auctions that led to the sale of the Funds' portfolios at prices substantially below fair market value, the Brokers breached their obligation to liquidate at a price "obtained from a generally recognized source or the most recent closing bid quotation from such a source." (Compl. P 233.) Additionally, the LAB contends, by deliberately depressing the prices at which the Funds' CMOs were sold the Brokers breached their contractual duty to liquidate in good faith and in a commercially reasonable manner.

While DLJ does not move against this cause of action, Merrill Lynch proposes that it should be dismissed under *Rule 9(b)*, and Bear Stearns challenges it insofar as it alleges a breach of the implied duty of "commercial reasonableness."

A. *Rule 9(b)* Does Not Apply to the Contract Claim

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[15] Additionally, the LAB's allegation that the forward contracts between the Funds and Bear Stearns resulted in secured loans is unsupported and therefore dismissed.

On its face, *Rule 9(b)* does not apply to contract claims, but only to "averments of fraud and mistake." Merrill Lynch's contention that Count X fails to meet the requirement of *Rule 9(b)* does not command solicitude because the authority **[**89]** it cites is inapposite to the instant case.

For example, Merrill Lynch invokes *Frota v. Prudential-Bache Securities, Inc., 639 F. Supp. 1186, 1193 (S.D.N.Y. 1986)*, in which the court applied *Rule 9(b)* to a claim that "merely incorporates the allegations of the securities fraud and RICO counts." By contrast, the LAB's contract claim does not "merely incorporate" the fraud allegation, nor does it depend in any way on a showing of fraud. It is based on the allegation that the Brokers' below-market liquidation of the Funds' portfolios breached specified contract provisions, as well as the Brokers' obligation to liquidate in good faith. *Rule 9(b)* is inapplicable to such a claim.

B. Implied Duties of Good Faith and Commercial Reasonableness

The Complaint alleges a breach of both the implied duties to liquidate the Funds' holdings in good faith and in a "commercially reasonable manner." (Compl. § 232.) While Bear Stearns has no quarrel with the requirement of good faith, it takes issue with that of commercial reasonableness.

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." *Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389, 663 N.E.2d 289, 292, 639 N.Y.S.2d 977, 979 (1995)*. **[**90]** The covenant encompasses "any promises which a reasonable person in the position of the promisee would be justified in understanding were included," and it prohibits either party from acting in a manner "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Id. (citations and internal quotations omitted); see *Travellers Int'l, A.G. v. Trans World Airlines, Inc., 41 F.3d 1570, 1575 (2d Cir. 1994)* (stating that "the implied covenant of good faith and fair dealing inheres in every contract"). Breach of the covenant gives rise to a cognizable claim. See *Chase Manhattan Bank, N.A. v. Keystone Distribs., Inc., 873 F. Supp. 808, 815 (S.D.N.Y. 1994)* (finding that "[a] party may be in breach of its implied duty of good faith and fair dealing even if it is not in breach of its express contractual obligations").

Indeed, the broker's "power to liquidate must be exercised in good faith under the existing facts and circumstances." *Cauble v. Mabon Nugent & Co., 594 F. Supp. 985, 992 (S.D.N.Y. 1984)*; see *Modern Settings, Inc. v. Prudential-Bache Sec., Inc., 936 F.2d 640, 644 (2d Cir. 1991)* **[**91]** (stating that the "contractual power [to liquidate] must be exercised in good faith"); see also *Travellers Int'l, 41 F.3d at 1575* ("Even when a contract confers **[*306]** decision-making power on a single party, the resulting discretion is nevertheless subject to an obligation that it be exercised in good faith.").

While an implied covenant of good faith and fair dealing is recognized in most contracts under New York law, the duty cannot be used to create independent obligations beyond those agreed upon and stated in the express language of the contract. See *Warner Theatre Assoc. Ltd. Partnership v. Metropolitan Life Ins. Co., 1997 U.S. Dist. LEXIS 17217*, *No. 97 Civ. 4914, 1997 WL 685334*, at *6 (S.D.N.Y. Nov. 4, 1997). Any purported duty of good faith "cannot add to, detract from, or alter the terms of the contract itself." Id.; see *CIBC Bank and Trust Co., Ltd. (Cayman) v. Banco Cent. do Brasil, 886 F. Supp. 1105, 1118 (S.D.N.Y. 1995)* ("Although the obligation of good faith is implied in the contract, it is the terms of the contract which govern the rights and obligations of the parties.").

The phrase "commercially **[**92]** reasonable manner," however, has been given special meaning under Article 9 of the UCC, and the totality of those concepts will not be imported wholesale into the PSA Agreement to which, as discussed above, Article 9 does not apply. The contract claim is to be interpreted under ordinary contract jurisprudence. Therefore, to the extent the LAB seeks to impose an implied obligation by its use of the term "commercially reasonable," Count X is to be modified such that any reference invoking the duty to liquidate "in a commercially reasonable manner" shall be deleted. If the LAB wishes, it may replace the term with the covenant of "fair dealing."

VIII. The LAB May Not Maintain Count I of the Complaint Alleging a Claim for Inducing and Participating in a Breach of Fiduciary Duty Against the Brokers

To state a claim for inducing or participating in a breach of fiduciary duty under New York law, [16] the plaintiff must allege that a fiduciary breached its obligations to another, that the defendant knowingly induced or participated in the breach, and that the plaintiff suffered damages as a result of the breach. See *S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 847-48 (2d Cir. 1987)*. **[**93]**

[94]** As stated in the Complaint, the objective of Granite Corp. and Granite Partners was to invest on a market-neutral basis. Askin and ACM were supposed to employ sophisticated computer models capable of analyzing the impact of interest rate changes on prepayments, cash flows, and yields in order to balance bullish and bearish CMOs. It was anticipated that the Funds would achieve a high rate of return through this process, without exposure to upward or downward movements in interest rates. The Complaint **[*307]** alleges that Askin and ACM had a fiduciary duty to adhere to this investment strategy. They, however, breached that duty by failing to use adequate analytic models and by constructing portfolios that, far from being market-neutral, were dangerously bullish, containing, in particular, inordinate numbers of inappropriate, highly toxic, bullish inverse IOs. [17]

[95]** The Complaint further alleges that the Brokers knew of Askin and ACM's duty to follow the Funds' investment strategy; that they knew Askin and ACM lacked the ability to analyze the securities that the Brokers were creating and selling to the Funds; and that they knew of the Funds' drastic bullish tilt. Despite this knowledge, the Brokers induced and participated in Askin and ACM's breach of duty by urging them to buy ever greater quantities of toxic inverse IOs and other bullish or unpredictable securities, including inappropriate forward-settling CMOs that the Brokers knew Askin and ACM were unable to analyze.

The Brokers maintain that the claim for inducing and participating in Askin and ACM's breach of fiduciary duty fails because of the doctrine of in pari delicto. According to the Brokers, the LAB is collaterally estopped from bringing the instant claim because of the decision in *Granite Partners, L.P. v. Primavera Familienstiftung, 194 B.R. 318 (Bankr. S.D.N.Y. 1996)* [hereinafter Granite I], and because the in pari delicto defense bars the claim as a matter of law. The LAB counters that Granite I does not preclude the claim because the allegations **[**96]** in the instant Complaint differ from that in Granite I, that the applicability of in pari delicto cannot be established on the pleadings because the relative degrees of culpability must be determined, and that the doctrine is inapplicable to a bankruptcy trustee and his successors.

A. *Granite I* and Collateral Estoppel

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[16] As an initial matter, the LAB contends that their tort claim is to be governed by the laws of the Cayman Islands and Delaware because the Funds were organized under the laws of those jurisdictions. New York law, however, governs this cause of action. It was brought in a New York federal court by and against entities and individuals located in New York and based on facts alleged to have occurred in New York. Significantly, the disposition of the claim - that the Brokers induced and participated in a breach of fiduciary duty by a money manager of investment funds - is vitally important to the financial industry, which is centered in New York. For these reasons, New York substantive law applies to the claim and, therefore, to the applicability of the Brokers' in pari delicto defense discussed below. See *Brink's Ltd. v. South African Airways, 93 F.3d 1022, 1030 (2d Cir. 1996)*, cert. denied, *519 U.S. 1116, 136 L. Ed. 2d 845, 117 S. Ct. 959 (1997)*.

The LAB cites to this Court's decision in *ABF Capital Management v. Askin Capital Management, L.P., 957 F. Supp. 1308, 1331 (S.D.N.Y. 1997)*, for the proposition that its claim for inducing and participating in breach of fiduciary duty will be governed by Cayman Islands and Delaware law. Yet, the LAB misreads the decision. In discussing whether investors in the Funds had standing to bring aiding and abetting claims against broker-dealers, this Court in ABF merely held that the investors' claims are derivative claims under Cayman Islands and Delaware law. Id. A choice of law analysis to determine which law should apply to the aiding and abetting breach of fiduciary duty claim was not performed at that time. As noted recently in *Solow v. Stone, 994 F. Supp. 173 (S.D.N.Y. 1998)*, under New York's choice of law rules, the law of the state of incorporation controls a breach of fiduciary duty claim while New York law controls the plaintiff's claim for aiding and abetting the breach of fiduciary duty because the acts giving rise to the claim took place, in significant part, in New York. *Id. at 177*.

[17] Quartz was intended to be market-directional. Despite concerns about rising interest rates, which dictated the purchase of bearish securities, Askin and ACM breached their duties by acquiring for Quartz the same bullish CMOs they were buying for Granite Corp. and Granite Partners.

In Granite I, The Honorable Stuart M. Bernstein ruled that the Funds, then represented by the Trustee, could not bring an aiding and abetting breach of fiduciary duty claim against several broker-dealers under the doctrine of in pari delicto. The Brokers submit that this holding collaterally estops the Funds from asserting Count I of the Complaint.

The doctrine of collateral estoppel "bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding." *Metromedia Co. v. Fugazy, 983 F.2d 350, 365 (2d Cir. 1992)*. For collateral estoppel to apply, two requirements must be satisfied: "first, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded . . . must **[**97]** have had a full and fair opportunity to contest the prior determination." *Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 482 N.E.2d 63, 67, 492 N.Y.S.2d 584, 588 (1985)*; see also *Computer Assocs. Int'l, Inc. v. Altai, Inc., 126 F.3d 365, 371 (2d Cir. 1997)*, cert. denied, *140 L. Ed. 2d 814, 118 S. Ct. 1676 (1998)*.

In Granite I, the Trustee filed an adversary proceeding in the Bankruptcy Court on behalf of the Funds to enjoin certain equity holders and their representatives from violating the automatic stay by pursuing claims against Askin and ACM for breach of fiduciary duty and against several broker-dealers, including the Brokers here, for aiding and abetting that breach. The Trustee asserted that the claims for mismanagement, waste, and breach of fiduciary duty belonged to the debtor Funds, not the investors. Judge Bernstein found that once bankruptcy ensues, claims for breach of fiduciary duty could be asserted only by the Trustee on behalf of the debtor estates. *Granite I, 194 B.R. at 328*. However, Judge Bernstein also found that where the debtor's insiders acted in concert with third parties, the doctrine **[**98]** of in pari delicto may be invoked.

In Granite I, the investors had alleged that the defendant broker-dealers aided, abetted, and influenced Askin and ACM to breach their fiduciary duties to the Funds. **[*308]** *Id. at 330*. Judge Bernstein found that "the law imputes to the corporation the knowledge and conduct of the guilty insider; a corporation only acts through its agents, and the imputation of the agent's wrongful conduct lies at the heart of in pari delicto." Id. Relying on the Second Circuit's decisions in *Hirsch v. Arthur Andersen & Co., 72 F.3d 1085 (2d Cir. 1995)*, and *Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114 (2d Cir. 1991)*, Judge Bernstein concluded that the doctrine of in pari delicto applied to the Funds and would preclude the Trustee from asserting claims against the broker-dealers for aiding and abetting a breach of fiduciary duty by Askin and ACM. The analysis in Granite I was confirmed by this Court. See *Primavera Familienstiftung v. Askin, 1996 U.S. Dist. LEXIS 12683*, No. 95 Civ. 8905, 1996 WL 494904, at *12 (S.D.N.Y. Aug. 30, 1996) ("Applying **[**99]** the doctrine, Judge Bernstein held that the in pari delicto doctrine deprived the Trustee of the ability to bring the claims - which would otherwise belong to the Funds' estate - for waste, mismanagement, and breach of fiduciary duty.").

The Brokers urge that because the Funds are the same parties that moved to enjoin the investor suits in Granite I, they had a full and fair opportunity to contest the prior determination. The LAB, however, responds that it is not collaterally estopped by the Granite I decision because, unlike Primavera Familienstiftung, the party which the Funds' Trustee sought to enjoin in Granite I, the LAB does not allege that Askin or ACM committed fraud against the Funds.

Because the allegations in the two cases differ somewhat, Count I will not be dismissed pursuant to a collateral estoppel approach. However, accepting the allegations of the LAB's Complaint as true, the doctrine of in pari delicto provides an independent basis for dismissal.

B. The Doctrine of *In Pari Delicto* May Be Applied to Bar Count I of the LAB's Complaint

The in pari delicto doctrine derives from the Latin, in pari delicto potior est conditio **[**100]** defendentis: "'In case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.'" *Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306, 86 L. Ed. 2d 215, 105 S. Ct. 2622 (1985)* (quoting Black's Law Dictionary 711 (5th ed. 1979)). The doctrine is based on the following two premises: "courts should not mediate disputes between wrongdoers, and denying judicial relief to a wrongdoer deters illegal conduct." *Granite I, 194 B.R. at 328* (citing *Bateman Eichler, 472 U.S. at 306*, and *Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990))*. It is "rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct." *Pinter v. Dahl, 486*

U.S. 622, 632, 100 L. Ed. 2d 658, 108 S. Ct. 2063 (1988). The Supreme Court in Pinter explained that in pari delicto bars claims of a plaintiff who is "an active, voluntary participant in the unlawful activity that is the subject of the suit. Plaintiffs who are truly in pari delicto are those who have themselves violated the law in cooperation with the defendant." Id. at 635-36 **[**101]** (citations and internal quotations omitted). In litigations arising under the federal regulatory statutes, in discussing the application of in pari delicto, the Supreme Court has required "at least substantially equal responsibility" on the part of the plaintiff. See Bateman Eichler, 472 U.S. at 310.

As the Brokers represent, during the period in which the conduct alleged in the Complaint occurred, Askin, directly and through ACM, was the Funds' sole decisionmaker. Cf. Granite I, 194 B.R. at 331. Askin was the sole voting shareholder of Granite Corp. and Quartz and was the sole general partner of Granite Partners. Id. Thus whatever wrongful conduct the Brokers are alleged to have induced and participated in was consented to and participated in by the Funds. The Brokers claim that even accepting the allegations in Count I as true, the Funds themselves -- acting through their managers, ACM and Askin -- are equally at fault. Therefore, the principles underlying the doctrine of in pari delicto preclude the LAB from asserting a claim for inducing and participating in a breach of fiduciary duty against the Brokers.

[*309] The Funds **[**102]** were active and voluntary participants in the securities purchases about which they now complain. Acting through Askin and ACM, they were the central decisionmakers in the allegedly improper purchases they made. The Complaint states that "ACM and Askin repeatedly breached their fiduciary and contractual duties to the Funds to make investments with due care and in accordance with the Funds' stated investment objectives. ACM and Askin did not create market neutral . . . portfolios . . .; they did not use (or have) sophisticated computerized analytical techniques; they maintained inadequate liquidity; and they exposed the Funds to near-complete market - i.e., Broker - control." (Compl. P 69.) It further states that "as a result of ACM's and Askin's failure to manage the Funds with due care . . . ACM and Askin failed to create a market neutral portfolio . . . . Rather, ACM and Askin created portfolios that were markedly and inappropriately tilted toward the bullish . . . securities at a time when virtually all observers, including Askin, believed that interest rates soon would rise or were in fact rising." (Id. P 71.)

The LAB, however, asserts that Askin and the Brokers were not **[**103]** of substantially equal fault since the Complaint alleges that Askin breached his duty of care by negligently buying inappropriate securities, whereas the Brokers deliberately took advantage of Askin's weaknesses and induced him to buy toxic waste that they knew to be inappropriate. Thus the LAB submits that Askin and ACM are alleged to be less culpable than the Brokers and not pari in their delicto. According to the LAB, application of the in pari delicto doctrine depends on proof that these factual allegations were wrong - i.e., it depends on proof that Askin and ACM did, in fact, deliberately buy securities that they knew to be inappropriate for the Funds.

The LAB's "conclusory allegations of the legal status" of the acts of Askin and the Brokers, however, "need not be accepted as true for the purposes of ruling on a motion to dismiss." In re American Express, 39 F.3d at 400-01 n.3; see Cohen, 906 F. Supp. at 961. Also, as stated in Granite I, "it is true that in many of the in pari delicto cases, the trustee filed the complaint detailing the insider's wrongdoing, and the Court could determine from the trustee's own allegations **[**104]** whether in pari delicto applied." [18] Granite I, 194 B.R. at 330; see, e.g., Hirsch, 72 F.3d at 1092; In re Mediators, Inc., 190 B.R. 515, 520 (Bankr. S.D.N.Y. 1995), aff'd, 105 F.3d 822 (2d Cir. 1997).

Indeed, the LAB's factual allegations concerning ACM and Askin's conduct in breaching their fiduciary duties do not sound in negligence. For example, the LAB alleges that ACM and Askin "had committed themselves to making extensive use of proprietary computerized models to analyze CMOs." (Compl. P 67.) According to the LAB, ACM and Askin breached their fiduciary duties in that "they **[**105]** did not use (or have) sophisticated analytical techniques," (id. P 69), "ACM and Askin in fact had no proprietary, computerized tools with which to model CMOs," and "often made purchase decisions based on little or no analysis or research." (Id. P 70.) This is the language of

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[18] It is appropriate to resolve this issue on a motion to dismiss if, as the Brokers contend, the LAB's pleading alleges that Askin and ACM, the Funds' sole decisionmakers, and the Brokers were equal wrongdoers as a matter of law. See Ross, 904 F.2d at 826; In re Haven Indus., Inc., 462 F. Supp. 172, 180 (S.D.N.Y. 1978).

deliberate misrepresentation, not negligence. It is difficult to interpret an allegation that Askin and ACM "committed" themselves to using a computer model, then bought billions of dollars of CMOs without having one, as anything but intentional conduct. [19] Additionally, the LAB establishes that ACM and Askin were responsible for forming and managing the **[*310]** Funds' portfolios and that "ACM and Askin created portfolios that were markedly and inappropriately tilted toward bullish . . . securities." (Compl. P 71 (emphasis added).); cf. *Pinter, 486 U.S. at 633* (stating that the in pari delicto doctrine is not limited to situations "when the plaintiff's fault is intentional or willful"). Any attempt to claim that Askin and ACM were not central to the alleged wrongdoing is contradicted by the factual allegations the Complaint sets forth.

[106]** Because the factual allegations demonstrate substantially equal fault between the Funds - acting through Askin and ACM - and the Brokers, the doctrine of in pari delicto bars the claim. [20]

C. *In Pari Delicto* Is Applicable to the LAB's [107] Claim**

The LAB also proposes that the doctrine is inapplicable to a bankruptcy trustee or his successor, in this case the LAB. This contention, however, is based on decisions from other jurisdictions and is contrary to the prevailing law of this circuit.

The Second Circuit decisions that the LAB does cite address actions by trustees exercising special avoidance powers under the Bankruptcy Code to recover estate property from transferees. By contrast, the present case seeks ordinary damages from the alleged wrongdoing and has been recognized as the type of case in which the in pari delicto may apply. See Primavera, 1996 WL 494904, at *12; *Granite I, 194 B.R. at 328*.

Indeed, in his decision in Granite I, Judge Bernstein showed no hesitation in explaining how in pari delicto would apply to the Trustee's ability to bring claims against broker-dealers, including the Brokers here. Significantly, Judge Bernstein noted that the LAB's predecessor, the Trustee, made "several arguments why in pari delicto does not apply here." *Id. at 330*. Judge Bernstein rejected those arguments, finding that allegations of the broker-dealers' **[**108]** complicity in ACM and Askin's wrongdoing fall within the in pari delicto doctrine. This Court embraced Judge Bernstein's explanation in Primavera, 1996 WL 494904, at *12.

IX. Count XX Against DLJ for Equitable Subordination Is Dismissed

Analogous to the defense of in pari delicto, the doctrine of "unclean hands" bars recovery by the LAB in equity. The doctrine of clean hands is an "established and salutary tenet of equity practice" based on the principle that "one who seeks equity must do equity." *In re Mediators, 190 B.R. at 530*. Under New York law, a court may decline to exercise its equitable powers in favor of a party whose "'unconscionable act . . . has immediate and necessary relation to the matter that he seeks in respect of the matter in litigation.'" *Aris-Isotoner Gloves, Inc. v. Berkshire*

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[19] It is the same intentional conduct that formed the basis for Judge Bernstein's finding that the Funds' Trustee was barred from pursuing a claim on behalf of the Funds' debtor estates for inducing and participating in a breach of fiduciary duty against the broker-dealers because the Funds were in pari delicto with them. See *Granite I, 194 B.R. at 330*.

Contrary to the LAB's contention, Askin and ACM need not only have deliberately bought inappropriate securities to have engaged in intentional wrongdoing such that in pari delicto may be applied. The factual allegations concerning the computer models, for example, smell of fraud.

[20] It is useful to note that to succeed in an inducing and participating in a breach of fiduciary duty claim, a requirement of "knowledge" is sufficient. The factual allegations in the Complaint demonstrate as much regarding Askin and ACM.

According to Merrill Lynch, it seems illogical to claim that a defendant's culpability for inducing and participating in a breach of fiduciary duty can ever be greater than that of the fiduciary himself. As the Supreme Court stated in Bateman Eichler, which is cited by the LAB, "we do not believe that a person whose liability is solely derivative can be said to be as culpable as one whose breach of duty gave rise to the liability in the first place." *472 U.S. at 313* (speaking in the context of insider trading).

Fashions, Inc., 792 F. Supp. 969, 969 (S.D.N.Y. 1992) (quoting Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 78 L. Ed. 293, 54 S. Ct. 146 (1933)).

In In re Mediators, the plaintiff debtor corporation, through a committee of unsecured creditors, sought to recover fees paid **[**109]** by the corporation to its attorneys and bank, claiming that these defendants had been unjustly enriched because they assisted in defrauding the corporation. In re Mediators, 190 B.R. at 529. The court dismissed the unjust enrichment claim, holding that, because the corporation's sole shareholder and decisionmaker had engineered the fraud, the corporation's hands were also "filthy with fraud," and thus it was barred from obtaining equitable relief. Id. at 530.

[*311] Here, the LAB acknowledges that the Funds, through Askin and ACM, invested in inappropriate securities, failed to use proprietary computerized models to analyze the securities they purchased, did not continuously monitor their portfolios, and did not maintain sufficient liquidity in their portfolios. The factual allegations support that the Funds knowingly engaged in these acts, through Askin and ACM, despite contrary representations to their investors. This conduct by the Funds is intrinsically related to the claims for which the LAB seeks to recover from DLJ. Accordingly, the equitable subordination claim is dismissed. [21]

[110] X. The Brokers' Motion to Dismiss the Unjust Enrichment Claim in Count XVII Is Granted**

In Count XVII of the Complaint, the LAB alleges that the Brokers were unjustly enriched through their receipt of monies from four transactions: (1) "profits, fees, commissions, bonuses, interest, and other compensation" from its sale of inappropriate CMOs to 'the Funds; (2) "by deeming sales of the Funds' securities" to themselves at prices "substantially below their fair market value"; (3) "profits, fees, commissions, bonuses, interest, and other compensation" from their sales of other CMOs to other customers allegedly made possible by the Funds' purchase of the "deal driver" CMOs; and (4) short sale profits after artificially depressing the CMO market by its "collusive, rigged liquidations" of the Funds' securities. (Compl. PP 271-72.)

To state a claim for unjust enrichment, a plaintiff must allege that the defendant was enriched at the plaintiff's expense and that the circumstances are such that equity and good conscience require that the defendant make restitution. See ABF Capital, 957 F. Supp. at 1333; Violette v. Armonk Assocs., L.P., 872 F. Supp. 1279, 1282 (S.D.N.Y. 1995). **[**111]** Unjust enrichment is a quasi-contractual remedy, so that such a claim is ordinarily unavailable when a valid and enforceable written contract governing the same subject matter exists. See ABF Capital, 957 F. Supp. at 1333-34; Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 388, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987). This is true whether the contract is one between parties to the lawsuit, or where one party to the lawsuit is not a party to the contract. See ABF Capital, 957 F. Supp. at 1334; Graystone Materials, Inc. v. Pyramid Champlain Co., 198 A.D.2d 740, 604 N.Y.S.2d 295, 296 (3d Dep't 1993); Metropolitan Elec. Mfg. Co. v. Herbert Constr. Co., 183 A.D.2d 758, 583 N.Y.S.2d 497, 498 (2d Dept. 1992).

Here, the Complaint represents that the transactions and repurchase agreements between the Brokers and the Funds were governed by written agreements. Because both the sales of securities to the Funds and the liquidation of those securities were done pursuant to contracts, namely the PSA and transaction confirmations, the unjust enrichment claim may not lie. [22] See, **[**112]** e.g., Clark-Fitzpatrick, 70 N.Y.2d at 388, 516 N.E.2d at 193, 521

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[21] The "unclean hands" doctrine also provides grounds for dismissing the other claims through which the LAB seeks equitable relief: unjust enrichment and innocent representation, for example. As discussed above, the innocent representation claim is also barred by the Martin Act (as well as failure to plead justifiable reliance), and, as discussed below, the unjust enrichment claim is precluded due to the existence of written contracts.

[22] Indeed, the LAB alleges three causes of action against the Brokers for breach of contract, claiming that the Brokers breached contractual obligations to the Funds by "improperly calculating the margin positions in the Funds' accounts," (Count IV), by liquidating the Funds' securities "at prices substantially below fair market value," by "failing to give the Funds credit for repoed securities in an amount equal to the price therefore obtained from a generally recognized source or the most recent closing bid quotation from such a source, within the meaning of the PSA Agreement," (Count X), and "by failing to pay the Funds more than

N.Y.S.2d at 656; A.H.A. General Constr., Inc. v. New York City Housing Auth., 241 A.D.2d 428, 661 N.Y.S.2d 213, 216 (1st Dep't 1997), rev'd on other grounds, 92 N.Y.2d 20, 699 N.E.2d 368, 677 N.Y.S.2d 9, 1998 WL 305439 (N.Y. 1998).

[113] [*312]** While the LAB does not meaningfully oppose the opposition against the unjust enrichment claim based on profits derived from allegedly wrongful margin calls and commercially unreasonable liquidations, it maintains that the allegations regarding the sale of inappropriate CMOs to the Funds is viable. According to the LAB, the Brokers profited from their sale of inappropriate CMOs to the Funds in two ways: First, they received large markups and other fees directly from the Funds as payment for the toxic securities. Second, because the securities that the Funds bought were the "deal driver" tranches of the Brokers' CMO offerings - the riskiest securities that had to be sold, or preferably pre-sold, to make the entire offering economically feasible - their sale to the Funds allowed the Brokers to market the balance of each offering to their other customers, also at a substantial profit.

The LAB contends that the claim that the Brokers sold the Funds toxic CMOs that they knew were inappropriate is outside the scope of any contract between the Brokers and the Funds because the Complaint does not allege that the Brokers breached any contract by selling inappropriate toxic CMOs **[**114]** to the Funds. However, such a narrow characterization of the allegations set forth in the Complaint is not entirely forthright. The amounts paid by the Funds for the "inappropriate" CMOs were in every case at the heart of the contractual agreements governing those transactions. The enrichment which was allegedly "unjust" was simply the payment of a bargained-for sales price for the securities which were in fact delivered to the Funds, and the LAB does not allege otherwise. The law is clear that the payments made pursuant to the express terms of a contract cannot be recovered via unjust enrichment theory. See Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 767 F. Supp. 1269, 1284 (S.D.N.Y. 1991) ("Bargained-for benefits cannot be deemed to unjustly enrich a contracting party" (citing City of Yonkers v. Otis Elevator Co., 844 F.2d 42, 48 (2d Cir. 1988) (noting that quasi-contractual relief unavailable where an express contract covers the subject matter))), aff'd in part and rev'd in part on other grounds, 970 F.2d 1138 (2d Cir. 1992), aff'd, 510 U.S. 86 (1993).

Additionally, as alleged in the Complaint, **[**115]** ACM and Askin were bound by both fiduciary and contractual duties to, inter alia, make investments in accordance with the Funds' stated investment objectives. Part of ACM and Askin's duties were to purchase appropriate - or bearish - securities for the Funds. The Complaint further maintains that the Brokers allegedly sold bullish securities to the Funds, in breach of the investment objective requiring the bearish securities. It is undisputed that the transaction confirmations issued the agreement between the parties with respect to any particular purchase. The LAB is on unsteady ground in contending that the agreements between the Funds and the Brokers regarding the purchase and sale of CMOs memorialized in transaction confirmations did not encompass the type and characteristics of the CMOs sold.

In support for its contention, the LAB cites to this Court's decision in Violette, 872 F. Supp. at 1282, in which an unjust enrichment claim was sustained despite the existence of contracts between the parties because the "agreements [did] not expressly address" the matter about which the plaintiff complained. The case is distinguishable, however, because unlike the **[**116]** instant case Violette is a quantum meruit case. In Violette, this Court held that quasi-contract principles dictated that a worker's compensation insurer pay legal fees out of its portion of settlement proceeds negotiated by the employee's attorneys, despite the settlement agreement's silence on the subject of attorneys' fees. Id. Violette's holding that the attorneys were entitled to payment for their work does not support the LAB's assertion that it should recover in quasi-contract the payment price of the securities purchased by the Funds.

The sale of and profits made from inappropriate CMOs are covered by the contract between ACM and the Funds and agreements between the Brokers and the Funds. The written agreements governing the substance of the instant claim preclude recovery **[*313]** under the quasi-contractual theory of unjust enrichment.

$ 4 million of principal and interest payments due the Funds, and/or by improperly applying such principal and interest payments to alleged deficiencies in the Funds' accounts that resulted from the liquidations of the Funds' securities," (Count XVIII).

Furthermore, the last two grounds for the LAB's unjust enrichment claim - namely, monies the Brokers received from sales of CMOs to customers other than the Funds and receipt of profits from "short sales of Treasury and mortgage-backed securities" before and during the liquidation, (Compl. PP 271-73) - are dismissed for **[**117]** failure to adequately allege enrichment at the Funds' expense.

A defendant is enriched at the expense of a plaintiff when the defendant receives a benefit of money or property belonging to the plaintiff. See *Ammar Textiles (PVT) Ltd. v. Contitrade Servs. Corp., 1994 U.S. Dist. LEXIS 3783*, No. 93 Civ. 237, *1994 WL 115993*, at *3 (S.D.N.Y. Mar. 30, 1994). The Funds had no right to the Brokers' profits from sales of CMOs to other customers, nor did the Funds have any right to proceeds allegedly received by the Brokers from short sales of their own accounts of Treasury and other mortgage-backed securities. Accordingly, the LAB's unjust enrichment claim is dismissed.

XI. The Remaining Claims Subject to This Motion

The Brokers also moved to dismiss the claims for rescission of unauthorized trades; breach of duty due to wrongful margin calls and liquidation; conversion; prima facie tort against Bear Stearns; breach of express warranty; and tortious interference with contract between the Trustee and Gifford Fong, against Merrill Lynch. The LAB concedes that these counts are to a large extent duplicative of other causes of action asserted **[**118]** in the Complaint and has therefore not provided meaningful opposition to the Brokers' motion for dismissal. After careful review, the Court finds that the reasons the Brokers' have provided in support of their motion to dismiss those claims have merit. Therefore, the claims above are hereby dismissed.

Conclusion

For the reasons set forth above, the Brokers' motion for partial dismissal of the Complaint is granted in part and denied in part. The LAB is granted leave to replead within 20 days of this decision.

Specifically, the Brokers' motion to dismiss the claims for inducing and participating in a breach of fiduciary duty (Count I), tortious interference with contracts (Counts II, XII, and XXI), rescission of unauthorized trades (Count III), breach of duty due to wrongful margin calls and liquidation (Count V), conversion (Count VI), violations of the Sherman and Donnelly Acts (counts VII and VIII, respectively), prima facie tort against Bear Stearns (Count IX), common law fraud (Count XIII), negligent and innocent misrepresentation (Counts XIV and XV, respectively), breach of express warranty (Count XVI), unjust enrichment (Count XVII), and equitable subordination **[**119]** against DLJ (Count XX) is hereby granted.

The Brokers' motion to dismiss the claim for breach of duty to liquidate in a commercially reasonable manner (Count XI) is granted as to Bear Stearns and DLJ but denied as to Merrill Lynch.

The motion to dismiss the breach of contract claim for commercial unreasonable liquidations (Count X) is hereby denied, but the claim is to be modified as directed herein.

It is so ordered.

New York, N. Y.

August 25, 1998

ROBERT W. SWEET

U.S.D.J.

End of Document

PepsiCo, Inc. v. Coca-Cola Co.

United States District Court for the Southern District of New York

August 27, 1998, Decided ; August 27, 1998, Filed

98 Civ. 3282 (LAP)

Reporter

1998 U.S. Dist. LEXIS 13440 *; 1998-2 Trade Cas. (CCH) P72,257

PEPSICO, INC., Plaintiff, -against- THE COCA-COLA COMPANY, Defendant.

Disposition: [*1] Coca-Cola's motion to dismiss denied.

Core Terms

distributors, foodservice, customers, soft drink, fountain-dispensed, products, monopolization, alleges, relevant market, distributed, submarket, delivery, fountain, supplies, sales, restaurant, chains, consumers, manufacturer, antitrust, syrup, substitutes, motion to dismiss, purchasers, monopoly, segment, buyers, merger, anti trust law, interchangeable

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN1[] **Higher Education & Professional Associations, Colleges & Universities**

A dismissal is warranted under *Fed. R. Civ. P. 12(b)(6)* only if it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Under this standard, the question is not whether a plaintiff will or might ultimately prevail on its claim, but whether it is entitled to offer evidence in support of the allegations in the complaint. It may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test. To this end, the court must accept as true all the factual allegations in the complaint and must draw all reasonable inferences in favor of plaintiff. This generous approach to pleading applies in the antitrust context, and courts should recall that where the proof of an alleged antitrust violation is largely in the hands of defendants, dismissals prior to giving plaintiff an opportunity for discovery should be granted sparingly.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2[] **Sherman Act, Claims**

To state a monopolization claim under *15 U.S.C.S. § 2* of the Sherman Act, a plaintiff must establish (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To state an attempted monopolization claim, a plaintiff must establish (1) that defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN3[] **Market Definition, Relevant Market**

It is a basic principle in the law of monopolization that the first step in a court's analysis must be a definition of the relevant markets. This is so because without a definition of that market, there is no way to measure a defendant's ability to lessen or destroy competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN4[] **Regulated Practices, Market Definition**

For antitrust purposes a relevant market has both a product dimension and a geographic dimension.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN5[] **Regulated Practices, Market Definition**

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Defining the relevant product market requires consideration of "cross-elasticity of demand" between products, which measures the extent to which consumers will change their consumption of one product in response to a price change in another. If customers are able to substitute one product or service in response to a nontrivial increase in the price of another, these products or services must fall within the same product market. Defining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business away from each other.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] **Relevant Market, Product Market Definition**

The boundaries of so-called "submarkets" may be established by reference to such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN7[] **Regulated Practices, Market Definition**

Ultimately, a "submarket" definition turns on the same inquiry as a "market" definition -- whether the products in a proposed submarket are reasonably interchangeable in use or production with products in the broader market. At bottom, then, the same proof which establishes the existence of a relevant product market also shows (or fails to show) the existence of a product submarket.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN8[] **Regulated Practices, Market Definition**

To define a relevant product market one must look at how consumers view the products in question.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **International Aspects, Commerce With Foreign Nations**

No rule of law or economic principle bars application of *15 U.S.C.S. § 2* of the Sherman Act to one of several alternative means of distributing a product. The statute prohibits monopolization of "any part" of interstate or foreign commerce. Accordingly, the Sherman Act and other antitrust statutes have been applied to protect competition in one of alternate channels of distribution.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] **Regulated Practices, Market Definition**

It is appropriate to limit a market to a discrete channel of distribution so long as it is shown, using established market-definition criteria, that enough customers do not view other methods of distribution as viable substitutes to the distribution method in question.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN11[] **Regulated Practices, Market Definition**

Market definition is a particularly fact-based inquiry. Thus, courts granting *Fed. R. Civ. P. 12(b)(6)* motions for failure to allege a proper market generally dismiss only those complaints that fail to explain how the product in question is not reasonably interchangeable with other similar products.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN12[] **Regulated Practices, Market Definition**

A "market" for antitrust purposes is the one relevant to the particular legal issue at hand.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Monopolies & Monopolization, Attempts to Monopolize**

The essence of product market definition in a monopoly case under *15 U.S.C.S. § 2* of the Sherman Act is determining whether there exists a group of buyers which is unable, because of market forces, to switch to an alternative product or service in the face of a monopolist's price increase.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN14[] **Monopolies & Monopolization, Actual Monopolization**

Even where a defendant has monopoly power, a plaintiff's claims of actual or attempted monopolization require proof of anticompetitive conduct as an essential element of the claim.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN15[] **Actual Monopolization, Anticompetitive & Predatory Practices**

There is a general right of a private business to select its customers, but the exercise of that right for the purpose of monopolization violates *15 U.S.C.S. § 2* of the Sherman Act. In the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he may deal.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > Inferences & Presumptions > General Overview

HN16[] **Regulated Practices, Market Definition**

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***.

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Judges: LORETTA A. PRESKA, United States District Judge.

Opinion by: LORETTA A. PRESKA

Opinion

OPINION AND ORDER

LORETTA A. PRESKA, United States District Judge:

Plaintiff PepsiCo, Inc. ("PepsiCo") has sued defendant The Coca-Cola Company, Inc. ("Coca-Cola"), alleging that Coca-Cola has violated *section 2* of the Sherman Act, *15 U.S.C. § 2*, by monopolizing and attempting to monopolize a segment of the fountain-dispensed **[*2]** soft drink industry. Coca-Cola moves to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*. For the reasons that follow, Coca-Cola's motion is denied.

BACKGROUND

The facts alleged in the complaint are as follows. PepsiCo complains of Coca-Cola's behavior in a market described as "sales of fountain-dispensed soft drinks distributed through foodservice distributors throughout the United States." Complaint P 9. This market allegedly consists of "an increasing number of restaurant chains, movie theater chains and other 'on-premise' accounts" that purchase "most of their supplies, including fountain soft drink products, through foodservice distributors." *Id*. P 7.

Foodservice distributors are "independent companies that distribute a broad variety of food products, paper products and other supplies, including fountain-dispensed soft drinks, in consolidated deliveries to restaurant chains, movie theater chains and other customers." *Id*. P 2. These distributors carry thousands of items and supply all of a customer's needs at once, using consolidated single-truck deliveries and consolidated bookkeeping. *Id*. P 8.

Because foodservice distributors offer a form of one-stop **[*3]** shopping, their customers take delivery of all of the customer's supplies from only one distributor at each of the customer's locations. *Id*. P 2. Foodservice distributors' customers "generally make it a practice not to purchase these supplies through any other means." *Id*. Furthermore, for "logistical and economic reasons, these accounts make it a practice to have only a single foodservice distributor supply any given outlet, and it is common for a single foodservice distributor to supply either an entire chain or groups of outlets within a chain." *Id*. As a result, "for each location in each such chain there is only one foodservice distributor through which a supplier" can have its product distributed. *Id*. P 7.

According to PepsiCo, the accounts in question have no viable alternatives to fountain-dispensed soft drinks distributed through foodservice distributors. As an initial matter, soft drinks sold in bottles and cans are not adequate substitutes for fountain products. Indeed, virtually all of the soft drink volume of these accounts is in fountain-dispensed products (which provide considerably greater profits than drinks sold in bottles and cans), and the cost of **[*4]** switching a fountain business to bottles and cans would be prohibitive. *Id*. P 8.

Other modes of delivery also fail to present an adequate alternative to distribution through foodservice distributors. According to PepsiCo, "customers of foodservice distributors generally refuse to be supplied by any other means once they have begun receiving supplies through such distributors, because changing from their established distribution and accounting practices to other methods of distribution, or even switching distributors, would cause them to incur severely adverse economic and logistical consequences." *Id*. As described in the complaint, the distribution "superhighway" formed by the growth of independent foodservice distributors has become "the lifeblood of competitive efficiency in the restaurant business, movie theater business and other businesses that depend upon delivery through foodservice distributors in order to remain logistically efficient." *Id*.

PepsiCo alleges that Coca-Cola "dominates" the market described above, *see* Complaint PP 9, 33, 36, and that "virtually every major foodservice distributor in America today" has an agreement with Coca-Cola to distribute **[*5]** Coca-Cola fountain products. *Id*. P 16. Coca-Cola is alleged to control over 90% of that market and to possess the power to control prices and exclude competition in the market. *Id*. P 9.

PepsiCo alleges that the parties' past business practices explain Coca-Cola's dominance in, and PepsiCo's absence from, this market. Although PepsiCo itself markets fountain-dispensed soft drinks, for two reasons "it historically has been less successful than Coca-Cola in penetrating the relevant market." *Id*. P 10. First, the fountain products that PepsiCo sold to its "on-premise" accounts were distributed exclusively through PepsiCo local bottlers, while Coca-Cola's sales were made through various types of national, regional and local fountain distributors. *Id*. P 11. As a result, when foodservice distributors "began to take over" distribution of supplies to restaurant chains, movie theater chains and other "on-premise" accounts, Coca-Cola was able to designate the foodservice distributors as Coca-Cola fountain distributors as well, "thereby facilitating sales to the growing number of customers that had begun to receive their supplies only through such distributors." *Id*. P 11. **[*6]** In contrast, PepsiCo's arrangements with its local bottlers prevented it from selling its products through foodservice distributors, and PepsiCo lost the opportunity to capitalize on the emergence of foodservice distribution. *Id*. P 11.

PepsiCo attributes its disadvantage as well to its acquisition in the 1970's and 1980's of restaurant chains which featured PepsiCo products. Coca-Cola capitalized on PepsiCo's restaurant ownership by "convincing other restaurant chains that PepsiCo had become their competitor and therefore they should spurn Pepsi and support Coke." *Id*.

In 1997, PepsiCo changed its business strategy. It negotiated new arrangements with its bottlers, thereby allowing it to distribute fountain-dispensed soft drinks through foodservice distributors rather than local bottlers. PepsiCo also divested itself of its restaurant chains "so that it could no longer be portrayed as a competitor of the other chains." *Id*. P 13. As a result of these moves, PepsiCo "emerged in 1997 as a significantly more potent competitive threat to Coca-Cola's dominance" in the alleged market. *Id*. P 14. Rid of its self-imposed constraints, PepsiCo increased its efforts to sell and **[*7]** market its fountain products; to this end, PepsiCo approached restaurant chains, movie theater chains and other customers with "highly competitive proposals, offering to sell to them through foodservice distributors for less money than Coca-Cola." *See id*.

According to the complaint, Coca-Cola viewed PepsiCo's emergence as a threat to Coca-Cola's market dominance. Coca-Cola thus embarked on a "strategy to use its market power to perpetuate its monopoly by threatening foodservice distributors with the loss of Coke if they dare to carry Pepsi for their customers who want Pepsi, and by cutting off any distributors that decide to carry Pepsi anyway, making examples of them." *Id*. P 15. PepsiCo maintains that Coca-Cola's strategy "threatens to freeze PepsiCo out of the market and leave customers that require delivery through foodservice distributors with no alternative to Coke." *Id*.

According to the complaint, to carry out its strategy Coca-Cola relied on the terms of its contracts with foodservice distributors. Those contracts allegedly contain an express condition prohibiting the distributor from handling PepsiCo soft drink products. *Id*. P 17. While those agreements historically **[*8]** contained such a condition, Coca-Cola rarely enforced it and even had acquiesced when some foodservice distributors refused to agree to the provision. *Id*. As soon as PepsiCo "became a serious competitive threat," however, Coca-Cola began to enforce the condition actively. *Id*. P 20. Coca-Cola allegedly cut off foodservice distributors that began to distribute PepsiCo products and threatened to cut off those that showed an interest in carrying PepsiCo products. *Id*. PP 20-26.

PepsiCo maintains that Coca-Cola's tactics lock foodservice distributors into Coca-Cola, depriving those distributors of the ability to distribute competing brands to their customers. In particular, because of Coca-Cola's

> huge share of the relevant market, its particular dominance of fountain-dispensed cola (which restaurants, theaters and other accounts must have), and the fact that foodservice distributors must carry Coke products in order to fill orders from their other customers who sell Coke, such a threat is overwhelmingly powerful and coercive, and reflects Coca-Cola's single-minded determination to hold on to its monopoly.

Id. P 25. As a consequence, restaurant chains, theater **[*9]** chains and other customers of foodservice distributors "remain locked into Coca-Cola as their supplier without the real ability to entertain a competitive bid from PepsiCo." *Id*. P 11. Because their distributors will only deliver Coca-Cola products, establishments that wish to serve PepsiCo products are forced to remain with Coca-Cola products and are prevented from putting their requirements out for fair and open competitive bids. *Id*. P 27. This absence of price competition is alleged to affect the consumers who are customers of these establishments and deprives PepsiCo of opportunities to compete on the merits for the business of the customers that require delivery through foodservice distributors. *Id*. PP 27-28.

DISCUSSION

Coca-Cola moves to dismiss, under *Fed. R. Civ. P. 12(b)(6)*, on the ground that PepsiCo's complaint fails to state a claim upon which relief may be granted. "***HN1***[] A dismissal is warranted under *Rule 12(b)(6)* only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 128 F.3d 59, 62-63 (2d Cir. 1997)*. **[*10]** Under this standard, the question is not "whether a plaintiff will or might ultimately prevail on [its] claim, but whether [it] is entitled to offer evidence in support of the allegations in the complaint." *Id. at 62*. As explained by the Supreme Court, and recently reiterated by the Court of Appeals, "it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974)* (quoted in *Hamilton College, 128 F.3d at 62*). To this end, I must "accept as true all the factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff." *Hamilton College, 128 F.3d at 63* (citing *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740, 96 S. Ct. 1848, 1850, 48 L. Ed. 2d 338 (1976))*. This "generous approach to pleading applies in the antitrust context," and courts should recall that "where the proof of the alleged antitrust violation is largely in the hands of the defendants, dismissals prior to giving the plaintiff an opportunity **[*11]** for discovery should be granted sparingly." *Id*.

I. *SECTION 2* OF THE SHERMAN ACT

PepsiCo alleges that Coca-Cola is guilty of actual or attempted unlawful monopolization of the relevant market in violation of *section 2* of the Sherman Act, *15 U.S.C. § 2*. ***HN2***[] To state a monopolization claim under *section 2*, a plaintiff must establish "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)*; *Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir. 1997)*. To state an attempted monopolization claim, a plaintiff must establish "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890, 122 L. Ed. 2d 247 (1993)*; *Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 99-100 (2d Cir. 1998)*. **[*12]**

According to Coca-Cola, PepsiCo's complaint must be dismissed because it fails, as a matter of law, to allege either (1) a valid relevant market or (2) prohibited anticompetitive conduct. These contentions are discussed in turn below.

II. FAILURE TO ALLEGE A VALID RELEVANT MARKET

HN3[] It is "a basic principle in the law of monopolization that the first step in a court's analysis must be a definition of the relevant markets." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)*. This is so because "without a definition of that market, there is no way to measure [a defendant's] ability to lessen or destroy competition." *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 350, 15 L. Ed. 2d 247 (1965)*; *see* *Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994)* ("An actual monopolization claim often succeeds or fails strictly on the definition of the product or geographic market."), *cert. denied*, *513 U.S. 1150, 115 S. Ct. 1100, 130 L. Ed. 2d 1068 (1995)*. Accordingly, **[*13]** PepsiCo's first task is to plead a relevant market. *See* *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 840 (2d Cir. 1980)*; *Theatre Party Assocs., Inc. v. Shubert Org., Inc., 695 F. Supp. 150, 153 (S.D.N.Y. 1988)*.

A. *Defining a Relevant Product Market*

HN4[] For antitrust purposes a relevant market has both a product dimension and a geographic dimension. *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 1523, 8 L. Ed. 2d 510 (1962)*; *T. Harris Young & Assoc. v. Marquette Elec. Inc., 931 F.2d 816, 823* (11th Cir.), *cert. denied*, *502 U.S. 1013, 112 S. Ct. 658, 116 L. Ed. 2d 749 (1991)*. Coca-Cola does not contest PepsiCo's allegation that the relevant geographic market in this case consists of sales "throughout the United States." This dispute thus focuses on whether PepsiCo has alleged a valid and relevant product market.

As the Supreme Court has explained, ***HN5***[] "the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1523*; **[*14]** *Hayden Pub. Co., Inc. v. Cox Broadcasting Corp., 730 F.2d 64, 70-71 (2d Cir. 1984)*. Defining the relevant product market requires consideration of "cross-elasticity of demand" between products, which measures "the extent to which consumers will change their consumption of one product in response to a price change in another." *Eastman Kodak v. Image Technical Servs., 504 U.S. 451, 469, 112 S. Ct. 2072, 2083, 119 L. Ed. 2d 265 (1992)*. If customers are able to substitute one product or service in response to a nontrivial increase in the price of another, these products or services must fall within the same product market. *F.T.C. v. R.R. Donnelley & Sons Co., 1990 U.S. Dist. LEXIS 11361, 1990-2 Trade Cas. (CCH) P 69,239, at 64,854 (D.D.C. 1990)* (citing *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400, 76 S. Ct. 994, 1010, 100 L. Ed. 1264 (1956))*. As explained by the Court of Appeals, "'defining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business **[*15]** away from each other.'" *Hayden, 730 F.2d at 71* (quoting *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063* (3d Cir.), *cert. denied*, *439 U.S. 838, 99 S. Ct. 123, 58 L. Ed. 2d 134 (1978))*.

At play in this case is the principle that within a broad product market there may exist "well-defined submarkets . . . which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1524* (citing *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-95, 77 S. Ct. 872, 877, 1 L. Ed. 2d 1057 (1957))*. ***HN6***[] The boundaries of so-called "submarkets" may be established by reference to such "practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.; see* *F.T.C. v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 1998 U.S. Dist. LEXIS 11778, 1998 WL 433784*, at *12 (D.D.C. 1998); *F.T.C. v. Staples, Inc., 970 F. Supp. 1066, 1075 (D.D.C. 1997)*. **[*16]**

HN7[] Ultimately, a "submarket" definition turns on the same inquiry as a "market" definition -- "whether the products in a proposed submarket are reasonably interchangeable in use or production with products in the broader market." ABA Antitrust Section, ***Antitrust Law*** Developments 521 (4th ed. 1997). At bottom, then, "the same proof which establishes the existence of a relevant product market also shows (or fails . . . to show) the existence of a product submarket." *H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1540 (8th Cir. 1989)*; *AD/SAT v. Associated Press, 920 F. Supp. 1287, 1296 n.6 (S.D.N.Y. 1996)* (observing that "the required analysis does not change whether a particular product market is deemed a market or a submarket," agreeing with commentators that "submarket" term draws no meaningful distinction and restricting itself to use of the term "market"); *Staples, 970 F. Supp. at 1080 n.11* (noting that use of term "submarket" may be confusing and observing that "whatever term is used -- market, submarket, relevant product market -- the analysis is the same"). As Professor Areeda counseled, "speaking of submarkets **[*17]** is both superfluous and confusing in an antitrust case," and "nothing would be lost by deleting the word 'submarket' from the antitrust lexicon." IIA ***Antitrust Law*** P 533e, at 170, 173. Heeding this advice, where possible this Opinion will speak only of relevant "markets".

Also crucial here is the principle that ***HN8***[] to define a relevant product market one must look at how *consumers* view the products in question. *See* *Westman Commission Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)* ("Any definition of a line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." (quoting *United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958))*; *Cardinal Health*, 1998 WL 433784, at *11 ("The relevant market consists of all of the products that the Defendant's customers view as substitutes to those supplied by the Defendants.").

The market definition inquiry set out in *Cardinal Health*, which involved a potential merger of pharmaceutical wholesalers, is apt here. In deciding whether wholesale distribution services constituted a market distinct **[*18]** from other distribution methods, Judge Sporkin focused on customers' decisions:

> Thus, in this case, if enough customers view other forms of prescription drug delivery methods as acceptable substitutes to the services provided by the Defendants, then the relevant market should include these

alternative methods. On the other hand, if customers do not view the other methods of distribution as viable substitutes, then the relevant product market should be limited to wholesalers' services.

12 F. Supp. 2d 34, 46, 1998 WL 433784, at *11. Judge Sporkin also reflected that "it is imperative that the Court, in determining the relevant market, take into account the economic and commercial realities of the pharmaceutical industry." *Id. at 46*. Similarly, market definition in this case must account for the "economic and commercial realities" of the beverage industry, but on this motion to dismiss such consideration must be limited to how those realities are alleged in the complaint.

B. *The Standard for Evaluating Market Definition on a Motion to Dismiss*

As the above cases might suggest, market definition is most often a factual inquiry. *See* **[*19]** *Hayden, 730 F.2d at 70 n.8* (noting that "'a pronouncement as to market definition is not one of law, but of fact'" (quoting *Jennings Oil Co. v. Mobil Oil Corp., 539 F. Supp. 1349, 1352 (S.D.N.Y. 1982)))*; *International Audiotext Network, Inc. v. American Tel. & Tel. Co., 893 F. Supp. 1207, 1214 (S.D.N.Y. 1994)* ("Market definition . . . is generally ultimately a question of fact which 'can be determined only after a factual inquiry into the "commercial realities" faced by consumers.'" (quoting *Eastman* *Kodak, 504 U.S. at 482, 112 S. Ct. at 2090*)), *aff'd*, *62 F.3d 69 (2d Cir. 1995)*. Motions to dismiss in this context thus may be granted only if the alleged market makes "no economic sense under any set of facts." *National Communications Ass'n v. American Tel. & Tel. Co., 808 F. Supp. 1131, 1134 (S.D.N.Y. 1992)* (quoting *Theatre Party*, 695 F. Supp. at 154); *Envirosource, Inc. v. Horsehead Resource Dev. Co., 1997 U.S. Dist. LEXIS 12570, 1997-2 Trade Cas. (CCH) P 71,944, at 80,608 (S.D.N.Y. 1997)* ("Extensive analyses of reasonable interchangeability **[*20]** and cross elasticity of demand . . . are not required at the pleading stage."); *Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc., 795 F. Supp. 639, 647 (S.D.N.Y. 1992)* (deeming market definition-based 12(b)(6) dismissal proper only where proposed market definition is "patently implausible solely on the basis of the four corners" of the complaint). Absent an inherently implausible market allegation, the question must be resolved on the facts and economic realities of the case. *See, e.g., R.R. Donnelley, 1990 U.S. Dist. LEXIS 11361*, 1990-2 Trade Cas. P 69,239, at 64,854 (rejecting market definition where evidence showed that technological developments in relevant fields rendered once-viable market allegation implausible).

C. *PepsiCo's Alleged Market*

As explained above, PepsiCo defines the relevant market as "sales of fountain-dispensed soft drinks distributed through independent foodservice distributors throughout the United States." Complaint P 6. In alleging this market, PepsiCo contends, and for the purposes of the motion Coca-Cola accepts, that the relevant sales are to the restaurants, movie theaters, or other establishments that **[*21]** purchase fountain-dispensed soft drinks for later sale to individual consumers, not sales to the diners, moviegoers, or other customers who patronize those retail establishments and actually drink the soft drinks. The market PepsiCo alleges consists of an "increasing number" of these restaurants, theater operators, and other "on-premise" accounts who "generally make it a practice" to purchase the supplies exclusively through foodservice distributors. *Id*. PepsiCo thus alleges that the relevant market consists not of the sale of all soft drinks, or even of all fountain-dispensed soft drinks, but only of sales of fountain-dispensed soft drinks distributed through foodservice distributors. In this way, PepsiCo alleges that within the broader market for fountain-dispensed soft drinks, there exists a separate distinct market (or submarket) for fountain-dispensed soft drinks distributed through foodservice distributors. The boundaries of PepsiCo's proposed product market are thus defined by this particular method of distribution. As one would expect, Coca-Cola takes issue with this market definition.

D. *Coca-Cola's Arguments*

1. *A Market Cannot Be Limited to Sales Through a Single* **[*22]** *Group of Distributors*

At the outset I must address Coca-Cola's argument that "as a matter of law, a market cannot be limited to sales through a single group of distributors." Memorandum of Defendant The Coca-Cola Company in Support of Its Motion to Dismiss ("Coca-Cola Mem.") at 12. This statement is incorrect -- numerous courts have defined product markets by reference to a channel of distribution. *See e.g., Cardinal Health*, 1998 WL 433784, at *13 (holding that wholesale distribution of pharmaceutical products to customers who demanded such distribution was a relevant market, even though products so delivered were identical to those delivered through other modes of distribution); Staples, 970 F. Supp. at 1080 (holding that sales of consumable office supplies through office supply superstores constituted relevant market, even though the office supplies sold in those outlets were physically identical to those sold elsewhere; relying on "compelling pricing evidence" which demonstrated that customers of office superstores did not turn to non-superstore outlets when faced with price increases in the superstore market); Columbia Broadcasting Sys., Inc. v. FTC, 414 F.2d 974, 978-79 (7th Cir. 1969), **[*23]** *cert. denied*, *397 U.S. 907, 90 S. Ct. 903, 25 L. Ed. 2d 88 (1970)* (phonograph records sold through record clubs comprised relevant market even though records delivered by clubs were identical to those sold in record stores and other outlets); Henry v. Chloride, Inc., 809 F.2d 1334, 1343 (8th Cir. 1987) (sales of automobile batteries through route salespersons distinct from sales of such batteries through retail stores even though "the batteries sold by route salespersons are not different in character, creation or use from those sold from a warehouse or store"); Ansell Inc. v. Schmid Lab., Inc., 757 F. Supp. 467, 471-75 (D.N.J. 1991) (holding that sales of condoms "to retail distributors does constitute an 'economically significant submarket'" even though manufacturers "may sell their products through a number of different channels of distribution").

The point was expressly made in Greyhound Computer Corp., Inc. v. International Business Mach. Corp., 559 F.2d 488, 494 (9th Cir. 1977), *cert. denied*, *434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978)*, where IBM argued that leasing general purpose **[*24]** computers did not constitute a submarket "economically distinct from others in which such computers are made available to users," such as sales, time-sharing and contracting with service bureaus. Id. at 494. In upholding the jury's finding that leasing of computers did constitute a separate submarket, the court noted:

> ***HN9***[] No rule of law or economic principle bars application of section 2 of the Sherman Act to one of several alternative means of distributing a product. The statute prohibits monopolization of 'any part' of interstate or foreign commerce. Accordingly, the Sherman Act and other antitrust statutes have been applied to protect competition in one of alternate channels of distribution.

Id.

Accordingly, ***HN10***[] it is appropriate to limit a market to a discrete channel of distribution so long as it is shown, using established market-definition criteria, that enough customers do not view other methods of distribution as viable substitutes to the distribution method in question. *See Cardinal Health*, 1998 WL 433784, at *11. PepsiCo's allegations on this score are more than adequate.

PepsiCo's complaint expressly alleges that there **[*25]** are no viable substitutes to fountain-dispensed soft drinks distributed through independent foodservice distributors. *See, e.g.*, Complaint P 8 (alleging that neither sales of soft drinks in bottles and cans nor sales of fountain-dispensed soft drinks through alternative means of distribution are viable alternatives to foodservice distribution of fountain-dispensed soft drinks). According to the complaint, distribution through foodservice distributors constitutes "the lifeblood of competitive efficiency" among the delineated restaurants, theaters, and other customers who must take delivery in this fashion in order to "remain logistically efficient." *Id*. P 8. Indeed, "because customers of foodservice distributors maintain a tightly integrated relationship with their distributors, relying on the distributor for virtually all of their supplies, it is far more difficult for them to switch distributors than to switch brands of soft drinks." *Id*. P 24. Accordingly, even though PepsiCo has made "highly competitive proposals" to customers of foodservice distributors, *id*. P 14, those customers "remain locked into Coca-Cola as their supplier without the real ability to entertain **[*26]** a competitive bid from PepsiCo." *Id*. P 27. PepsiCo has adequately alleged a market with reference to cross-elasticity of demand and a lack of reasonable interchangeability within the meaning of the distribution channel cases cited above.

Nonetheless, Coca-Cola argues that it is inappropriate to define the relevant product market in this way, because there is no difference in the products that the parties manufacture. Viewing PepsiCo's proposed market definition as a "submarket" within a broader soft-drink market, Coca-Cola argues that "there can be no relevant submarket without some differences in the products" the parties sell. In support Coca-Cola cites T. Harris, 931 F.2d 816, where a supplier of EKG paper alleged that its competitor monopolized the market in EKG paper sold to "hospitals with more than 200 beds." *Id. at 825*. Although recognizing that "a relevant product market can be limited to a portion of customers," the court cautioned that such a limitation must be "based on a distinction in the product sold to those customers." *Id. at 823*. The court rejected plaintiffs' purported distinction, finding after discovery **[*27]** that the paper sold to hospitals with more than 200 beds was identical to the paper sold to all other hospitals. Coca-Cola seizes on the court's holding, observing that "the product that Coca-Cola and PepsiCo supply -- soft drinks -- is *identical* irrespective of the form of distribution that is used." *See* Reply Brief of Defendant The Coca-Cola Company in Support of Its Motion to Dismiss ("Coca-Cola Reply Mem.") at 11. Coca-Cola maintains that this fact is fatal to PepsiCo's claim.

Although *T. Harris* is not dispositive for Coca-Cola, it highlights a crucial aspect of PepsiCo's claim: under PepsiCo's purported market definition, there *is* a distinction among the products in question -- PepsiCo has alleged that the relevant product market is not the market for soft-drinks, or fountain-dispensed soft drinks, but rather the market for "fountain-dispensed soft drinks *distributed through foodservice distributors*." This product -- fountain-dispensed soft drinks distributed through foodservice distributors -- is alleged to be something distinct from "fountain-dispensed soft drinks" distributed through any other means. Indeed, the complaint posits that the buyers in question **[*28]** have real efficiency-based reasons to take delivery of all of their supplies, including fountain syrup, from foodservice distributors; the complaint maintains that for these customers delivery through other means simply will not do. The *T. Harris* plaintiff made no showing to this effect. [1] Further, PepsiCo alleges that a soft drink manufacturer that can offer its product delivered through the preferred -- indeed required -- channel of distribution offers something markedly different than does a soft drink manufacturer that can only offer delivery of its product through alternate, but disfavored, methods of distribution.

Coca-Cola contends generally **[*29]** that PepsiCo has merely selected one group of customers and called it a market. Coca-Cola posits that "just as Coca-Cola could not define a market made up of [fast-food restaurants owned by a PepsiCo subsidiary] and then accuse PepsiCo of monopolizing the sale of soft drinks within that market, PepsiCo cannot make out a monopolization case focused entirely on a segment of the selling opportunities in which Coca-Cola has achieved substantial success." Coca-Cola Reply Mem. at 7.

In this vein, Coca-Cola relies on *Redmond v. Missouri Western State College, 1988 U.S. Dist. LEXIS 12230, 1988-2 Trade Cas. (CCH) P68,323, at 59,843 (W.D.Mo. 1988)*. There, a private college-textbook bookstore claimed that the college-owned bookstore unlawfully monopolized a market for the sale of college textbooks to scholarship students by issuing vouchers to the students usable only for books in the college-owned bookstore. The court rejected plaintiff's attempt to "define the relevant market in terms of a certain class of prospective purchasers," noting that to do so would run "contrary to the classic tests used in a monopolization case." *Id*. The court observed that "it seems unprecedented **[*30]** to allow a claim that a defendant has monopolized a class of customers as distinguished from a product or service." *Id*. The *Redmond* court noted, and Coca-Cola relies upon, the proposition that a plaintiff cannot artificially define a market so as to cover only the practice complained of; to do so would, as described by the *Redmond* court, be an example of "circular or at least result-oriented reasoning." *Id.*

Redmond is distinguishable. Here, the complaint alleges that market realities force the end users in question to make their purchases exclusively through foodservice distributors. Thus, at least at the pleading stage, it is economic reality, not reference to "the practice complained of," that delineates the boundaries of the alleged market. Further, the books at issue in *Redmond* were identical whether delivered by the plaintiff or the defendant; as noted above, PepsiCo argues that the character and value of the product actually manufactured by the parties -- fountain syrup used to create fountain-dispensed soft drinks -- changes in the eyes of buyers by virtue of the manner in which it is delivered. Because foodservice distributors satisfy all of their customers' **[*31]** supply needs at once, offering consolidated delivery and accounting systems, their customers buy supplies through them to the exclusion of all other methods of distribution. *See, e.g., Staples, 970 F. Supp. at 1080*; *Cardinal Health*, 1998 WL

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[1] Further, as another court in this Circuit has observed, *T. Harris* was decided "not on law, but on facts." *See Sunshine Cellular v. Vanguard Cellular Sys., Inc., 810 F. Supp. 486, 494 (S.D.N.Y. 1992)*. Its consideration of the economic realities of the marketplace before it thus provide limited guidance on this motion under *Rule 12(b)(6)*.

433784, at *11. Thus, a manufacturer offering to sell its product through a foodservice distributor is offering something different from a manufacturer offering to sell the same product through other means of distribution. The cluster of products and services offered by independent foodservice distributors selling fountain syrup is alleged to constitute a different product, for antitrust purposes, than fountain syrup sold through other methods of distribution. *See, e.g., Staples, 970 F. Supp. at 1080*; *Cardinal Health*, 1998 WL 433784, at *15.

Finally, the *Redmond* scholarship students had the option of exchanging their vouchers for cash and then using that cash to purchase books elsewhere; the class of customers alleged to have no alternative to textbooks in the college-owned store in actuality were free to purchase their books from other distributors. Here, in contrast, **[*32]** PepsiCo alleges that buyers who take delivery through foodservice distributors are unable to switch to any product/distribution combination other than fountain-dispensed soft drinks distributed through foodservice distributors. If, as alleged, Coca-Cola has monopoly power in the market for distribution of fountain syrup within the distinct cluster of products and services offered by foodservice distributors, Coca-Cola would have the ability to restrict output, raise prices, and exclude competition in that market to the detriment of its rivals and buyers in the market.

PepsiCo has not, as suggested at argument, merely "drawn a circle around" certain customers and called those customers a market. To the contrary, PepsiCo has alleged a market using criteria traditionally considered in antitrust cases and has alleged that Coca-Cola has monopolized or attempted to monopolize that market. The market alleged indeed contains a disproportionately high number of Coca-Cola purchasers; but those purchasers are alleged to be distinct, not because they buy Coca-Cola, but because market forces dictate that they purchase their fountain syrup only through foodservice distributors, and those foodservice **[*33]** distributors offer only Coca-Cola.

Coca-Cola also relies on *Queen City Pizza v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997)*, *cert. denied*, *140 L. Ed. 2d 645, 118 S. Ct. 1385 (1998)*, to argue that a market cannot be defined by reference to the purchasing restrictions of a distinct class of customers. There, Domino's pizza franchisees, bound under the terms of their franchise agreements to purchase Domino's-approved supplies and distribution services, claimed that Domino's had monopolized the market for the supplies and services "used in the operation of Domino's stores." *Id. at 437*. The district court granted the defendant's *Rule 12(b)(6)* motion to dismiss for failure to allege a valid relevant market, and the Third Circuit affirmed. The court of appeals observed that the supplies available from other pizza suppliers and used by other pizza companies differed from Domino's approved supplies in but one particular: only the latter could be used by Domino's franchisees without precipitating a breach of the franchise contract. Because "the test for a relevant market is not commodities reasonably interchangeable by a particular **[*34]** plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes,'" the inquiry properly focused not on the contractual restrictions of one class of consumers but rather on the decisions of all consumers purchasing the commodity for the same purpose. *Id. at 438*. The court rejected the notion that a market may be defined by reference to a particular consumer's contractual restraints, affirming the district court's conclusion that the relevant economic power in the antitrust context must flow from the market, not from private contractual relations. *Id. at 435*; *see also* IIA Phillip E. Areeda et al., ***Antitrust Law*** P 510b, at 111 (Supp. 1998) (discussing *Queen City* holding and noting that "the existence of even an unconscionable contract does not create a relevant market for antitrust purposes").

In contrast to the *Queen City* plaintiffs, however, PepsiCo alleges a market based on consumer demand, not on contractual restrictions. As noted above, PepsiCo has alleged that "logistical efficiency" considerations compel an increasing number of purchasers to take delivery of supplies exclusively through foodservice distributors **[*35]** and that such customers will not switch away from that method of distribution once they have chosen it because to do so would result in "severely adverse economic and logistical consequences." Complaint P 8. Again, as alleged, economic forces, not contractual restraints, dictate the boundaries of the market defined in the complaint, and *Queen City* is thus distinguishable. *See* IIA ***Antitrust Law*** P 510b, at 112 (noting importance of distinguishing between "lock-in" imposed by a contract and that imposed by market forces).

The above cases demonstrate that ***HN11***[] market definition is a particularly fact-based inquiry. Thus it is not surprising that courts granting 12(b)(6) motions for failure to allege a proper market generally have dismissed only those complaints that failed to explain how the product in question was not reasonably interchangeable with other similar products. *See e.g., Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 347 (N.D. Ill. 1997)* (dismissing complaint where alleged market "improperly excludes interchangeable substitutes"); *Deep-South Pepsi-Cola Bottling Co. v. PepsiCo, Inc., 1989 U.S. Dist. LEXIS 4639, 1989-1 Trade Cas. (CCH) P68,560 (S.D.N.Y. 1989)* **[*36]** (granting 12(b)(6) dismissal where plaintiff failed "to set out a theoretically rational explanation to support its proposed relevant product market"; plaintiff "failed to allege why Pepsi-Cola franchises are not interchangeable with franchises for the distribution of other soft drinks"); *Theatre Party*, 695 F. Supp. at 153 (dismissing complaint after concluding that plaintiff alleging a market limited only to the defendant-supplier's own product had "narrowly defined the market in an attempt to conform the alleged market to the facts of the present case"). Here, the complaint addresses and explains the basis for the market, and on this score is more than sufficient to withstand a motion to dismiss.

While not compelling on a motion to dismiss, Coca-Cola's arguments highlight the difficulties PepsiCo may encounter in proving the existence of the market it has alleged in the complaint. Indeed, numerous cases have rejected purported market definitions, some of which were similar to that proposed here, after evidence culled during discovery demonstrated that the plaintiff had excluded reasonably interchangeable products or services from its proposed market definition. **[*37]** *See e.g., Thurman v. Pay ' N Pak Stores, Inc., 875 F.2d 1369 (9th Cir. 1989)* (rejecting proposed submarket based on one-stop shopping where evidence failed to support plaintiff's purported market); *Westman, 796 F.2d 1216* (rejecting proposed market limited to one-stop shopping distributors of goods where evidence in record failed to establish inelastic demand between defendant's products and similar products offered by competing brands); *see also R.R. Donnelley*, 1990 Trade Cas. at P 64,852 (denying motion for a preliminary injunction after five days of evidentiary hearings because plaintiff was unable to prove the contours of the product market that it had alleged); *T. Harris, 931 F.2d 816* (rejecting alleged market because record failed to support finding that products included in alleged market differed from those sold to different class of customers).

Here, if the facts adduced during discovery demonstrate that customers purchasing fountain-dispensed soft drinks view other methods of fountain-dispensed soft drink delivery as acceptable substitutes to delivery through foodservice distributors, then the market **[*38]** alleged should include those alternative methods, and Coca-Cola may be entitled to summary judgment at that time. But for the moment our attention is limited to the complaint, and the allegations contained therein must be taken as true. Those allegations expressly state that an "increasing number" of customers do not view the other distribution methods as viable substitutes. As such the market alleged in the complaint is properly limited to fountain-dispensed soft drinks distributed through foodservice distributors.

2. *Even if the Purported Market Exists, It is Irrelevant to This Claim*

Conceding that a market may, in certain circumstances, be defined by reference to a distribution channel, Coca-Cola argues that even if such a market exists here, it is irrelevant to PepsiCo's claim. In particular, Coca-Cola points out that PepsiCo alleges it has been foreclosed from competition. Therefore, Coca-Cola maintains, citing *Tampa Electric Co. V. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*, that foreclosure must be measured within the context of a market which "includes the full range of selling opportunities reasonably open to rivals, namely, **[*39]** all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations." Coca-Cola Reply Brief at 4 (citing IIA ***Antitrust Law*** P 570b, at 278 (rev. ed. 1995)). To this end, Coca-Cola asserts that foreclosure should be "measured in a market including the total output of the sellers who would be included in the market for assessing a horizontal merger between the merging seller [*i.e.*, Coca-Cola] and any allegedly foreclosed rival [*i.e.*, Pepsi]." Coca-Cola Mem. at 13. Coca-Cola maintains that whatever amount of sales might be attributed to the buyers PepsiCo delineates in its alleged market, such a distinct class of customers is meaningless unless considered in the context of the entire market in which PepsiCo and Coca-Cola, both soft drink manufacturers, compete generally. I disagree.

HN12[] A "'market' for antitrust purposes is the one relevant to the particular legal issue at hand." IIA ***Antitrust Law*** P 533, at 167. With this in mind it is helpful to examine the nature of the claim PepsiCo asserts. Here, PepsiCo asserts monopoly claims under *section 2* of the Sherman Act. That Act prohibits unlawful monopolies because monopoly **[*40]** power allows the monopolist to control a market by excluding competition, restricting output, and raising prices, all without losing customers. *See Grinnell Corp., 384 U.S. at 571, 86 S. Ct. at 1704*; *Hamilton*

College, 128 F.3d at 67 (explaining that ability to "restrict output and raise prices" without losing customers is "precisely the vice of a monopoly"). **HN13**[] The essence of product market definition in a monopoly case, therefore, is determining whether there exists a group of buyers which is unable, because of market forces, to switch to an alternative product or service in the face of a monopolist's price increase. [2]

[*41] An example by Professor Areeda, advanced in his attempt to discourage use of the term "submarket," *see supra*, demonstrates that identifying the relevant market turns on identifying the harm to be avoided. Presume a glass maker selling containers for food, medicine, *etc.*; presume also that some of the buyers can readily substitute cans or other packages, but others find substitution more difficult. In explaining how to define the market properly in such a case, Professor Areeda noted that "while the glass firms might be able to charge the latter higher prices than others, the more vulnerable customers are not a 'submarket,'" but rather are properly deemed a relevant product market in their own right. IIA ***Antitrust Law*** P 533e, at 170. The following F.T.C. discussion makes the point even more clearly:

> If in fact price could be raised above competitive levels for the glass containers sold in these end-use segments, those segments would be proper topics of antitrust concern not because they are submarkets, but because they would be relevant product markets in their own right. *At least in theory, each end-use segment could stand as a grouping of sales for which a hypothetical* **[*42]** *monopolist might be able to impose a significant price increase.*

In re Owens-Illinois, Inc., 115 F.T.C. 14 (1992) (emphasis added).

Here, the complaint alleges a distinct "end-use segment" comprised of those fountain-dispensed soft drink purchasers who can take delivery *only* through foodservice distributors. For these customers nothing else will do; in Professor Areeda's words, they find substitution "more difficult" than do other purchasers of fountain syrup. If a monopolist -- in this case Coca-Cola -- can charge these customers more than it charges others, these "more vulnerable" customers constitute a separate product market, and that market is directly relevant to a case complaining about the monopolist's anticompetitive behavior.

As noted above, Coca-Cola suggests that the proper market definition inquiry in a case between manufacturers would be the same as that undertaken in evaluating a horizontal merger between those parties. Exploring this suggestion, I note that in evaluating a horizontal merger between sellers, it is appropriate to consider not only the effect of the merger across a market defined by the full range of those companies' selling **[*43]** opportunities, but also to explore the merger's effects within smaller, distinct markets for "unique" items that the merging entities offer. As the Supreme Court put it in *Brown Shoe*, "because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in any line of commerce', it is necessary to examine the effect of a merger in each economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1524. Indeed, as then-Judge Bork observed, "that view of submarket analysis is also mandated by the purpose of antitrust laws: the promotion of consumer welfare." Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, *479 U.S. 1033, 107 S. Ct. 880, 93 L. Ed. 2d 834 (1987)*; *see also* United States v. Household Fin. Corp., 602 F.2d 1255 (7th Cir. 1979) (noting that "in determining the effect of competition in mergers of one type of institution, it is the effect in any area of unique services **[*44]** that must be considered" (citing United States v. Phillipsburg Nat'l Bank, 399 U.S. 350, 360-61, 90 S. Ct. 2035, 26 L. Ed. 2d 658 (1970))), *cert. denied*, *444 U.S. 1044 (1980)*.

[2] Courts have also considered "supply substitutability," or cross-elasticity of supply, *i.e.*, "the ability of firms in a given line of commerce to turn their productive facilities toward the production of commodities in another line because of similarities in technology between them." *See* Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1271 (9th Cir. 1975). While the parties have not focused on this potential factor, I note that the effect, if any, of supply substitutability on market definition can be determined after discovery.

Indeed, in *Owens-Illinois, supra*, which involved a proposed merger of glass container manufacturers, the F.T.C. looked not only at the market for the broadest range of the companies' selling opportunities, but also examined the effect within distinct "end-user segments" that might be vulnerable to price increases imposed by a hypothetical monopolist. The Commission found that certain classes of customers put the glass containers to different end uses, with varying abilities to substitute away from the product in the event of price increases. The Commission concluded that so long as an "end-user segment within the larger grouping meets the same economic standard which defines a market, the end-use segment may properly be analyzed as a product market in its own right." *Owens-Illinois*, 115 F.T.C. at 16. Accordingly, here, where the complaint alleges an end-use segment that "meets the same economic standard which defines a market," it is appropriate to consider that **[*45]** segment a market.

3. *Coca-Cola Cannot Monopolize a Market in Which It Does Not Participate*

Coca-Cola also argues that PepsiCo's allegations indicate that the proper market here is really the market for foodservice distribution services, not any type of market for fountain syrup. Coca-Cola argues that PepsiCo's market definition is thus inappropriate in a claim against Coca-Cola because Coca-Cola is not a foodservice distributor.

To support the proposition that an entity may not be said to monopolize a market in which it does not participate, Coca-Cola points to *Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980)*, *cert. denied*, *450 U.S. 917, 101 S. Ct. 1362, 67 L. Ed. 2d 343 (1981)*. There, the petitioner published an airline guide which provided detailed information on flight connections and fares. The guide, described as the "bible" of the industry, was the "standard reference for airline ticket offices, travel agents, businesses, and the public generally" and was the "primary market tool of . . . virtually every (air) carrier . . . in the United States." *Id. at 921-22*. The publisher's concededly arbitrary listing **[*46]** policy was found to handicap commuter carriers attempting to compete against certificated carriers. The Court of Appeals held that the publisher, not itself an air carrier, had no duty under the Federal Trade Commission Act "not to discriminate unjustifiably between certificated air carriers and commuter airlines so as to place the latter at a significant competitive disadvantage." *Id. at 921*.

In so holding, the Court of Appeals noted at the outset that the guide publisher had no "purpose to create or maintain a monopoly" in the relevant market, which was defined as the airline industry. *Id. at 925*. The court concluded that the guide publisher, "though possibly a monopolist in the airline schedule publishing industry, admittedly had no anticompetitive motive or intent with respect to the airline industry and is engaged in a different line of commerce from that of the air carriers." *Id. at 926*.

Here, in contrast, the complaint clearly alleges that Coca-Cola has acted with "anticompetitive motive or intent with respect" to the downstream distribution of its product, that is to say, in the market for fountain-dispensed soft drinks **[*47]** distributed through foodservice distributors. In particular, by virtue of its agreements with foodservice distributors and in carrying out its actual and threatened refusals to deal, Coca-Cola is alleged to have exhibited anticompetitive conduct in a market for its product as delivered through a particular method of distribution that a number of customers must have in order to remain efficient. It is alleged to have done so to the detriment of both retail customers and ultimate consumers, as well as to the detriment of PepsiCo, which is foreclosed from reaching the buyers in this market. Moreover, in contrast to *Official Airline Guide*, both PepsiCo and Coca-Cola compete with one another in the market alleged.

Coca-Cola also relies on *Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9 (1st Cir. 1987)*, but that case is distinguishable as well. There, the defendant was a municipal authority which possessed a monopoly over an airport's facilities. The plaintiff, an air carrier, was denied access to the ground facility of its choice and claimed that defendant had denied plaintiff access to an "essential facility" in violation of *section 2* of the Sherman **[*48]** Act. The court rejected the claim, because it was "difficult to see how denying a facility to one who, like [plaintiff], is not an actual or potential competitor could enhance or reinforce the monopolist's market power." *Id. at 12*. Here in contrast, Coca-Cola's alleged refusals to deal clearly could "enhance or reinforce" Coca-Cola's market power in the market for the sale of its product to those customers who must take delivery through independent foodservice distributors.

The lingering question, however, is whether it makes sense to charge Coca-Cola, a soft-drink manufacturer, with monopolizing a product market defined by reference to both the product Coca-Cola manufactures, fountain syrup, and the independent, value-added method of distribution through which that syrup is delivered. As PepsiCo alleges it, this case involves one market with two components: the market for (1) fountain-dispensed soft drinks (2) distributed through foodservice distributors. As Coca-Cola would have it, this case involves two distinct markets: (1) a market for fountain-dispensed soft drinks (in which PepsiCo and Coca-Cola compete) and (2) a market for foodservice distribution services **[*49]** (in which neither PepsiCo nor Coca-Cola participate or compete). Coca-Cola maintains that the market PepsiCo has alleged is at most a distribution-specific market; thus, because Coca-Cola does not participate or operate in any distribution business, a claim that it monopolizes such a market makes no sense. According to Coca-Cola, it may be accused of monopolizing only a market for the "thing" it produces, which in this case is the fountain syrup used to make fountain-dispensed soft drinks.

But PepsiCo does more than allege a market for distribution services and it has not alleged that Coca-Cola monopolizes the foodservice distribution industry generally. Rather, PepsiCo alleges that Coca-Cola has monopolized the market for fountain-dispensed soft drinks *as distributed through* foodservice distributors. According to the allegations in the complaint, consumers view fountain syrup distributed within this cluster of products and services to be different from fountain-dispensed soft drinks distributed through other means. According to the complaint, therefore, the relevant product is neither fountain-dispensed soft drinks alone nor foodservice distribution services alone, but rather **[*50]** a distinct product created by the combination of fountain-dispensed soft drinks and distribution through foodservice distributors. So understood, Coca-Cola has a hand in making this combined product -- it manufactures the fountain syrup and secures delivery of that syrup through a distinct channel of distribution that the complaint describes as the "lifeblood of competitive efficiency in the restaurant business, movie theater business and other businesses that depend upon delivery through foodservice distributors in order to remain logistically efficient." Complaint P 8. In this way Coca-Cola creates a product that is unique in the purchasing eyes of an increasing number of restaurants, movie theaters, and other "on-premise" accounts. Moreover, the complaint alleges that by virtue of its actual and threatened refusals to deal Coca-Cola has acted with anticompetitive purpose and intent in this market. Thus, while the complaint does not allege that Coca-Cola is a direct participant in the downstream foodservice distribution market, *i.e.*, it does not compete horizontally with foodservice distributors, the complaint does allege Coca-Cola's purposeful participation in the distribution **[*51]** of its product and in that regard trumps, at the pleading stage, any attempt by Coca-Cola to disclaim participation in the market alleged in the complaint.

III. FAILURE TO ALLEGE ANTICOMPETITIVE CONDUCT

PepsiCo alleges that Coca-Cola is unlawfully exercising its monopoly power by refusing to deal and threatening to refuse to deal with foodservice distributors that carry or desire to carry Pepsi. Coca-Cola properly notes that ***HN14***[] even where a defendant has monopoly power, a plaintiff's claims of actual or attempted monopolization require proof of anticompetitive conduct as an essential element of the claim. *See* *Spectrum Sports, 506 U.S. at 456, 113 S. Ct. at 890*; *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990)*, *cert. denied*, *500 U.S. 928, 111 S. Ct. 2041, 114 L. Ed. 2d 125 (1991)*.

Coca-Cola argues that the conduct in which it is alleged to have engaged is not anticompetitive as a matter of law. In particular, Coca-Cola contends that PepsiCo's complaint is fatally flawed because it fails to allege that Coca-Cola's agreements with foodservice distributors are not terminable at will. For this **[*52]** proposition Coca-Cola cites a number of cases of "fairly recent vintage": *Paddock Publications, Inc. v. Chicago Tribune Co., 103 F.3d 42* (7th Cir.), *cert. denied*, *520 U.S. 1265, 138 L. Ed. 2d 196, 117 S. Ct. 2435 (1997)*; *Omega Envt'l, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1164 (9th Cir. 1997)*, *pet. for cert. denied*, *142 L. Ed. 2d 36, 119 S. Ct. 46 (1998)*; *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236-38 (1st Cir. 1983)*.

Each of these cases held that exclusive dealing arrangements that were terminable at will or of short duration were not barred by the antitrust laws because they left the relevant market up for grabs and because competitors were not foreclosed from the market but rather were encouraged to "compete for the contract." *See* *Paddock, 103 F.3d at 45* (dismissing exclusive dealing claim brought under section 1 of the Sherman Act because, *inter alia*, "other firms that want to enter the market can do so by competing at intervals for these contracts"); *Gilbarco, 127 F.3d at 1164* (finding, after trial, that exclusive dealing arrangements **[*53]** did not foreclose rivals from substantial portion of market because other modes of distribution were available and all relevant distributors were open to bids within one year or less); *Barry Wright, 724 F.2d at 236-38* (affirming district court's rejection of claim that requirements contract was exclusionary after finding, on complete record, that multiple factors, including nature and duration of contract, suggested the agreements were not 'exclusionary').

Coca-Cola argues that in this case the ability of *all* distributors to switch to Coca-Cola's competitors' products at all times precludes a finding of exclusionary conduct as a matter of law. Coca-Cola points out that the complaint itself alleges that the reason distributors faced with threats do not carry Pepsi is because those distributors could not afford to stop distributing Coca-Cola in favor of Pepsi because those distributors have customers who want Coca-Cola. According to Coca-Cola, this reflects Coca-Cola's superior product and superior business strategy, not unlawful monopolistic activity.

PepsiCo points out, however, that this complaint does not assert that Coca-Cola has entered into anticompetitive **[*54]** exclusive dealing contracts. Rather, PepsiCo complains that Coca-Cola's actual and threatened refusals to deal represent anticompetitive monopolization or attempted monopolization of the relevant market. To this effect, PepsiCo relies predominantly upon *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*, which held that a defendant-monopolist's refusal to deal with any advertiser that also dealt with an emerging competitor constituted a *section 2* violation because it was a use of "monopoly to destroy threatened competition." *Id. at 143, 72 S. Ct. at 187* (recognizing ***HN15***[] the general right of a private business to select its customers, but holding that the exercise of that right for the purpose of monopolization violates the Sherman Act). This principle may be traced back to the Supreme Court's pronouncement generations ago that:

> *In the absence of any purpose to create or maintain a monopoly*, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he may deal. **[*55]**

United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919). The principle has remained valid law. *See* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S. Ct. 2847, 2857, 86 L. Ed. 2d 467*; *Byars v. Bluff City News Co., 609 F.2d 843, 858 (6th Cir. 1979)* (observing that where "a monopolist refuses to deal with customers who deal with its rivals," such "behavior is inherently anticompetitive; *Lorain Journal* . . . makes it clear that this is illegal . . . ."). As noted by Professors Areeda and Hovenkamp:

> Extraction of an agreement not to deal with any competitor -- or the equivalent, refusing to deal with buyers who do -- can be exclusionary and particularly damaging where the buyers cannot do without the seller's product or service. We see no convincing justification for a requirement that a customer not deal with a particular rival.

IIIA Phillip E. Areeda et al., ***Antitrust Law*** P 768e6 (citing *Lorain Journal, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181*).

In this case, PepsiCo asserts that Coca-Cola has refused to deal and threatened **[*56]** to refuse to deal with independent foodservice distributors who wish to distribute Pepsi. This conduct might be unobjectionable had PepsiCo not alleged that Coca-Cola has acted with a "purpose to create or maintain a monopoly." But PepsiCo's complaint does allege that Coca-Cola possesses or is likely to possess monopoly power in the market for fountain-dispensed soft drinks delivered through these distributors and that Coca-Cola's actual and threatened refusals to deal have been undertaken with the "purpose to create or maintain" monopoly power in that market. The complaint also alleges that Coca-Cola's actions effectively foreclose PepsiCo from reaching any consumers in the relevant market. As such, PepsiCo's complaint states a *section 2* claim, and Coca-Cola's motion to dismiss on the ground that PepsiCo has failed to allege anticompetitive conduct must be denied.

CONCLUSION

"***HN16***[] Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***." *Eastman Kodak, 504 U.S. at 467-68, 112 S. Ct. at 2082*. Taking the allegations in the complaint as true, I find that they describe an economically **[*57]** viable market relevant to the *section 2* claims PepsiCo asserts. Thus, because it does not appear that PepsiCo "can prove no set of facts in support of [its] claim which would entitle [it] to relief," *see* *Hamilton College, 128 F.3d at 62*, Coca-Cola's motion to dismiss is denied. PepsiCo now must demonstrate, however, that "market realities" support the market it has alleged.

Counsel shall appear for an initial pre-trial conference in Courtroom 12A on Friday, October 2, 1998, at 10:00 a.m.

SO ORDERED:

Dated: New York, New York

August *27*, 1998

LORETTA A. PRESKA, U.S.D.J.

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Supermarket of Marlinton v. Valley Rich Dairy

United States Court of Appeals for the Fourth Circuit

May 7, 1998, Argued ; August 27, 1998, Decided

No. 97-2314, No. 97-2315

Reporter
1998 U.S. App. LEXIS 21110 *; 1998-2 Trade Cas. (CCH) P72,247

SUPERMARKET OF MARLINTON, INCORPORATED, Plaintiff-Appellant, v. VALLEY RICH DAIRY; FLAV-O-RICH, INCORPORATED; THE VALLEY OF VIRGINIA COOPERATIVE MILK PRODUCERS ASSOCIATION, Defendants-Appellees, and MEADOW GOLD DAIRIES, INCORPORATED; BORDEN, INCORPORATED, Defendants. JOHN MILES, formerly doing business as Central Market; RUTH C. MILES, formerly doing business as Central Market, Plaintiffs-Appellants, v. VALLEY RICH DAIRY; FLAV-O-RICH, INCORPORATED; THE VALLEY OF VIRGINIA COOPERATIVE MILK PRODUCERS ASSOCIATION, Defendants-Appellees, and MEADOW GOLD DAIRIES, INCORPORATED; BORDEN, INCORPORATED, Defendants.

Notice: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: *1998 U.S. App. LEXIS 33534*.

Prior History: Appeals from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, Senior District Judge. (CA-93-968-R, CA-96-407-R).

Disposition: AFFIRMED.

Core Terms

antitrust, milk, prices, dairies, price-fixing, anti trust law, sufficient evidence, district court, grocery store, conspiracy, raw milk, regulated, alleged conspiracy, injury in fact, deposition, summary judgment, fail to produce, no application, dairy company, distributor, purchases, products, changes, damages, courts, limits

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews the district court's grant of summary judgment de novo. Although permissible inferences from the underlying facts are to be drawn in the light most favorable to the non-moving party, those inferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN2[] **Remedies, Damages**

Section 4 of the Clayton Act, which authorizes private actions for treble damages, provides in part that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN3[] **Private Actions, Standing**

In determining whether a plaintiff has standing to sue under the antitrust laws, the threshold inquiry must focus on the plaintiff's alleged injury. This inquiry is potentially dispositive: if there is no showing of injury, the plaintiff does not have a claim cognizable under the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN4[] **Private Actions, Remedies**

The threshold showing of injury in a private antitrust action, sometimes labeled injury in fact, is satisfied if the plaintiff can produce sufficient evidence of an injury proximately caused by the defendants' conduct. However, the showing of an injury causally linked to a defendant's alleged illegal conduct, by itself, is insufficient to maintain an action for treble damages. Rather, an antitrust plaintiff must show that the alleged injury is an "antitrust injury," which it defined as: injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should be the type of loss that the claimed violations would be likely to cause.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN5[] **Private Actions, Remedies**

Injury in fact is not equated with antitrust injury for not every loss stemming from an antitrust violation counts as antitrust injury.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN6[] **Private Actions, Standing**

Antitrust standing involves more than the constitutional standing requirement of case or controversy. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN7[] **Clayton Act, Claims**

Certain factors limiting the reach of the threefold damage remedy authorized by § 4 of the Clayton Act, codified at *15 U.S.C.S. § 15(a)*, which are to be assessed on a case-by-case basis, include: the risk of duplicative recovery by multiple antitrust claimants; the extent to which the claim is based upon speculative, abstract, or impractical measures of damages; the causal connection between the alleged violation and the harm suffered; and the relationship of the injury alleged to the forms of injury about which Congress was concerned when it created a private remedy.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act provides in part that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN9[] **Private Actions, Standing**

In order to prevail in a private antitrust action, a private plaintiff must establish both that (1) he has standing and (2) the defendant has violated the antitrust laws. Once it appears, whether early or late in the litigation, that either requirement is lacking, the suit must be dismissed."

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a case under *§ 1* of the Sherman Act, codified at *15 U.S.C.S. § 1*.

Counsel: ARGUED: Charles Leonard Egan, FORT & SCHLEFER, L.L.P., Washington, D.C., for Appellants.

Michael Francis Urbanski, WOODS, ROGERS & HAZLEGROVE, P.L.C., Roanoke, Virginia, for Appellees.

ON BRIEF: William C. Buckhold, FORT & SCHLEFER, L.L.P., Washington, D.C., for Appellants.

Francis H. Casola, WOODS, ROGERS & HAZLEGROVE, P.L.C., Roanoke, Virginia; William H. Cleaveland, RIDER, THOMAS, CLEAVELAND, FERRIS & EAKIN, P.C., Roanoke, Virginia, for Appellees.

Judges: Before MICHAEL and MOTZ, Circuit Judges, and TRAXLER, United States District Judge for the District of South Carolina, sitting by designation.

Opinion

OPINION

PER CURIAM:

Supermarket of Marlinton, Inc. ("Marlinton") and the owners of Central Market **[*2]** ("Central Market") filed class actions against several large dairy companies, seeking treble damages for alleged violations of federal antitrust laws. Specifically, the grocery stores claimed that the dairy companies conspired to suppress competition by fixing, raising, and maintaining the price of milk at artificially high levels in violation of the Sherman Act. *See 15 U.S.C.A. § 1 (West 1997)*. Marlinton and Central Market appeal the district court's order granting summary judgment to the dairy companies on the ground that they failed to produce sufficient evidence of injury in fact, and, therefore, lacked antitrust standing. We affirm.

I.

Marlinton and Central Market are two grocery stores located in southeastern West Virginia and southwestern Virginia, respectively. They instituted these private antitrust actions in the wake of a 1992 Department of Justice investigation into the milk industry, which led to the indictment of Valley Rich Dairy ("Valley Rich"), Meadow Gold Dairies, Inc. ("Meadow Gold"), Borden, Inc. ("Borden"), and three Meadow Gold officials on charges that they had rigged school milk bids. The dairy companies pled guilty while the Meadow **[*3]** Gold officials proceeded to trial.

During the trial of the Meadow Gold officials, Paul French ("French"), the former General Manager of Valley Rich, testified under a grant of use immunity that he had engaged in various pricefixing activities with officials from Meadow Gold, a competitor in portions of Virginia and West Virginia. More specifically, French testified about meetings in which he and the Meadow Gold officials conspired to fix school milk bids and wholesale milk prices. He stated that these meetings were in person, prearranged, and conducted at locations away from his office. French further testified that he filled out his expense accounts in such a manner as to conceal these meetings. The trial resulted in a hung jury and the Government did not reprosecute the case. French's testimony, however, became the basis for the present actions against the dairies.

In 1993, Marlinton filed a class action [1] against Meadow Gold, Borden, Valley Rich, Flav-O-Rich, Inc. ("Flav-O-Rich"), and Valley of Virginia Co-Operative Milk Producers Association ("Valley of Virginia"), [2] alleging that between 1984 and 1987 the dairies had conspired to fix the price of milk sold in the wholesale **[*4]** market where Marlinton conducted business. The district court granted the dairies' motion for summary judgment on the ground that the applicable statute of limitations barred Marlinton's claim. [3] We reversed that ruling in *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, [4] holding that the district court had employed an incorrect standard for the tolling of the statute of limitations under the fraudulent concealment doctrine. In addition, we recognized that on remand the district court would have to resolve the question of whether Marlinton had antitrust standing, an issue that the parties had not yet fully briefed. [5] In April 1996, Marlinton's attorney filed an identical suit on behalf of John and Ruth Miles, who owned and operated Central Market during the period of the alleged conspiracy. The district court consolidated these cases for discovery purposes. Thereafter, in April 1997, the grocery stores deposed French, who by then claimed to have a poor recollection of his price-fixing discussions with Meadow Gold officials. However, French did testify that his discussions with Meadow Gold officials had "no application" when: (1) Valley Rich faced competition from **[*5]** a third dairy competitor; (2) one of Valley Rich's partners, such as Flav-O-Rich, controlled the account; (3) there was guaranteed pricing; (4) the milk was sold to a customer under a private label; or (5) the milk was purchased from a distributor to whom Valley Rich sold milk.

[*6] Two developments relevant to this appeal occurred after French's deposition. First, the district court approved a classwide settlement between the grocery stores and Meadow Gold and Borden in the amount of $ 100,000. Therefore, in the present appeal, Valley Rich, Flav-O-Rich, and Valley of Virginia are the only defendants remaining in the case. Second, the non-settling dairies once again moved for summary judgment, arguing that the grocery stores lacked antitrust standing because the grocery stores could not prove that they were injured by the price-fixing conspiracy. Although Marlinton and Central Market could show that a price-fixing conspiracy existed in the general geographic areas where they conducted business, the district court held they could not demonstrate that the products they purchased from the dairies were a subject of that conspiracy, *i.e.*, Marlinton and Central Market failed to produce sufficient evidence of injury in fact. Therefore, the district court found that Marlinton and Central Market lacked antitrust standing, and granted the dairies' motion for summary judgment. This appeal followed.

II.

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[1] Marlinton purported to represent a class of similarly situated commercial milk purchasers in western Virginia and a portion of southeastern West Virginia.

[2] During the relevant period, Flav-O-Rich and Valley of Virginia were joint venture partners of Valley Rich.

[3] *See* *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 874 F. Supp. 721 (W.D. Va. 1994)*.

[4] *71 F.3d 119 (4th Cir. 1995)*.

[5] On remand, the dairies renewed their motion for summary judgment, arguing that the action was both time-barred and that Marlinton lacked antitrust standing to bring suit because it could not prove that it purchased a price-fixed product from any of the dairies during the relevant period. The district court denied that motion.

HN1[] We review the district court's grant of summary judgment *de* **[*7]** *novo*. [6] Although permissible inferences from the underlying facts are to be drawn in the light most favorable to the non-moving party, we have noted that, "those inferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture." [7] *HN2*[] Section 4 of the Clayton Act (" § 4"), which authorizes private actions for treble damages, provides in pertinent part that, "*any* person who shall be injured in his business or property by reason of *anything* forbidden in the antitrust laws may sue . . . ." [8] The Supreme Court has recognized that "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." [9] For this reason, "the federal courts . . . have not interpreted section 4 as expansively as its literal language suggests." [10] Rather, "the voluminous case law on [antitrust] standing to sue under section four reflects an effort by the federal courts to narrow the scope of the broad statutory language so as to prevent unfair and oppressive results." [11] "Judicial limitation of the § 4 remedy . . **[*8]** . has proven to be less than an empirical judicial science." [12] **[*9]** "The Supreme Court, along with the lower federal courts, has long struggled to develop a precise test to determine whether a particular plaintiff is the proper party to bring an antitrust suit under section 4 of the Clayton Act; in truth, 'the issue of antitrust standing has become somewhat confused.'" [13]

Although federal courts have not developed a single precise test for determining antitrust standing, they have gradually begun to conduct § 4 analysis in a uniform manner. [14] **[*12]** In particular, courts have recognized that an

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[6] *See* *Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994)*.

[7] *Thompson Everett, Inc. v. National Cable Adver., L.P., 57 F.3d 1317, 1323 (4th Cir. 1995)* (citation omitted).

[8] *15 U.S.C.A. § 15(a) (West 1997)* (emphasis added).

[9] *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*.

[10] *Todorov v. DCH Healthcare Auth. , 921 F.2d 1438, 1448 (11th Cir. 1991)*.

[11] *Midwest Communications, Inc. v. Minnesota Twins, Inc., 779 F.2d 444, 450 (8th Cir. 1985)*.

[12] *Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1081 (6th Cir. 1983)*.

[13] *Todorov, 921 F.2d at 1449* (footnote omitted) (quoting *Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197, 1201 (7th Cir. 1986))*.

In *Associated General, 459 U.S. at 535-36*, the Supreme Court likened the struggle of federal judges to fashion a precise test to determine antitrust standing to "the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause.'"

[14] *See* *Sports Racing Serv., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 882 (10th Cir. 1997)* (stating that "to maintain standing to bring an antitrust claim under § 4 . . . a plaintiff must show (1) an 'antitrust injury;' and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws"); *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997)* (antitrust standing exists only if plaintiff shows: (1) injury in fact; (2) antitrust injury; and (3) proper plaintiff status, "which assures that other parties are not better situated to bring suit"); *Barton & Pittinos, Inc. v. Smithkline Beecham Corp., 118 F.3d 178, 182 (3d Cir. 1997)* (explaining that antitrust standing requires a showing of antitrust injury and proper plaintiff status); *Serfecz v. Jewel Food Stores, 67 F.3d 591, 596-97 (7th Cir. 1995)* ("in order to maintain an antitrust action, plaintiffs must establish that they (1) have suffered an antitrust injury and (2) are proper plaintiffs to maintain an antitrust action . . . ."); *Balaklaw v. Lovell, 14 F.3d 793, 797 n.9 (2d Cir. 1994)* (noting that courts have developed a two-pronged test for determining antitrust standing: (1) whether the plaintiff suffered an antitrust injury; and (2) an analysis of other factors "largely relating to the directness and identifiability of the plaintiff's injury"); *Todorov, 921 F.2d at 1449* (prescribing a twopronged test for determining antitrust standing: (1) whether the plaintiff has suffered an antitrust injury; and (2) whether the

antitrust standing analysis should begin by examining the plaintiff's alleged injury. As the Eighth Circuit has noted, ***HN3***[] in determining "whether a plaintiff has standing to sue under the antitrust laws, the threshold inquiry must focus on the plaintiff's alleged injury. This inquiry is potentially dispositive: if there is no showing of injury . . . the plaintiff does not have a claim cognizable under the antitrust laws. **[*10]** " [15] Indeed, we have noted that injury is the "crux" of every private antitrust action. [16] ***HN4***[] This threshold showing of injury, sometimes labeled injury in fact, [17] **[*13]** is satisfied if the plaintiff can produce sufficient evidence of an injury "proximately caused by the defendants' conduct." [18] **[*14]** However, the Supreme Court has held that the showing of an injury causally linked to a defendant's alleged illegal conduct, by itself, is insufficient to maintain an action for treble damages. [19] Rather, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, [20] the Court held that an antitrust plaintiff must show that the alleged injury is an "antitrust injury," which it defined as:

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plaintiff is an "efficient enforcer" of the antitrust laws); *Adams v. Pan Am. World Airways, Inc., 264 U.S. App. D.C. 174, 828 F.2d 24, 26 (D.C. Cir. 1987)* (stating that the plaintiff must show: (1) antitrust injury; and (2) proper plaintiff status).

[15] *Midwest Communications, 779 F.2d at 450* (footnote omitted). *See also* *Amarel v. Connell, 102 F.3d 1494, 1507 (9th Cir. 1997)* (stating that "the nature of the plaintiff's alleged injury is of 'tremendous significance' in determining whether a plaintiff has antitrust standing") (quoting *Bhan v. NME Hosp., Inc., 772 F.2d 1467, 1470 n.3 (9th Cir. 1985))*; 2 Phillip E. Areeda & Hebert Hovenkamp, ***Antitrust Law*** P 363a, at 219 (rev. ed. 1995) (stating that "all courts demand a showing of injury-in fact 'caused' by an antitrust violation").

[16] *See* *Windham v. American Brands, Inc., 565 F.2d 59, 66 (4th Cir. 1977)*.

[17] *See* Areeda & Hovenkamp, *supra*, P 360e, at 201 (stating that "we usually speak of 'causation' or 'injury-in-fact' when focusing on the presence or absence of actual injury caused by an alleged antitrust violation").

We recognize that a majority of courts begin their antitrust standing analysis by determining whether a plaintiff has suffered an "antitrust injury." We see no substantive difference between those courts which look first to whether the plaintiff has produced sufficient evidence of injury in fact and those which begin by examining whether the plaintiff has suffered an "antitrust injury." "The key point is that a plaintiff is generally denied relief unless he proves each element[for standing]. The Supreme Court has made this clear in requiring a plaintiff to establish both proximately caused injury-in-fact and antitrust injury as 'essential' elements of the plaintiff's case." *Id.*,P 360e, at 200 (citing *Associated General, 459 U.S. at 539, 542-44*; *Blue Shield of Virginia v. McCready, 457 U.S. 465, 478-79, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982))*.

We do note, however, that there is a distinction between the two concepts. On several occasions, the Supreme Court has declined to ***HN5***[] "equate injury in fact with antitrust injury . . . [for] not every loss stemming from an [antitrust] violation counts as antitrust injury." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339 n.8, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)* (noting that the Court declined to adopt such an approach in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, and *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986))*. *See also* Areeda & Hovenkamp, *supra*, P 360e, at 201 n.53 (stating that "injury-in-fact is never defined to include antitrust injury").

[18] *Doctor's Hosp., 123 F.3d at 305*. *See also* Areeda & Hovenkamp, *supra*, P 360e, at 201 (stating that "causation, or injury-in-fact, requires a showing that the injury of which the plaintiff complains actually resulted from those acts of the defendant that violated the antitrust laws"); M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 Antitrust L.J. 311, 315 (1997) (noting that "in order to establish the fact of injury, an antitrust plaintiff must demonstrate that it suffered 'some damage' as a causal result of the defendant's violation") (footnote omitted).

As courts and commentators have observed, ***HN6***[] antitrust standing involves more than the constitutional standing requirement of "case or controversy." "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated General, 459 U.S. at 535 n.31*; *see also* *Todorov, 921 F.2d at 1448* (stating that antitrust standing involves more than the constitutional "case or controversy" requirement).

[19] *See* *Brunswick, 429 U.S. at 489*.

[20] *429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." [21] The purpose of such a requirement is two-fold: "It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of **[*11]** the antitrust laws . . . and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief." [22] We recently applied *Brunswick*'s "antitrust injury" requirement in Thompson Everett, Inc. v. National Cable Advertising, L.P., [23] and concluded that the plaintiff, "if injured at all, had not been injured by anything forbidden by the antitrust laws." [24] If a would-be antitrust claimant produces sufficient evidence of "antitrust injury," the standing analysis continues. In Cargill, Inc. *v. Monfort, Inc.*, [25] the Supreme Court stated that, "[a] showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons." [26] Identifying who is a "proper plaintiff" under § 4 involves an analysis of "other factors in addition to antitrust injury." [27] **[*15]** These factors help determine whether a plaintiff is an efficient enforcer of the antitrust laws, and helps "exclude as plaintiffs those whose suits might 'undermine[] the effectiveness of treble-damages suits.'" [28]

In *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, [29] **[*16]** we identified certain factors, enunciated by the Supreme Court in *Blue Shield of Virginia v. McCready* [30] and *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, [31] which are "designed in combination to put principled limits on the literally unbounded reach of the threefold damage remedy authorized by § 4 of the Clayton Act." [32] ***HN7***[] These factors, which are to be assessed on a case-by-case basis, include:

the risk of duplicative recovery by multiple antitrust claim ants; the extent to which the claim is based upon speculative, abstract, or impractical measures of damages; the causal connection between the alleged violation and

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[21] *Brunswick, 429 U.S. at 489* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 124, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*).

[22] *Atlantic Richfield, 495 U.S. at 342* (discussing purpose of the "antitrust injury" requirement).

[23] *57 F.3d 1317 (4th Cir. 1995)*.

[24] *See* *Thompson Everett, 57 F.3d at 1320*. In *Thompson Everett*, we stated that, "[a] private person may not . . . recover damages simply by establishing that his injury was causally linked to an illegal presence in the market. Rather, the damages sought must flow from *that conduct* which is proscribed by the antitrust laws." *Id. at 1325* (citations and internal quotation marks omitted).

[25] *479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*.

[26] *Cargill, 479 U.S. at 110 n.5*.

[27] *Id. at 111 n.6* (citing *Associated General, 459 U.S. at 544-45*; *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*).

[28] *Adams, 828 F.2d at 26* (quoting *Associated General, 459 U.S. at 545*).

[29] *828 F.2d 211 (4th Cir. 1987)*.

[30] *457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*.

[31] *459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*.

[32] *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 219 (4th Cir. 1987)*.

the harm suffered; and the relationship of the injury alleged to the forms of injury about which Congress was concerned when it created a private remedy. [33]

In the instant case, the district court determined that Marlinton and Central Market lacked antitrust standing because they failed to produce sufficient evidence that they purchased products affected by the alleged price-fixing conspiracy, *i.e.*, they failed to produce sufficient evidence of injury in fact. Based on the following, we affirm. [34]

[*17] III.

Marlinton and Central Market base their claims entirely upon French's testimony. They contend that French's testimony demonstrates that between 1984 and 1987 Valley Rich and Meadow Gold agreed on joint responses to changes in the regulated cost of raw milk in the geographic areas where the grocery stores conducted business, in violation of the Sherman Act. *See* *15 U.S.C.A. § 1*. [35]

In support of their argument, the grocery stores point specifically to the agreement that whenever there was a significant change in the price of raw milk, French and Meadow Gold officials would meet to decide on the timing and amount of published price changes of key items, such as gallons, **[*18]** half-gallons, quarts, and pints of milk. Marlinton and Central Market claim that they purchased milk affected by these price changes. Therefore, the injury they assert is the increase in prices that they and others paid over the price that would have been charged in a competitive market.

A.

Central Market claims to have direct evidence that beginning in December 1986 it purchased milk affected by the alleged price-fixing conspiracy. On September 1, 1986, the regulated cost of raw milk in the relevant portions of southern West Virginia and southwestern Virginia rose $ .60 per hundred weight. French testified that he and a Meadow Gold official agreed on a joint response to this increase. At the time of this joint response, Central Market was served by Alexander, Inc. ("Alexander"), one of Valley Rich's distributors. Central Market does not contend that Alexander was a party to this pricefixing agreement, and indeed, French stated in his deposition that his price-fixing discussions with Meadow Gold officials had "no application" when an independent distributor, such as Alexander, controlled the pricing.

However, on December 12, 1986, Valley Rich acquired Alexander, and as a result, **[*19]** Central Market began purchasing milk directly from Valley Rich. Because the regulated cost of raw milk did not change again until 1987, Central Market claims that the milk it began purchasing from Valley Rich in December 1986 was affected by the alleged price-fixing conspiracy. We disagree.

As an initial matter, we will assume for purposes of our analysis that the alleged conspiracy existed through 1987, as Marlinton and Central Market contend. We note, however, that the district court determined that the latest evidence of price-fixing was a discussion between French and a Meadow Gold official concerning the September 1, 1986 regulated price increase of raw milk, and that there was no evidence "of any collusion in prices in 1987." [36] Additionally, in analyzing Central Market's claim, the district court found that the evidence was "suggestive of the

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[33] *Id.* (citations omitted).

[34] Because we agree that Marlinton and Central Market have failed to satisfy the threshold requirement of demonstrating injury in fact, we need not address whether they produced sufficient evidence of "antitrust injury" and whether they are considered "proper plaintiffs" under § 4.

[35] ***HN8***[] *Section 1* of the Sherman Act provides in pertinent part that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C.A. § 1 (West 1997)*.

[36] J.A. 354 n.4.

absence, not presence, of collusion between Valley Rich and Meadow Gold" [37] because the price Central Market paid for milk did not change when Valley Rich acquired Alexander.

[*20] We are mindful that, ***HN9***[] in order to prevail, "a private plaintiff must establish both that (1) he has standing *and* (2) the defendant has violated the antitrust laws. Once it appears, whether early or late in the litigation, that either requirement is lacking, the suit must be dismissed." [38] In the instant case, if there is no evidence that the alleged conspiracy continued to exist in December 1986, then in reality Central Market's claim fails on its merits. [39] **[*21]** However, we limit our discussion to antitrust standing, and in so doing, we will "assume the existence of a violation and then [determine] whether the . . . standing elements are shown." [40] Applying this test, even assuming the alleged conspiracy existed through 1987, we find that Central Market has not produced sufficient evidence that it purchased price-fixed products.

As noted, Marlinton and Central Market allege that Valley Rich and Meadow Gold agreed on *joint responses* to changes in the regulated cost of raw milk. Such joint responses would have resulted in joint increases or decreases in the dairies' milk prices. However, the pricing data for Central Market during the period it was allegedly injured demonstrates that Valley Rich's and Meadow Gold's prices to Central Market were not mutual. When Valley Rich acquired Alexander's account in December 1986, Valley Rich continued to charge Central Market the same prices as had Alexander. These prices were substantially lower than Meadow Gold's during this time. In addition, while Valley Rich did not change its gallon price for milk sold to Central Market until July 1987, Meadow Gold changed Central Market's gallon price two times during this same period.

Even when there were changes in the regulated cost of raw milk, which the grocery stores contend was the "triggering event" for price increases, "the movement in milk prices charged by Valley Rich and **[*22]** Meadow Gold to Central Market [was] anything but mutual." [41] For example, when the regulated cost of raw milk increased effective January 1, 1987, Meadow Gold's gallon price to Central Market increased four cents, while Valley Rich's price did not increase. Similarly, when Meadow Gold, in response to a May 1987 regulated raw milk change, lowered its price on half-gallons and quarts, Valley Rich's prices remained unchanged.

As the Supreme Court has stated, ***HN10***[] "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." [42] In light of the pricing data, we cannot agree with Central Market's contention that it has produced sufficient evidence that could support an inference that it was injured by its purchases of milk from Valley Rich. Because Central Market has not produced sufficient evidence that it purchased products that were affected by the alleged pricefixing conspiracy, it has failed to satisfy the threshold requirement of demonstrating injury in fact, **[*23]** and therefore, lacks antitrust standing.

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[37] J.A. 353.

[38] Areeda & Hovenkamp, *supra* , P 360f, at 202.

[39] *See Todorov, 921 F.2d at 1459* (stating that "because we find no conspiracy, [the plaintiff's*] section 1* claim must fail").

Commentators have stated that, "an increasing number of courts, unfortunately, deny standing when they really mean that no violation has occurred." Areeda & Hovenkamp, *supra*,P 360f, at 203. *But see Levine v. Central Fla. Med. Affiliates, Inc. 72 F.3d 1538, 1545* (11th Cir.) (agreeing with Areeda & Hovenkamp and deciding antitrust case on merits rather than standing), *cert. denied*, ***136 L. Ed. 2d 34, 117 S. Ct. 75 (1996)***; *Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 855 n.10 (9th Cir. 1995)* (deciding not to reach appellants' standing contention because there was no proof of injury to competition); *Todorov, 921 F.2d at 1455* (addressing the merits of a *§ 1* claim even though the plaintiff lacked antitrust standing); *McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988)* (assuming standing and addressing antitrust claim on its merits).

[40] Areeda & Hovenkamp, *supra* , P 360f, at 204.

[41] J.A. 353.

[42] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

B.

Both Marlinton and Central Market make the additional argument that they have established a circumstantial evidentiary basis to infer that they were injured by their purchases from Meadow Gold throughout the 1984-87 conspiracy period. Specifically, Marlinton and Central Market contend that French's testimony supports the existence of a general conspiracy whose effect must flow through the pricing system of the two dairies. We disagree.

In his deposition testimony in this case, which focused upon wholesale price fixing by the dairies, French specifically testified that his discussions had "no application" when: (1) Valley Rich faced competition from a third dairy competitor; (2) one of Valley Rich's partners controlled the account; (3) there was guaranteed pricing; (4) the milk was sold to a customer under a private label; or (5) **[*24]** the milk was purchased from a distributor to whom Valley Rich sold milk. When asked specifically about Marlinton and Central Market, French testified that: (1) his discussions had "no application" to Marlinton because a third dairy, Broughton's Foods, was present in the market during the relevant period and set Marlinton's prices; and (2) his discussions had "no application" to Central Market because Alexander, an independent distributor, controlled Central Market's prices.

French's deposition testimony is significant for several reasons. First, it reveals the narrow scope of his price-fixing discussions and the fact that the alleged conspiracy did not have the all-encompassing effects which the grocery stores urge. Second, French's deposition was the first time that he testified in great detail as to the alleged conspiracy to fix prices in the wholesale market, as opposed to the school milk market at issue in the previous criminal proceedings. Finally, French's deposition statements are consistent with his trial testimony that "all bets were off" when a third party competitor was involved.

To reiterate the Supreme Court's instruction - "***antitrust law*** limits the range of permissible **[*25]** inferences from ambiguous evidence in a *§ 1* case." [43] Because French's testimony is the grocery stores' only evidence indicating how Meadow Gold handled its pricing, we believe that Marlinton and Central Market have failed to establish a circumstantial evidentiary basis to infer that they were injured by their purchases from Meadow Gold.

IV.

Based upon the foregoing, we hold that Marlinton and Central Market have failed to produce sufficient evidence that the products they purchased were affected by the alleged price-fixing conspiracy.

As such, they have failed to satisfy the threshold requirement of demonstrating injury in fact, and therefore, lack antitrust standing. Accordingly, the district court's grant of summary judgment in favor of the dairy companies is affirmed.

AFFIRMED

End of Document

[43] *Matsushita Elec., 475 U.S. at 588*.

Surgical Care Ctr. v. Hospital Serv. Dist. No. 1

United States Court of Appeals for the Fifth Circuit

August 27, 1998, Decided

No. 97-30887

Reporter
153 F.3d 220 *; 1998 U.S. App. LEXIS 21022 **; 1998-2 Trade Cas. (CCH) P72,249

SURGICAL CARE CENTER OF HAMMOND, L.C., d/b/a St. Luke's SurgiCenter, Plaintiff-Appellant, versus HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, d/b/a North Oaks Medical Center, and QUORUM HEALTH RESOURCES, INC., Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Louisiana. 97-CV-1840. A J McNamara, US District Judge.

Disposition: AFFIRMED.

Core Terms

immunity, exclusive contract, foreseeable, hospital service, hospital district, district court, anticompetitive, antitrust, anticompetitive conduct, surgical care, Sherman Act, practices, providers, plans

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Standards of Review, De Novo Review**

The court reviews de novo the dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) and must construe all allegations in the complaint favorably to the pleader and accept as true all well-pleaded facts.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

The court has expanded the state action doctrine to include acts by political subdivisions that stem from state authority. Although subdivisions, because they are not sovereign, are not automatically immune, they nonetheless can claim immunity when they demonstrate that they are engaging in the challenged activity pursuant to a clearly expressed state policy to displace competition. The legislature need not state explicitly, in the statute or legislative history, its intention or expectation that the delegated action have anticompetitive effects. A municipality is entitled to immunity when the anticompetitive action is the foreseeable result of the legislation.

Business & Corporate Law > Joint Ventures > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN3[] **Business & Corporate Law, Joint Ventures**

La. Rev. Stat. Ann. § 46:1077 provides that a hospital service district may contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health service.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN4[] **Sales of Goods, Output, Exclusive & Requirements Agreements**

The Louisiana hospital statute, *La. Rev. Stat. Ann. § 46:1077*, contemplates that a hospital service district might enter into exclusive contracts with health care providers.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN5[] **Antitrust Actions, Facilities**

See *La. Rev. Stat. Ann. § 46:1071*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN6[] **Parker State Action Doctrine, Local Governments & Private Parties**

La. Rev. Stat. Ann. § 46:1055(B) provides that hospital service districts may enter into a special services agreement with any person, including a hospital management firm to manage, operate, and administer a hospital or hospitals, or any part thereof, under the control of the commission for the benefit of the hospital's service district.

Counsel: For SURGICAL CARE CENTER OF HAMMOND, L.C., Plaintiff - Appellant: Donna Guinn Klein, Craig Lewis Caesar, McGlinchey, Stafford & Lang, New Orleans, LA.

For HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, QUORUM HEALTH RESOURCES, INCOPORATED, Defendants - Appellees: Robert S Rooth, Chaffe, McCall, Phillips, Toler & Sarpy, New Orleans, LA. L Kenneth Krogstad, Wilbur Anthony Toups, III, Chaffe, McCall, Phillips, Toler & Sarpy, New Orleans, LA. Daniel M Mulholland, III, Horty Springer & Mattern, Pittsburgh, PA. Susan M Lapenta, Horty, Springer & Mattern, Pittsburgh, PA.

Judges: Before KING, SMITH, and PARKER, Circuit Judges. KING, Circuit Judge, specially concurring.

Opinion by: JERRY E. SMITH

Opinion

[*221] JERRY E. SMITH, Circuit Judge:

Surgical Care Center of Hammond ("St. Luke's") sued Hospital Service District No. 1 of Tangipahoa Parish ("North Oaks") and Quorum Health Resources, Inc. ("Quorum"), under the Sherman Act, *15 U.S.C. § 2*, charging various anticompetitive practices. The district **[**2]** court found that North Oaks and Quorum were entitled to state action immunity from the antitrust laws and dismissed the complaint. We affirm.

I.

St. Luke's is an outpatient surgery center in Hammond, Louisiana, that opened for business in 1996. North Oaks, a hospital service district created pursuant to Louisiana statute, is a neighbor of St. Luke's. North Oaks's hospital is located about a quarter mile from St. Luke's and is managed by Quorum, a private, for-profit hospital management firm. In addition to its acute care services, North Oaks offers both inpatient and outpatient surgery.

In 1997 St. Luke's filed the instant suit, alleging that North Oaks enjoyed monopoly power and was conspiring with Quorum to engage in unlawful anticompetitive practices aimed at driving St. Luke's from the market. St. Luke's claimed that North Oaks exercised monopoly power in the market for acute care services and surgical care and was seeking to attain monopoly power in the outpatient surgical care submarket. St. Luke's alleged **[*222]** violations of the Sherman Act, the Louisiana Monopolies Law, *LA. REV. STAT. § 51:123*, and the Louisiana Unfair Trade Practice and Consumer Protection Law, *LA. **[**3]** REV. STAT. § 51:1405*, 1409.

Specifically, St. Luke's charged that North Oaks, by leveraging its power in the acute care market and inpatient surgical care submarket, was pressuring managed care plans to sign exclusive contracts. St. Luke's characterized these deals as unlawful tying arrangements that stifled competition in the outpatient surgical care submarket. [1]

[4]** The district court granted North Oaks and Quorum's motion to dismiss, concluding that both were insulated from antitrust liability under the state action doctrine. It then dismissed St. Luke's state law claims for want of jurisdiction.

II.

A.

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[1] St. Luke's alleged other unlawful trade practices, including North Oaks's refusal to enter into an emergency blood type-and-cross match agreement, its refusal to enter into a standard patient transfer agreement, its attempt to intimidate North Oaks personnel from working at St. Luke's, its refusal to allow nurses from St. Luke's to attend training courses at North Oaks, its attempt to form a joint alliance with an independent physician association to negotiate all contract rates and terms with health care insurers, its purchase and funding of family practices in hopes of channeling their patients to North Oaks, and its attempt to undermine the practices of two St. Luke's doctors. In its brief, however, St. Luke's focuses on the exclusive contracts as the most egregious of North Oaks's alleged anticompetitive practices.

HN1[] We review *de novo* the dismissal of a complaint under FED. R. CIV. P. 12(b)(6). Morin v. Caire, 77 F.3d 116, 120 (5th Cir. 1996). We must construe all allegations in the complaint favorably to the pleader and accept as true all well-pleaded facts. Word of Faith World Outreach Ctr. Church v. Sawyer, 90 F.3d 118, 121 (5th Cir. 1996).

B.

The Supreme Court first recognized state action immunity to antitrust liability in Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), holding that a state agricultural program did not violate the Sherman Act, even though the program restricted competition. The Court premised its holding on principles of federalism and state sovereignty, concluding: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. **[**5]** " Id. at 350-51. The Sherman Act, the Court reasoned, targeted *private* restraints of trade rather than restraints imposed by state legislatures. *Id*.

Four decades later, the Court refined the state action doctrine in Town of Hallie v. City of Eau Claire, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985). **HN2**[] There, the Court expanded the state action doctrine to include acts by political subdivisions that stem from state authority. Although subdivisions, because they are not sovereign, are not *automatically* immune, they nonetheless can claim immunity when they "demonstrate that [they are] engaging in the challenged activity pursuant to a clearly expressed state policy" to displace competition. Id. at 40. The Court held that the legislature need not state explicitly, in the statute or legislative history, its intention or expectation that the delegated action have anticompetitive effects. Instead, a municipality is entitled to *Parker* immunity when the anticompetitive action is the "foreseeable result" of the legislation. Id. at 42. In other words, we ask whether "the legislature contemplated the **[**6]** kind of action complained of." Id. at 44 (quoting Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)). [2]

[*223] We construed *Parker* immunity in Martin v. Memorial Hosp., 86 F.3d 1391 (5th Cir. 1996), a case arising under strikingly similar facts. In *Martin*, we concluded that a hospital district was entitled to antitrust immunity when it entered into an exclusive contract with a doctor to operate **[**7]** its facility for end stage renal disease ("ESRD"). The plaintiff, another doctor, complained that the exclusive contract barred him from treating his own patients in the hospital facility. The hospital district pointed to the Mississippi statute authorizing it to enter exclusive contracts and requiring a certificate of need prior to establishing an ESRD facility. We agreed that, based on this statute, the Mississippi legislature "clearly contemplated anticompetitive conduct." Id. at 1399. Accordingly, the hospital district was entitled to *Parker* immunity.

III.

The instant case centers on a Louisiana statute, LA. REV. STAT. § 46:1051 et seq., which authorizes the creation, and specifies the powers and duties, of hospital districts. St. Luke's argues that while the statute entitles hospital districts to enter into contracts, the Louisiana legislature did not authorize or foresee the extent and magnitude of the anticompetitive conduct in which North Oaks and Quorum allegedly engaged. North Oaks and Quorum dispute this reading of the statute and argue that *Martin* controls this case. Because North Oaks is a political subdivision of the state of Louisiana, **[**8]** *see* LA. REV. STAT. § 46: 1064(a), it is entitled to *Parker* immunity if its anticompetitive conduct is the foreseeable result of the statutory scheme.

A.

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[2] The Court reaffirmed the *Town of Hallie* test in City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 372-73, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991), where it observed:

> We have rejected the contention that [the clear articulation] requirement can be met only if the delegating statute explicitly permits the displacement of competition. It is enough, we have held, if suppression of competition is the "foreseeable result" of what the statute authorizes.

We begin with the statutory language. ***HN3***[] *LA. REV. STAT. § 46:1077* provides that a hospital service district "may contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health service." This broad statutory language parallels the language we deemed sufficient to confer immunity in *Martin*:

> The [Mississippi] statute clearly, affirmatively and articulately empowers the hospital to contract with any individual for the providing of services by or to the hospital regarding any facet of the operation of the hospital or any division or department thereof, or any related activity. It is clearly a foreseeable result of what the statute authorizes that a hospital would enter an exclusive contract with an individual physician to supervise and perform the critical functions of the ESRD units.

Id. at 1400. [3] Following *Martin*, which linked (1) the power to contract with (2) the foreseeability **[**9]** of a hospital entering into exclusive contracts, we hold that ***HN4***[] the Louisiana hospital statute similarly contemplates that a hospital service district might enter into exclusive contracts with health care providers.

[10]** B.

Buttressing our conclusion is the plain language of *LA. REV STAT. § 46:1071*, which sets forth the legislative findings and purpose. (No comparable provision appeared in the Mississippi statute, which makes *Parker* immunity even more appropriate here.) This **[*224]** section, which appears under the subpart heading "ENHANCED ABILITY TO COMPETE," provides in its entirety:

> ***HN5***[] The legislature hereby finds that the market for hospital and health care services is becoming increasingly competitive. The legislature finds that the hospital and other health care providers are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public. The legislature finds that this increasing competition is forcing hospitals and other health care providers to develop market strategies and strategic plans to effectively compete. *The legislature further finds that hospital service districts are presently at a competitive disadvantage*. The legislature hereby declares that the purpose of R.S. 46:1071 through 1076 is to enhance the ability of a hospital service district to compete effectively and equally in the market for health care **[**11]** services. Towards this end, the provisions of R.S. 46:1071 through 1076 shall be construed liberally.

LA. REV. STAT. § 46:1071 (emphasis added). Given that the *Martin* court concluded that anticompetitive activity was foreseeable even in the absence of a legislative finding that hospitals were competitively disadvantaged, the Louisiana statute presents a far stronger case for foreseeability.

C.

St. Luke's seeks to distinguish *Martin* on the ground that here, the hospital has signed exclusive contracts with health care *plans*, whereas in *Martin*, the hospital signed exclusive contracts with individual *providers*. We agree with the district court that St. Luke's has not shown that this distinction is legally relevant. We must ask what

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[3] The Mississippi statute provided that a hospital may:

> contract by way of lease . . . or otherwise, with any agency, department or other office of government or any individual, partnership, corporation, owner, other board of trustees, or other health care facility, for the providing of property, equipment or services by or to the community hospital or other entity or regarding any facet of the construction, management, funding or operation of the community hospital or any department or division thereof, or any related activity, including, without limitation, shared management expertise or employee insurance and retirement programs, and to terminate said contracts when deemed in the best interests of the community hospital.

MISS. CODE. ANN. § 41-13-35(5)(g). While the Mississippi statute is broader in that it is not confined to "hospital health services," the anticompetitive practices alleged in the instant case concern the provision or promotion of health services, so this distinction is not implicated here. Moreover, the Louisiana statute defines "hospital health services" rather broadly. *See LA. REV. STAT. § 46:1072(1)* ("'Hospital health services" means but is not limited to any clinical, diagnostic, or rehabilitation service and any administrative, managerial, or operational service incident thereto.").

conduct is foreseeable under the statute, and *LA. REV. STAT. § 46:1077* provides that a hospital "may contract . . . with any person, corporation, partnership, or group of persons." This language belies St. Luke's distinction between plans and providers.

Moreover, nothing in *Martin* suggests that the holding was contingent on this distinction. Although exclusive contracts with health care plans may produce greater anticompetitive **[**12]** effects, the key issue, for purposes of *Parker* immunity, is not the magnitude of the effect but rather whether the effect was contemplated by the legislature. *Parker*'s focus is on federalism, not economics: It commands judicial deference to regulatory schemes enacted by state legislatures, notwithstanding a court's views on the economic wisdom of the challenged regulation. [4]

[13]** The Fourth Circuit considered a similar antitrust challenge in *Coastal Neuro-Psychiatric Assoc., P.A. v. Onslow Mem'l Hosp., 795 F.2d 340 (4th Cir. 1986)*. There, a physicians' association argued that a county hospital had violated the Sherman Act by entering into exclusive contracts with radiologists. The court held that the hospital was entitled to *Parker* immunity because the North Carolina statute contemplated anticompetitive conduct in allowing hospitals to decide which physicians could practice in them. *Id. at 341-42*. The court noted that restricting qualified doctors from practicing at the hospital "may or may not be a salutary result. It is clear, however, from *Town of Hallie* that the choice is that of North Carolina and its local hospital boards of governance." *Id. at 342*.

Several district courts have granted hospital districts *Parker* immunity based on the Louisiana statute. *See Willis-Knighton Med. Ctr. v. City of Bossier, 1997 U.S. Dist. LEXIS 20920*, *21-*22, No. 96-2617 (W.D. La. Oct. 15, 1997) (applying *Martin* and concluding that "the delegation of contractual authority, standing **[**14]** alone, [is] enough to immunize the municipal hospital from any antitrust liability that might otherwise arise from executing an exclusive services contract"), **[*225]** *appeal pending*; *Fremaux v. Board of Comm'rs, 1997 U.S. Dist. LEXIS 4098*, *8-*10, No. 96-1225 (E.D. La. Mar. 26, 1997) (applying *Martin* and concluding that hospital's entering into an exclusive contract was foreseeable). In two district court cases from Florida, both of which St. Luke's says were wrongly decided, the courts construed *Parker* broadly and immunized a broad swath of anticompetitive conduct by hospitals. *See Central Fla. Clinic v. Citrus County Hosp. Bd., 738 F. Supp. 459* (M.D. Fla.), *aff'd*, *888 F.2d 1396 (11th Cir. 1989)* (unpublished); *Hospital Dev. & Serv. Corp. v. North Broward Hosp. Dist., 619 F. Supp. 535 (S.D. Fla. 1985)*.

D.

In sum, we conclude that the appellees are entitled to *Parker* immunity. The exclusive nature of the contracts was reasonably foreseeable by the Louisiana legislature. As to the other alleged unlawful trade practices, we agree with the district court that while North Oaks may have engaged **[**15]** in "cutthroat" and "hardball" business practices by trying to lure patients to North Oaks, it is conduct that is a reasonably foreseeable result of the Louisiana statute.

IV.

St. Luke's argues that even if North Oaks is entitled to *Parker* immunity, Quorum--because it is a private actor--is not. We disagree. ***HN6***[] *LA. REV. STAT. § 46:1055(B)* provides that hospital service districts "may enter into a special services agreement with any person, including . . . a hospital management firm . . . to manage, operate, and administer a hospital or hospitals, or any part thereof, under the control of the commission for the benefit of the hospital's service district." Because North Oaks's agreement with Quorum is expressly authorized by the statute,

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[4] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 212.1f, at 146-47 (Supp. 1997):

> The governing principle in this area has been federalism rather than economic rationality . . . . The Court's view of federalism has left enormous discretion to the states to displace competition. As long as a state announces its policy to displace the antitrust laws with adequate clarity and actively supervises the results, *Parker* allows it to do whatever it pleases, no matter how anticompetitive the consequences.

The active state supervision requirement applies only to private parties; it is not implicated in the instant case. *See Town of Hallie, 471 U.S. at 38*; *Martin, 86 F.3d at 1397-98*.

and because Quorum operates the hospital as an agent and for the benefit of the service district, Quorum is protected by North Oaks's *Parker* immunity. [5]

[16]** AFFIRMED.

Concur by: KING

Concur

KING, Circuit Judge, specially concurring:

Although I am troubled by our opinion in *Martin v. Memorial Hosp., 86 F.3d 1391 (5th Cir. 1996)*, I believe it controls the outcome here, and I therefore concur in Judge Smith's opinion for the panel.

End of Document

[5] Although St. Luke's hints in its brief that Quorum may have economic interests independent of North Oaks's, it failed to raise this argument before the district court.

[Johnstone ex rel. National Income Realty Trust v. First Bank N.A.](#)

United States District Court for the Northern District of Illinois, Eastern Division

August 28, 1998, Decided ; August 31, 1998, Docketed

Case No. 95 C 2008

Reporter
1998 U.S. Dist. LEXIS 13763 *; 1998 WL 565193

ROBERT JOHNSTONE, derivatively on behalf of NATIONAL INCOME REALTY TRUST, a California business trust, and JOHN PEDJOE, derivatively on behalf of TRANSCONTINENTAL REALTY INVESTORS, INC., a Nevada Corporation, Plaintiffs, v. FIRST BANK NATIONAL ASSOC., a national banking association; FIRST BANK (N.A.), a business entity; and FBS BUSINESS FINANCE CORPORATION, a business entity; and DAVID J. WABICK, an individual, Defendants, and NATIONAL INCOME REALTY TRUST, a California business trust; and TRANSCONTINENTAL REALTY INVESTORS, INC., a Nevada Corporation, Nominal Defendants.

Disposition: [*1] Plaintiffs' motion for partial summary judgment denied and defendants' motion for summary judgment granted in part and denied in part.

Core Terms

anti-competitive, Trusts, loans, defendants', summary judgment, tying arrangement, purchases, parties, banking, transactions, practices, entities, state law, obligations, conspiracy, defaulted, funds, summary judgment motion, bank holding company, conditioned, plaintiffs', conspiring, customer, challenged transaction, affiliates, lessen competition, misappropriate, participated, genuine, denies

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

The court will render summary judgment only if the factual record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The court will not render summary judgment if a reasonable jury could return a verdict for the nonmoving party. In ruling on a motion for summary judgment, the court views the facts in the light most favorable to the nonmoving party.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Summary Judgment, Opposing Materials**

On a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue of material fact exists. Since the parties filed cross-motions for summary judgment, each party assumes the role of the moving party and the nonmoving party. Therefore, if one party demonstrates that no genuine issue of material fact exists, then the burden shifts to the opposing party, which must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. In determining whether there are any genuine issues of material fact, we draw all inferences in the light most favorable to the nonmovant. However, the court is not required to draw every conceivable inference from the record, only those inferences which are reasonable.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > National Banks > Affiliates & Subsidiaries

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

HN3[] **Financial Institutions, Bank Holding Company Act**

The Bank Holding Company Act (Act) prohibits a bank from conditioning credit upon the requirement that the customer shall obtain some additional credit, property, or service from such bank, bank holding company, or subsidiary of such bank holding company. *12 U.S.C.S. § 1972(1)(B)*. The Act was not intended to prohibit customary banking practices or even unusual practices performed solely to protect a bank's investment. Rather, it was meant to ban anti-competitive ties which were designed to reduce competition and to increase a bank's economic power. In order to recover under the anti-tying provisions of the Act, plaintiffs must establish that defendant's actions (1) were unusual in the banking industry; (2) constituted an anti-competitive tying arrangement; and (3) benefited the bank.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Types of Banks & Financial Institutions > National Banks > Affiliates & Subsidiaries

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

HN4[] **Regulated Industries, Financial Institutions**

The Bank Holding Company Act provides in relevant part that:A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank or from any other subsidiary of such bank holding company. *12 U.S.C.S. § 1972 (1)(B)*.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

HN5[] **Financial Institutions, Bank Holding Company Act**

Unlike in traditional ***antitrust law***, *12 U.S.C.S. § 1972* plaintiffs need not quantify or articulate with great specificity the anti-competitive effect of the alleged tie-in, nor are they required to prove actual anti-competitive effects of the challenged practice, such as a bank's dominance or control over the tying product market or that a substantial volume of commerce is affected.

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

HN6[] **Federal Acts, Bank Holding Company Act**

A tie-in is an arrangement by one party to sell one product (the tying product), but only on the condition that the buyer also purchase a different product (the tied product), or at least agree that he will not purchase the product from another supplier. Tying arrangements lessen competition by enabling an economically powerful seller of the tying product to coerce customers of that product into buying an additional product they do not want or would rather buy elsewhere.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

HN7[] **Financial Institutions, Bank Holding Company Act**

In order to prevail under the Bank Holding Company Act , plaintiffs must show that the notes-and-loans transactions were anti-competitive, i.e., that defendants used their economic power over credit to lessen competition in the marketplace.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN8[] **Choice of Law, Significant Relationships**

In diversity cases, federal courts apply the choice of law rules of the state in which they sit. Illinois choice of law rules provide that the law of the state with the most significant relationship with the events giving rise to the litigation shall apply.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN9[] **Conspiracy, Elements**

Wisconsin defines a civil conspiracy as a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful. In general, for a conspiracy to exist under Wisconsin law, there must be, at a minimum, facts that show some agreement, explicit or otherwise, between the alleged conspirators on the common end sought and some cooperation toward the attainment of that end.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN10[] **Civil Conspiracy, Elements**

Under Wisconsin law, in order to state a claim for civil conspiracy, plaintiff must set forth the formation and operation of the conspiracy, the wrongful act or acts done pursuant to the conspiracy, and the resultant damage from such acts.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN11[] **Summary Judgment, Entitlement as Matter of Law**

It is true that, in order to withstand summary judgment, a plaintiff must present more than a mere suspicion or conjecture that a conspiracy was formed. However, this court cannot grant summary judgment if a fair-minded jury could return a verdict for the nonmoving party on the evidence presented.

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Judges: Ann Claire Williams, Judge.

Opinion by: Ann Claire Williams

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiffs Robert Johnstone, on behalf of National Income Realty Trust, and John Pedjoe, on behalf of Transcontinental **[*2]** Realty Investors, Inc., bring this action against Defendants, First Bank System, Inc., First Bank National Association, First Bank, and FBS Business Finance Corporation ("FBS Entities") and David J. Wabick, alleging violations of the anti-tying provision of the Bank Holding Company Act ("the Act"), *12 U.S.C. § 1972* (Count I). Plaintiffs also allege that defendants violated various state laws by conspiring to breach fiduciary duties (Count II), conspiring to defraud (Count III), and conspiring to convert and misappropriate trust assets (Count IV).

The parties have filed cross-motions for summary judgment pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. Plaintiffs move the court to grant partial summary judgment on their behalf as to Count I of their Second Amended Verified Derivative Complaint. The FBS Entities move the court to enter summary judgment on their behalf and to dismiss with prejudice all claims asserted against them. For the reasons set forth below, the court grants defendants' motion for summary judgment with respect to Count I and denies defendants' motion for summary judgment with respect to plaintiffs' state law conspiracy claims. The court also denies **[*3]** plaintiffs' motion for partial summary judgment.

Background

National Income Realty Trust ("NIRT") and Transcontinental Realty Investors ("TCI"), hereinafter referred to collectively as "the Trusts," are real estate investment trusts whose primary business involves investing in equity interests in real estate and financing real estate related activities through mortgage loans. (Pl.'s Compl. P 7.) [1] At all times relevant to this case, the Trusts were managed and controlled directly or indirectly by Gene E. Phillips ("Phillips") and William S. Friedman ("Friedman"), on behalf of Basic Capital Management, Inc. ("BCM"), the advisors to the Trusts. [2]

By 1991, Phillips and Friedman were experiencing grave financial difficulties. American Realty Trust ("ART"), then the largest shareholder of the Trusts and two sister trusts [3] controlled by Phillips and Friedman, **[*4]** was being

[1] Refers to plaintiffs' Second Amended Derivative Complaint.

[2] Basic Capital Management was formerly known as National Realty Advisors.

[3] The two sister trusts controlled and managed by Phillips and Friedman were Continental Mortgage and Equity Trust ("CMET") and Income Opportunity Realty Trust ("IORT"). (Pl. Compl. P 19.)

pressured to repay approximately $ 30 million of delinquent obligations to its chief lender, First City BanCorporation of Texas ("First City"). (Pl. Compl. P 17.) In June 1991, First City had sent ART a letter of default based on its failure to make required payments. (Id. P 19.) Other Phillips-Friedman affiliates also owed millions of dollars to First City. (Id.)

At the same time, Milwaukee developer Frank P. Crivello ("Crivello") was also mired in a severe fiscal crisis. More than thirty foreclosure suits had been commenced against Crivello and his related entities and more than 100 other lawsuits were commenced against them by unpaid subcontractors and other creditors. In addition, Crivello and his affiliates were indebted to defendants in the principal amount of approximately $ 10.2 million, plus accrued interest. **[*5]** In early 1991, Vaughan Rasmussen ("Rasmussen"), Senior Vice President for First Bank National Association, assumed responsibility for the bank's relationship with Crivello. Rasmussen believed at the time that Crivello would "most likely have to file bankruptcy" and that the Crivello loans were collectible, if at all, only through litigation or pursuit in bankruptcy proceedings. (First Rasmussen Aff. P 6.) Throughout the course of the year, defendants "charged off" on its books and records a large portion of Crivello's obligations ("the notes"). [4] (Rasmussen Aff. P 8.)

It is uncontested that in late April 1991, Crivello told Rasmussen that he knew an individual who would **[*6]** propose to purchase the Crivello notes from defendants in return for the extension of secured real estate loans. (Pl.'s 12(N) P 13.) That individual was David Wabick. During his first direct communication with Rasmussen, Wabick stated that he would purchase the Crivello Notes from defendants provided that defendants would extend secured real estate loans to entities designated by Wabick. (Id. P 14.) These entities were all affiliated, either directly or indirectly, with BCM, Friedman, and Phillips. According to plaintiffs, Wabick was a partner of Friedman and Phillips whose participation in this arrangement was primarily designed to broker the transaction and to conceal its true nature. (Pl.'s Am. Compl. P 28; Pl.'s Mot. for Summ. J. at 2.) Eventually, both parties orally agreed to the general terms of the Crivello note purchase/real estate financing transactions as originally proposed by Wabick.

The precise manner in which the following transactions unfolded is disputed. According to plaintiffs, the first phase of the alleged notes-for-loans exchange occurred on December 13, 1991, when Wabick purchased $ 4.93 million in Crivello notes and December 16, when he purchased $ 1.69 **[*7]** million of additional Crivello obligations. (Pl.'s 12(N) P 27-29.) Plaintiffs claim that although the December purchase documentation identifies Wabick as the purchaser, in actuality, the Trusts funded most of these purchases and were the true acquiring parties. (Id. P 28.) According to plaintiffs, Wabick's actual role was in the exchange was essentially that of a broker. They assert that all parties knew and understood that Wabick was an assignee and that the Trusts were the true acquiring parties of the notes. (Pl.'s Mem. for Par. Summ. J. at 2; Pl.'s 12(M) P 14.)

Defendants deny that they knew either of Wabick's supposedly nominal role in the transaction or that he was not providing the money to buy the Crivello notes. (Def.'s 12(N) P 14.) In fact, defendants contend that they do not know whether the Trusts loaned the funds for the purchase to Wabick, whether the Trusts were mere conduits of the funds from another source, whether the Trusts transferred the funds to defendants to satisfy preexisting obligations to Wabick, or whether Wabick caused the Trusts to transfer the funds for another reason. (Id. P 13.) According to defendants, it was Wabick who conditioned his willingness **[*8]** to purchase the notes upon defendants' willingness to fund real estate loans to entities designated by him. (Def.'s 12(N) P 29.) Defendants claim that they never coerced or pressured either Wabick or the Trusts to purchase the Crivello debt.

The time sequence of the next phase of the transaction is also disputed. According to plaintiffs, defendants funded approximately $ 30 million in real estate loans on December 16 to three Illinois limited partnerships [5] ("Illinois

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[4] According to Rasmussen, "obligations are 'charged off' by financial institutions for many reasons, including, but not limited to, situations where there is potential uncertainty regarding collectibility." In many instances, defendants have recovered the full amount due on obligations that had previously been charged off. (Rasmussen Aff. P 8.)

[5] Defendants loaned $ 15 million to Search/Lodges Diversified L.P., $ 7.1 million to Tiberon Diversified L.P. and $ 7.025 million to Mallard Diversified, L.P. (Rasmussen Aff. PP 22-25.) Plaintiffs maintain that these Illinois partnerships were owned by "affiliates" of the Trusts and BCM, and were managed by Friedman and Phillips. (Pl.'s 12(M) P 19.)

partnerships") formed by Wabick and managed by Phillips and Friedman. Plaintiffs contend that these loans were *quid pro quo* for the December 13 note purchases and were extended on the condition that the Trusts, directly or indirectly, purchase the Crivello notes. (Pl.'s Mem. for Summ. J. at 3.) They claim that defendants approved the loans in order to recover millions of dollars on the Crivello notes, which had been charged off and deemed essentially worthless by the bank. (Pl.'s Mem. for Summ. J. at 2; Pl.'s 12(N) P 30.) In return, the proceeds from the loans to the Illinois partnerships were used to help Phillips' and Friedman's affiliates, principally ART, pay off their delinquent obligations, thus preventing **[*9]** the collapse of Phillips' and Friedman's financial empire. According to plaintiffs, the Trusts, which were consequently saddled with the essentially worthless Crivello notes, were the only parties who did not ultimately benefit from this transaction.

While defendants concede that the December 1991 note purchases were packaged with and related to the loans to the Illinois partnership, they maintain that these loans were not *quid pro quo*, but were rather contemporaneously extended when plaintiffs purchased the Crivello notes on December 13. They claim that the loans were not used to coerce plaintiffs into purchasing the defaulted Crivello debt, but were rather **[*10]** in accordance with the terms and conditions originally proposed by *Wabick.* (Def.'s 12(N) PP 16-17.) Defendants deny that they considered and treated the Illinois partnerships and the Trusts to be affiliates and related parties or that they conditioned the extension of credit upon the Crivello note purchases. (Id. P 22.)

According to plaintiffs, the parties engaged in a similar notes-for-loans exchange in February 1992. Plaintiffs maintain that on February 21, TCI purchased three additional Crivello notes for approximately $ 1.3 million. The notes had been previously written down by defendants to $ 560,000, thus resulting in a $ 712,124 gain for the defendants. (Pl.'s 12(M) PP 24-25.) As *quid pro quo* for purchasing these notes, defendants extended approximately $ 3.6 million in loans to TCI subsidiary South Cochran. (Id. P 6.) Plaintiffs contend that although certain documents identified Wabick as the note purchaser in the February transactions, once again he was essentially a nominee for TCI, and that TCI both financed the note purchases and received the extended loans. (Pl.'s Mem. for Summ. J. at 4.)

Defendants respond that Wabick, not TCI, purchased the additional **[*11]** Crivello Notes, and that Wabick, not defendants, proposed the terms and conditions of the February transactions. (Def.'s 12(N) PP 24, 27.) In addition, defendants maintain that the Crivello notes were not sold "at par," but rather for their outstanding principal amount. (Id. P 24.) According to defendants, they did not realize a gain on any of the Crivello notes sold to Wabick, but instead received only the principal amounts due in connection with the Crivello indebtedness sold to Wabick, thus suffering a loss represented by unreceived interest and collection expenses. (Id. P 26.) Defendants deny that they conditioned the funding of the December 1991 and February 1992 loans upon the purchase of the Crivello obligations. (Id. P 31.)

In 1994, the Trusts completely released Phillips and Friedman from any liability in connection with the transactions challenged in the litigation. (Pearson Aff. PP 14-15; Pl.'s 12(N) P 48.) Plaintiffs filed this lawsuit on March 31, 1995. On July 28, 1995, defendants filed a motion to dismiss the action for failure to state a claim. After finding that plaintiffs had failed to allege that defendants' actions constituted an anti-competitive tying **[*12]** arrangement, the court granted defendants' motion to dismiss plaintiff's federal Bank Holding Company Act claim. The court also denied defendants' motion to dismiss plaintiffs' state law conspiracy claims. See *Johnstone v. First Bank System, Inc., 947 F. Supp. 1220 (N.D. Ill. 1996)*. On February 3, 1997, plaintiffs filed a Second Amended Derivative Complaint for damages arising from civil conspiracy and from violations of the anti-tying provisions of the Bank Holding Company Act.

Analysis

HN1[] The court will render summary judgment only if the factual record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Bratton v. Roadway Package Sys., Inc., 77 F.3d 168, 173 (7th Cir. 1996)* (quoting *Fed. R. Civ. P. 56(c)*). The court will not render summary judgment if "a reasonable jury could return a verdict for the nonmoving party." *Sullivan v. Cox, 78 F.3d*

322, 325 (7th Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986))*. In ruling on a motion for summary judgment, the court views the facts in the light most favorable to the nonmoving **[*13]** party. *Bratton, 77 F.3d at 171* (citation omitted); *Sullivan, 78 F.3d at 325* (citation omitted).

HN2[] On a motion for summary judgment, the moving party "bears the initial burden of showing that no genuine issue of material fact exists." *Hudson Ins. Co. v. City of Chicago Heights, 48 F.3d 234, 237 (7th Cir. 1996)* (citing *Celotex Corp v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986))*. Since the parties filed cross-motions for summary judgment, each party assumes the role of the moving party and the nonmoving party. Therefore, if one party demonstrates that no genuine issue of material fact exists, then the burden shifts to the opposing party which "must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*; accord, *NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 234 (7th Cir. 1995)* (citations omitted). "In determining whether there are any genuine issues of material fact, we draw all inferences in the light most favorable to the nonmovant." *Bartman v. Allis-Chalmers Corp., 799 F.2d 311, 312 (7th Cir. 1986)*, cert. *Denied, 479 U.S. 1092, 107 S. Ct. 1304, 94 L. Ed. 2d 160 (1987)*. However, the **[*14]** court is not required to draw every conceivable inference from the record--only those inferences which are reasonable. *Spring v. Sheboygan Area School Dist., 865 F.2d 883, 886 (7th Cir. 1989)*.

I. Bank Holding Company Act

HN3[] The Bank Holding Company Act prohibits a bank from conditioning credit upon the requirement that "the customer shall obtain some additional credit, property, or service from such bank, bank holding company, or subsidiary of such bank holding company." [6] *12 U.S.C. § 1972(1)(B)*. The Act was not intended to prohibit customary banking practices or even unusual practices performed solely to protect a bank's investment. *McCoy v. Franklin Savings Association, 636 F.2d 172, 175 (7th Cir. 1980)*. Rather, it was meant to ban anti-competitive ties which were designed to reduce competition and to increase a bank's economic power. *Baggett v. First National Bank of Gainesville, 117 F.3d 1342, 1346 (11th Cir. 1997)*. In order to recover under the anti-tying provisions of the Act, plaintiffs must establish that defendant's actions (1) were unusual in the banking industry; (2) constituted an anti-competitive tying arrangement; and (3) benefited the bank. **[*15]** *ITC Financial Services, Ltd. v. Interstate Bank of Oak Forest, 1993 U.S. Dist. LEXIS 16137, 93 C 3799, 1993 WL 469926* *2 (N.D. Ill. Nov. 10, 1993); see *Graue Mill Development Corporation v. Colonial Bank and Trust Company of Chicago, 1990 U.S. Dist. LEXIS 111, 88 C 2584, 1990 WL 6823 (N.D. Ill. 1990)*, aff'd, *927 F.2d 988 (1991)*.

Plaintiffs allege that defendants violated the anti-tying provisions of the Act by conditioning the extension of credit upon plaintiffs' purchasing the defaulted loans of an unrelated borrower. Defendants respond that plaintiffs have no claim under **[*16]** the BHCA because (1) defendants did not coerce any party to enter into the transactions; (2) the Trusts do not qualify as "customers" in any tied transaction; (3) the challenged transactions had no anti-competitive effect; and (4) the Trusts lack standing because their alleged injury is not of the type that the BHCA was intended to remedy. Both parties move the court to enter summary judgment on their behalf pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. For the reasons stated below, the court finds that plaintiffs are unable to establish that defendants' actions constituted an anti-competitive tying arrangement, and therefore grants defendant's motion for summary judgment on Count I.

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[6] ***HN4***[] The Bank Holding Company Act provides in relevant part that:

> A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement . . .
>
> (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank or from any other subsidiary of such bank holding company.

12 U.S.C. § 1972 (1)(B).

In order to determine whether these admittedly related notes-and-loans transactions constituted an illegal tying arrangement, it is first necessary to examine the statute's legislative history and intent. The Act was designed to "prohibit anti-competitive practices which require bank customers to accept or provide some other service or product . . . in order to obtain the bank product they desire." Senate Banking and Currency Committee Report No. 91-1084, 91st Cong., 2d Sess. (1970). It **[*17]** was originally intended to guard against unfair competition and to prevent a small number of powerful banks from using their economic leverage to dominate commerce. The Act was amended in 1970 to "reach the anti-competitive practices of even smaller banks, which notwithstanding their comparative size, were able to exert economic power over businesses because of their control over credit." *Baggett, 117 F.3d at 1345*. However, the Act was only intended to prohibit intentionally anti-competitive banking practices, and Congress deliberately attempted to limit the statute's potentially expansive reach. See *Parsons Steel, Inc. v. First Alabama Bank of Montgomery, 679 F.2d 242, 245 (11th Cir. 1982)* (stating that Congress "was concerned that [the Act] not be too expansive" and did not intend to prohibit banking practices which were not anti-competitive). Consequently, the mere fact that a banking practice is "unusual" or is not directly related to a bank's investment does not constitute a violation of the Act. See *Davis v. First National Bank of Westville, 868 F.2d 206, 207 (7th Cir. 1989)* (noting that Act only proscribes anti-competitive banking practices). Unless the "unusual" **[*18]** banking practice is shown to be an anti-competitive tying arrangement principally designed to enhance the bank's market power, it does not fall within the scope of the Act's prohibitions. *Parsons, 679 F.2d at 245*.

The Seventh Circuit has suggested that bank tying laws are analogous to traditional antitrust statutes, and has construed *section 1972* to prohibit exclusive dealing practices and preserve "competition among rival businesses." [7] *Exchange National Bank of Chicago v. Daniels, 768 F.2d 140, 143 (7th Cir. 1985)* (noting that "we treat [the statute] as the banking equivalent of . . . the Clayton Act). See also *Mid-State Fertilizer v. Exchange National Bank of Chicago, 877 F.2d 1333, 1338 (7th Cir. 1989)* (noting that bank tying statutes bear a "considerable, although not total" resemblance to ***antitrust law***). Consequently, the Seventh Circuit has interpreted the Act's anti-tying provisions narrowly, and has required that plaintiffs show the anti-competitive nature of the challenged action. ***HN5***[] Unlike in traditional ***antitrust law***, *section 1972* plaintiffs need not "quantify or articulate with great specificity the anti-competitive effect" of the alleged tie-in, nor are they **[*19]** required "to prove actual anti-competitive effects of the challenged practice, such as a bank's dominance or control over the tying product market or that a substantial volume of commerce is affected." *Graue Mill Development Corporation v. Colonial Bank and Trust Co. of Chicago, 927 F.2d 988, 991-2 (7th Cir. 1991)* (citation omitted); *Palermo v. First National Bank and Trust Company of Oklahoma City, 894 F.2d 363, 368 (10th Cir. 1990)*. However, in order to recover under the Act, the Seventh Circuit requires that plaintiffs demonstrate that a challenged banking practice is an anti-competitive tying arrangement.

In the instant case, plaintiffs' claim fails because they are unable to establish either that the alleged notes-for-loans **[*20]** transactions were a "tie-in" or that they were anti-competitive. According to the Seventh Circuit, ***HN6***[] a "tie-in" is "an arrangement by one party to sell one product (the tying product), but only on the condition that the buyer also purchase a different product . . . (the tied product), or at least agree that he will not purchase the product from another supplier." *Davis, 868 F.2d at 208* (citation omitted). Tying arrangements lessen competition by enabling "an economically powerful seller of the tying product to coerce customers of that product into buying an additional product they do not want or would rather buy elsewhere." Id.

The court finds that no reasonable jury, even when viewing the facts in the light most favorable to the plaintiffs, could find that the notes-for-loans exchanges constituted an illegal tying arrangement. There is simply no factual issue as to whether defendants expressly conditioned their approval of the loans upon the purchase of the Crivello obligations. [8] Indeed, it is undisputed that it was not defendants but *Wabick* who initially proposed the terms and

[7] The antitrust laws are a response to tie-ins and reciprocity agreements that enable a party with sufficient power in one market to avoid the standard market criteria of price, quality, and service in another market and thereby lessen competition. ***Davis, 868 F.2d at 208***.

[8] Even by selectively quoting from Rasmussen's deposition testimony, plaintiffs are unable to create a genuine factual dispute as to whether defendants conditioned the loans upon the note purchases. A complete review of the deposition transcript reveals

conditions of the entire scheme. Because the bank did not use the promise of credit to entice **[*21]** plaintiffs into purchasing the Crivello notes, the arrangement, however unorthodox or profitable it might have been, does not constitute an illegal tying arrangement.

It is not true, as defendants assert, that plaintiffs must prove actual coercion in order to prevail under the Act. [9] Nevertheless, it would be unconscionable and illogical to find that defendants had participated in an illegal tying arrangement simply by accepting the terms of Wabick's proposed transaction. It would be a complete misapplication of the Act to hold that it permitted a cause of action against a bank who adheres to the terms and conditions of a **[*22]** transaction which are initially established by a customer. While a loan arrangement which conditioned "the extension of credit to a bank customer on the requirement that the customer participate in the bank's bad loans to an unrelated customer" would certainly be a blatant violation of the Act, that is not what happened here. *Palermo, 894 F.2d at 369*. Instead, it is undisputed that Wabick, rather than defendants, established the terms and conditions of the transaction and that defendants ultimately accepted those conditions. (Pl.'s 12(N) P 14.) The fact that the challenged transaction was financially advantageous to both defendants and the Phillips-Friedman-Wabick financial empire and financially harmful to the Trust does not, without more, constitute an illegal tying arrangement.

[*23] Moreover, plaintiffs are unable to evince that the challenged transactions were anti-competitive. As noted above, *Section 1972* plaintiffs have a lesser burden of proof than traditional antitrust plaintiffs. [10] See *Davis, 868 F.2d at 208* (noting that bank tying plaintiffs can prevail without showing "specific adverse effects on competition or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product of service.") However, this less stringent standard does not completely relieve plaintiffs from showing that defendants' actions were designed to lessen competition. See *Graue Mill, 927 F.2d at 990* (noting that Seventh Circuit requires *section 1972* plaintiffs to allege anti-competitive practice). But plaintiffs have failed to show that defendants' actions were designed to lessen competition. Like the Palermo plaintiffs, plaintiffs in the instant case "have not addressed the distinction between requiring proof of an anti-competitive *effect* versus requiring proof of an anti-competitive *practice*." *Palermo, 894 F.2d at 368* (emphasis supplied). ***HN7***[] In order to prevail under the Act, plaintiffs must show that the **[*24]** notes-and-loans transactions were anti-competitive, i.e., that defendants "used their economic power over credit to lessen competition" in the marketplace. *Davis, 868 F.2d at 209*.

[*25] Plaintiffs contend that they have proven the requisite anti-competitive effect by satisfying the alternate-prong standard established by the Seventh Circuit in Graue Mill. See *Graue Mill, 927 F.2d at 991* (stating that Seventh Circuit requires "plaintiffs to allege that they have sustained some semblance of economic injury as a result of the tying arrangement, or conversely, that economic advantage has accrued to the bank"). However, plaintiffs' reliance upon Graue Mill is misplaced. The anti-competitiveness "standard" employed in Graue Mill was narrowly tailored to the facts of that case, in which *section 1972* plaintiffs failed to allege either that they had suffered an economic injury, or that the bank had tangibly benefited from the challenged arrangement. Id. It was not intended to nullify the Seventh Circuit's requirement that bank-tying plaintiffs show that defendants' actions were anti-competitive and designed to lessen competition. See *McCoy, 636 F.2d at 175* (noting that Act was "intended only to prohibit anti-

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that Rasmussen explicitly stated that the arrangement was conditional in that Wabick established and insisted upon the term's conditions.

[9] Contrary to defendants' assertions, the Seventh Circuit has never expressly held that a plaintiff must show that a bank used its economic leverage to coerce a plaintiff into purchasing an unwanted product. See Def.'s Mem. for Summ. J. at 7.

[10] Defendants completely misstate the applicable standard for determining whether a challenged banking practice is an "anti-competitive practice" under the Act. The Seventh Circuit has never held, in Mid-State Fertilizer or elsewhere, that "a tie is unlawful under the BHCA only if a plaintiff shows that a bank (1) used its market power (2) to lessen competition in a particular market for banking services." (Def.'s Mem. for Summ. Judg. at 9.) Likewise, both parties' reliance upon traditional antitrust standards is misplaced. Although the Seventh Circuit has recognized "the congruence of bank-tying law with its antitrust cousin," it does not hold bank-tying plaintiffs to the same burden of proof as antitrust plaintiffs. *Mid-State Fertilizer Co., 877 F.2d at 1338*. See ***Davis*, *868 F.2d at 208*** (stating that "*section 1972* renders tying arrangements involving a bank unlawful 'without any showing of specific adverse effects on competition"). Consequently, Mr. Frankel's disputed affidavits (which detail the standards used to determine an anti-competitive practice in ***antitrust law***) have no material bearing on the ultimate disposition of this case.

competitive practices"); *Daniels, 768 F.2d at 143* (stating that Act was intended to preserve competition and to prohibit exclusive dealing **[*26]** practices); Davis*, 868 F.2d at 209* (finding that a challenged transaction which is not anti-competitive is "not the concern of *section 1972*"); *Mid-State Fertilizer, 877 F.2d at 1338* (affirming summary judgment against plaintiffs who failed to allege an anti-competitive practice). Indeed, the Graue Mill court ultimately affirmed the district court's decision to dismiss the bank-tying claim on the grounds that "tying arrangements that have no anti-competitive effect . . . do not violate *Section 1972*." *Graue Mill, 927 F.2d at 992*.

In summary, plaintiffs have produced no evidence tending to show that the alleged notes-for-loans exchanges were anti-competitive in practice or were intended to have an anti-competitive effect. They have presented no evidence suggesting that defendants misused their economic power by engaging in the challenged transactions. No reasonable jury could find that defendants agreed to Wabick's proposal in order to reduce competition or to compete unfairly. Even accepting, as the court must for the purposes of a summary judgment motion, plaintiffs' claim that defendants were fully aware that the Trusts' managers were misappropriating their assets **[*27]** for personal gain, the challenged transactions were "not anti-competitive and therefore not the concern of *section 1972*, which was enacted to prevent banks from using their economic power to lessen competition." Davis*, 868 F.2d at 209*. The Act was simply not intended to provide a cause of action for situations in which an organization's managers have mismanaged its assets. Indeed, it is plaintiffs, rather than defendants, who have "attempted to stretch the law beyond recognition" in this case. (Pl.'s Resp. at 1.)

Plaintiffs have failed to allege that the challenged action was an anti-competitive tying arrangement. Defendants' alleged actions simply do not constitute a violation of the Bank Holding Company Act. Accordingly, the court grants defendants' motion for summary judgment as to Count I claim.

II. **State Law Conspiracy Claims**

Plaintiffs also allege that defendants violated various state laws by conspiring with Phillips and Friedman to breach fiduciary duties, to defraud, and to convert and misappropriate the assets of the Trusts. This court has original jurisdiction over the parties to this action pursuant to *28 U.S.C. § 1332*, because the parties are from **[*28]** diverse states and the amount in controversy exceeds $ 50,000, exclusive of interest and costs (the requisite jurisdictional amount when this action was filed in 1995). Each of the plaintiffs is a citizen of the state of California; the defendant entities are incorporated under the laws of the state of Delaware; and defendant Wabick is a citizen of the state of Illinois.

HN8[] In diversity cases, federal courts apply the choice of law rules of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941)*. Illinois choice of law rules provide that the law of the state with the most significant relationship with the events giving rise to the litigation shall apply. *Malatesta v. Mitsubishi Aircraft International, Inc., 275 Ill. App. 3d 370, 655 N.E.2d 1093, 1099, 211 Ill. Dec. 710 (Ill. App. Ct. 1995)*(citing *Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593, 596 (Ill. 1970))*. In this case, Minnesota and Wisconsin have the most significant relationships with the events giving rise to this litigation. The closings on the sales of the Crivello notes occurred in Milwaukee, Wisconsin, and the closings on the real estate loans **[*29]** occurred in Minneapolis, Minnesota.

HN9[] Wisconsin [11] defines a civil conspiracy as "a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful." *Anderson v. Regents of the University of California, 203 Wis. 2d 469, 489, 554 N.W.2d 509, 518 (Wis. Ct. App. 1996)* (quoting *Cranston v. Bluhm, 33 Wis. 2d 192, 147 N.W.2d 337, 340 (Wis. 1967))*. In general, for a conspiracy to exist under Wisconsin law, there must be, at a minimum, "facts that show some agreement, explicit or otherwise, between the alleged conspirators on the common end sought and some cooperation toward the attainment of that end." *Bartley v. Thompson, 198 Wis. 2d 323, 542 N.W.2d 227, 235 (Wis. Ct. App. 1995)*. This court previously found that plaintiffs had adequately stated claims for civil conspiracy in compliance with *Federal Rules of Civil Procedure 12(b)(6)* and *9(b)*. [12] See *Johnstone v. First Bank System, Inc., 947 F. Supp. 1220 (N.D.*

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[11] There are no substantive differences between Minnesota and Wisconsin law with respect to the relevant issues.

Ill. 1996). The question currently before this court is whether plaintiffs have produced sufficient evidence to permit a reasonable inference that defendants entered into a conspiracy with **[*30]** Phillips and Friedman and to preclude summary judgment.

Defendants maintain that, in order to withstand summary judgment, plaintiffs must present evidence suggesting that FBS Entities 1) knowingly participated in a conspiracy and 2) had a legal duty of disclosure to the Trusts. They claim that they are entitled to judgment as a matter of law because plaintiffs have failed to produce any such evidence. They assert that "there is absolutely no evidence of the Bank's knowing participation in such a common plan or any agreement," and that, even if there were, defendants could not be held liable because they owed no independent **[*31]** duty of disclosure to the Trusts. (Def.'s Mem. for Summ. Judg. at 3-5.) However, defendants have once again misstated the applicable law. [13] Wisconsin law does not require that the alleged conspirator owe a legal duty to the plaintiff regarding the underlying wrong. Instead, it requires proof that two or more individuals engaged in "some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful." *Anderson, 554 N.W.2d at 518* (citation omitted). Plaintiffs allege that defendants conspired with Phillips and Friedman so that defendants could recoup millions of dollars on the defaulted Crivello notes and Friedman and Phillips could extricate themselves from a severe financial crisis. The "unlawful means" by which they accomplished this goal was the misappropriation and misuse of the Trusts' assets for their own personal gain. Plaintiffs claim to have produced "overwhelming" evidence that not only were defendants aware that the Trusts' assets were being misappropriated through the purchase of defaulted and over-valued properties, but that they knowingly participated in the scheme in order to recover on Crivello's charged **[*32]** off obligations.

The court finds that plaintiffs have presented evidence permitting a reasonable inference that defendants were, in fact, aware of the true nature of the challenged transactions and knowingly participated in the scheme in order to profit from them. Rasmussen, the First Bank officer primarily responsible for the transaction, admitted in his deposition testimony **[*33]** that he was aware at the time of the December transaction that the Trusts were to hold legal title to the Crivello notes. (Rasmussen Dep. at 181.) Rasmussen was also aware that Cliff Towns, the attorney who negotiated the final stages of the exchange, was affiliated with NRA/BCM and knew "there was a high possibility and a probability that [the funding for the note purchases] was coming from someone affiliated with NRA." (*Id. at 53*.) In addition, Crivello, the indebted party in the transaction, testified in his deposition that it was his understanding that "Rasmussen was completely aware of the true nature of the parties, specifically the ownership of the assets and who the true borrowers were, notwithstanding the fact that Wabick was up front." (Crivello Dep. at 75.) Crivello also stated that Wabick had told him on several occasions that Rasmussen had said that First Bank would not loan the money directly to either Phillips or his related entities because they would "have the comp controller or FDIC crawling all over [them]" if they did so (*Id. at 145-146*.) [14]

[*34] Moreover, another First Bank officer, Richard J. Mikos, testified that he was aware by December 1991 that NIRT was providing at least a portion of the funding for the December note purchases. (Mikos Dep. at 41-42.) Indeed, he acknowledged that on November 18, NIRT deposited $ 4 million with First Bank. Mikos testified that he construed this deposit as intended "to indicate a willingness to proceed with the transaction." Furthermore,

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[12] ***HN10***[] Under Wisconsin law, in order to state a claim for civil conspiracy, plaintiff must set forth "the formation and operation of the conspiracy, the wrongful act or acts done pursuant to the conspiracy, and the resultant damage from such acts." *Anderson, 554 N.W.2d at 518*.

[13] As support for this contention, defendants cite two California cases, *Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 869 P.2d 454, 458 (Cal. 1994)* and *Younan v. Equifax Inc., 111 Cal. App. 3d 498, 169 Cal. Rptr. 478 (1980)*, which are largely irrelevant and which have no precedential value. Likewise, the Minnesota case cited is not applicable to the instant case, as there was no assertion of an underlying crime or tort in that case, and the defendants in that case sought only permissible ends and acted only through permissible means. See *Senart v. Mobay Chemical Corp., 597 F. Supp. 502, 505 (D. Minn. 1984)*.

[14] Both Wabick and Towns have asserted their *Fifth Amendment* privilege against self-incrimination to all questions concerning this litigation.

Friedman testified that it was his understanding that "Rasmussen was directing the transaction in order to recoup bad loans from Crivello, and that he knew why the deal was being structured." (Friedman Dep. at 165.)

These documents, taken together, raise a genuine issue of fact as to whether defendants were aware of the true nature of the arrangement, but intentionally looked the other way in order to recoup the defaulted Crivello loans. It is undisputed both that Rasmussen had "charged off" most of the Crivello debt and that the notes-and-loans transactions allowed FBS Entities to recover millions of dollars on these defaulted loans. Moreover, both Mikos and Crivello testified that the exchange, which allowed defendants to realize a multi-million dollar **[*35]** profit on defaulted obligations which had been essentially charged off on their own books, was "unusual" in the banking industry. Based upon this evidence, a reasonable jury could certainly conclude that the bank had participated in an illegal conspiracy in order to recover on the defaulted Crivello loans.

HN11[] It is true that, in order to withstand summary judgment, a plaintiff must present "more than a mere suspicion or conjecture" that a conspiracy was formed. *Eiden v. Hovde, 260 Wis. 573, 51 N.W.2d 531, 532 (Wis. 1952)*. However, this court cannot grant summary judgment if "a fair-minded jury could return a verdict for the nonmoving party on the evidence presented." *Bridgman v. New Trier High School, District No. 203, 128 F.3d 1146, 1147-8 (7th Cir. 1997)* (quoting *Anderson, 477 U.S. at 252*). The court concludes that plaintiffs have adequately established that a factual issue exists as to whether defendants conspired with Phillips and Friedman to breach their fiduciary duties to the Trusts, to defraud the Trusts, and to convert and misappropriate the Trusts' assets. Because a jury could reasonably infer from the proffered evidence that defendants had unlawfully participated **[*36]** in a conspiracy, the court finds that plaintiffs are entitled to a trial on their state law conspiracy claims and accordingly denies defendants' motion for summary judgment.

Conclusion

For the foregoing reasons, the court denies plaintiffs' motion for partial summary judgment and grants defendants' motion for summary judgment in part and denies in part. The court grants defendants' motion for summary judgment with respect to the BHCA claim and denies defendants' motion with respect to the state law conspiracy claims.

ENTER:

Ann Claire Williams,

Judge

Dated: AUG 28 1998

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Metzler v. Bear Auto. Serv. Equip. Co., SPX

United States District Court for the Southern District of Florida

September 1, 1998, Decided ; September 4, 1998, Filed

Case No. 93-1993-CIV-GOLD

Reporter
19 F. Supp. 2d 1345 *; 1998 U.S. Dist. LEXIS 14672 **; 1998-2 Trade Cas. (CCH) P72,286

ROBERT METZLER and ALLSTATES OF AMERICA, INC., Plaintiffs, vs. BEAR AUTOMOTIVE SERVICE EQUIPMENT COMPANY, SPX CORPORATION, THE ALLEN GROUP, and ROLAND GERBER, Defendants.

Disposition: [1]** Summary judgment granted in favor of the defendants on the antitrust counts and the tortious interference claims based on the conduct underlying the antitrust claims.

Core Terms

customers, defendants', prices, manufacturers, diagnostic, summary judgment, machines, market power, relevant market, automotive, monopolization, repair, costs, monopoly, supracompetitive, aftermarket, anti trust law, brand, switching, policies, practices, products, anticompetitive, plaintiffs', locked, Counts, circuit board, imperfections, antitrust, external

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN1[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, provides that in every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > Sentencing > Fines

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

HN2[] **Conspiracy to Monopolize, Sherman Act**

According to *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

HN3[] **Standards of Review, De Novo Review**

When an objection is made to a magistrate's findings or recommendations on a dispositive motion, the district court shall make a de novo determination of those portions of the report or proposed findings to which the objections are addressed.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Summary Judgment, Supporting Materials**

Fed. R. Civ. P. 56(c) authorizes summary judgment where the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The court's focus in reviewing a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. The moving party has the burden to establish the absence of a genuine issue as to any material fact.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] Summary Judgment, Supporting Materials

In considering a *Fed. R. Civ. P. 56* summary judgment motion, a court must construe the evidence and the inferences drawn from the underlying facts in the light most favorable to the party opposing the motion. Furthermore, facts asserted by the party opposing a summary judgment must be regarded as true if supported by affidavit rendered an opinion or other evidentiary material. Ultimately, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] Regulated Practices, Market Definition

Under federal antitrust laws, the existence of competition is determined by market performance, not the number of competitors.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN7[] Regulated Practices, Market Definition

Absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN8[] Regulated Practices, Price Fixing & Restraints of Trade

Vertical integration (i.e., performance within one company of two or more steps in chain of production and distribution) does not violate the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Tying Arrangements, Clayton Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. Such an arrangement can violate the Sherman Act's prohibition against agreements in restraint of trade, codified at *15 U.S.C.S. § 1*. But not every refusal to sell two products separately can be said to restrain trade. Congress intended to prohibit only unreasonable restraints. Most antitrust claims are therefore analyzed under a rule of reason, according to which the finder of fact must decide whether the practice at issue imposes an unreasonable restraint on competition. This determination requires a consideration of a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

An illegal tying arrangement has five elements: (1) a tying product and a tied product; (2) evidence that the seller forced the buyer to purchase the tied product to get the tying product; (3) evidence that the seller has sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; (4) anticompetitive effects in the tied market; and (5) the involvement of a not insubstantial amount of interstate commerce in the market of the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN11[] **Tying Arrangements, Per Se Rule**

A claim that a tying arrangement is illegal per se eliminates the requirement that the plaintiff show an actual anticompetitive effect.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Sherman Act, Claims**

Market power is defined as the power to force a purchaser to do something he would not do in a competitive market. Market power is generally measured by market share. The appropriate query is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market. If the seller has sufficient power in the tying market to force the buyer to purchase the tied product, then competition on the merits is restrained and the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is violated. Without market power, the seller is unable to engage in the forcing necessary to establish a *15 U.S.C.S. § 1* violation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The fourth element of the five-element tying test -- anticompetitive effects in the tied market -- is properly analyzed in terms of the price of the tied and tying bundle. Thus, the plaintiffs must establish that the combined price for the tying and tied products was greater than if they had been sold independently.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

In order to violate the Sherman Act, *15 U.S.C.S. § 1 et seq.*, injury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value. The rationale behind this requirement is apparent: A determination of the value of the tied products alone would not indicate whether the plaintiff indeed suffered any net economic harm, since a lower price might conceivably have been exacted by the defendant for the tying product. Unless the fair market value of both the tied and tying products are determined and an overcharge in the complete price found, no injury can be claimed; suit then would be foreclosed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN15[] **Tying Arrangements, Defenses**

A tying arrangement is illegal if it: (1) has an actual anticompetitive effect or threatened to have such an effect; and (2) that effect is not outweighed by procompetitive justifications.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN16[] **Monopolies & Monopolization, Actual Monopolization**

Monopolization is the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Monopolies & Monopolization, Actual Monopolization**

A monopolization claim under § 2 of the Sherman Act, 15 U.S.C.S. § 2, has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. A § 2 claim requires a greater market share for a finding of market power than a claim under § 1 of the Sherman Act, 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Sherman Act, Claims**

To prove an attempt to monopolize claim under § 2 of the Sherman Act, 15 U.S.C.S. § 2, a plaintiff must show that: (1) the defendant engaged in predatory or anticompetitive conduct; (2) the defendant had the specific intent to monopolize; and (3) there was a dangerous probability that the defendant might achieved monopoly power. Proof of a dangerous probability of successful monopolization necessarily involves a determination of the relevant market and the defendant's power in that market.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN19[] **Intentional Interference, Elements**

The elements of a claim for tortious interference with a business relationship under Florida law are: (1) the existence of a business relationship; (2) defendant's knowledge of that relationship; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff. A plaintiff must prove each element to recover for tortious interference.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN20[] **Commercial Interference, Prospective Advantage**

Lawful competitive practices are privileged under Florida tortious interference law. As long as no improper means are employed, business activities taken to safeguard or promote one's own financial interests are not actionable.

Counsel: Blaine Winship, Esq. & Karen M. Byrne, Esq., Miami, Florida, for Robert Metzler and Allstates of America, Inc., PLAINTIFFS.

Ronald Ravikoff, Esq.; Christopher Carver, Esq.; Ross Bricker, Esq.; John Ward, Esq.; Eric A. Sacks, Esq.; and Terrance Truax, Esq., for Bear Automotive Service Equipment Company, DEFENDANT.

Judges: ALAN S. GOLD, UNITED STATES DISTRICT JUDGE.

Opinion by: ALAN S. GOLD

Opinion

[*1348] AMENDED ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNTS 3 THROUGH 13

The issue before the Court on defendants' motion for summary judgment is whether, under the principles set forth in *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*, the defendants' alleged refusal to sell certain internal parts for their automotive diagnostic equipment without repair service can constitute illegal tying or monopoly in violation of *sections 1* and *2* of the Sherman Act where the defendants never changed their parts and service policy and there is no showing that the defendants **[**2]** concealed the true cost of repairs or charged unreasonably high prices for internal parts or service.

I. FACTS

Robert Metzler and his corporation, Allstate's of America, Inc., filed this lawsuit against Metzler's former employers, SPX and Bear Automotive Service; and the Allen Group, alleging claims for breach of contract, intentional infliction of emotional distress, interference with an existing and prospective business relationship, and violations of federal and state anti-trust laws, specifically *sections 1* and *2* of the Sherman Act and *sections 542.18* and *542.19* of the Florida Statutes. [1] The gravamen of the plaintiffs' antitrust claims is that the defendants have failed to make certain internal parts available to independent service providers who wish to service the defendants' machines. Defendants' actions are allegedly designed to force equipment owners to obtain their service from the defendants (the illegal tie) and to capture the service market in the defendants' machines (the monopolization and attempted monopolization). Both parties agree that the outcome of this case is controlled by principles of ***antitrust law*** set forth by the Supreme Court in *Eastman Kodak* ***[**3]*** *Co. v. Image Technical Servs., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*.

The plaintiffs. Robert Metzler is the owner, president, and chief executive officer of Allstate's of America, Inc. **[**4]** Beginning in 1983, Metzler, through his company, worked as a sales representative, selling automotive diagnostic equipment for defendants Bear and SPX. As part of his job, Metzler trained customers in the use of the

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[1] ***HN1***[] *Section 1* of the Sherman Act provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. section 1*. ***HN2***[] *Section 2* provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." *15 U.S.C. section 2*.

equipment, installed upgrades, and performed some warranty--work on Bear machines. In 1993, SPX ended the business relationship over Metzler's objection.

The defendants. SPX Corporation manufactures and sells diagnostic equipment used to test and evaluate automobile functions such as engine performance, gas emissions, and wheel balance and alignment. SPX also sells replacement parts and labor services for its equipment. In 1988, SPX acquired Bear Automotive Service Equipment Company, a corporation that manufactured and distributed Bear brands of engine analyzers, emissions/gas analyzers, computerized wheel alignment machines, and computerized battery testers. [2] In June 1993, SPX acquired Allen Testproducts, a division of The Allen Group, Inc., a company that manufactured **[*1349]** and sold Allen Testproducts brands of engine analyzers, emissions/gas analyzers, and machines that combine engine and gas analyzers and emissions. After its acquisitions, SPX sold automotive diagnostic **[**5]** machines under both the Bear and Allen Testproducts brand names. In 1993, SPX consolidated the operations and product lines of Bear and Allen Testproducts into its Automotive Diagnostics division. At the end of 1996, the Automotive Diagnostics division was consolidated into SPX's Aftermarket Tool and Equipment Group. At that time, SPX stopped manufacturing the Allen Testproducts line.

Automobile diagnostic equipment. Automobile diagnostic machines are used to analyze problems with vehicles. These machines are manufactured and sold around the world by such companies as Ford, Chrysler, General Motors, Sun Electric, ESP, John Beam, Snap-On, and the defendants. It is undisputed that the market for automobile diagnostic equipment is highly competitive and swiftly changing. Automotive diagnostic machines are found in a wide range of automobile repair facilities, including independent service stations, car dealerships, and national automobile repair companies such **[**6]** as Pep Boys, Firestone, BP Oil, and Goodyear. Until the early 1980's, automotive diagnostic machines performed relatively simple diagnostic functions. But during the 1980's, as vehicles became more computer-based, manufacturers began selling computerized diagnostic equipment. In the early 1990's, Bear and Allen introduced personal-computer (PC) based automotive diagnostic equipment. The automotive diagnostic machines at issue in this lawsuit are large, PC-based machines set on wheeled carts. Outfitted with specialized software to provide an array of diagnostic functions, the machines are known in the industry as "big boxes." These machines generally cost between $ 10,000 and $ 40,000.

Parts. Although the defendants manufacture and sell both internal and external parts for diagnostic equipment, the plaintiffs' tying and monopoly claims relate solely to the defendants' actions concerning the sale and service of internal parts for the diagnostic equipment. Counting both external and internal parts, throughout the years at issue in this lawsuit, the defendants' equipment has been comprised of thousands of different types of parts. Of those thousands of parts, the plaintiffs have **[**7]** identified 109 internal parts which they claim are the alleged tying parts. In other words, the defendants allegedly will not sell any of these 109 parts unless the customer also agrees to purchase service. The differences between the internal and external parts to the defendants' automotive diagnostic equipment are explained below.

External parts. External parts for the defendants' equipment are easily obtained from a variety of sources and are interchangeable with the external parts of other manufacturers. When an external part needs to be replaced, the customer can generally perform the repair himself, without the need for a service technician. External parts are gradually used up and discarded by the customer.

Internal parts. Internal parts include such items as circuit board assemblies, programmed e-proms, internal power supplies, and built-in monitors. Some internal parts, such as circuit boards, are unique to the brand of equipment for which they are designed and will not work in other brands of automotive diagnostic equipment. Some internal parts are not unique. For almost all internal parts, a service call is generally required for repair or replacement. Unlike **[**8]** external parts, used internal parts typically have some repairable or exchange, "core" value, so they are not thrown away. The defendants buy back the internal parts and repair them.

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[2] Bear no longer exists as a separate entity.

Parts for Bear or Allen Testproducts equipment fall into three categories: internally-manufactured parts, parts sold by outside manufacturers, and off-the-shelf generic computer parts. The majority of parts for Bear equipment are off-the-shelf generic parts. A small number of parts for Bear equipment are internally manufactured. Some parts for Bear equipment, such as membrane key pads and optical benches, are manufactured by outside manufacturers.

The plaintiffs' allegations of illegal tying and monopoly apply only to the defendants' practices with respect to internal parts. In **[*1350]** contrast to external parts which are readily available from the defendants or other numerous sources, the plaintiffs claim that internal parts are usually obtainable only from the defendants. The amended complaint alleges that the defendants will not sell internal parts to competing ISOs and have prohibited authorized ISOs from selling to competing ISOs. In support of this contention, the plaintiffs submitted the affidavits of **[**9]** several independent service providers, all former employees of the defendants, who testified that they tried to buy parts from the defendants who either refused to sell to them or made them pay retail price. [3]

The defendants contend that they sell to anyone and that most parts can be purchased from multiple sources. They state that anyone seeking internal parts can purchase them from the defendants by calling a toll-free 800 number. The defendants will provide customers with a parts price list that specifies the price for each part. Parts are shipped directly to the customer from centralized warehouse facilities. Defendants presented evidence that many of the alleged tying parts, such as built-in monitors, internal harnesses, cables, connectors, optical benches, keyboards, some internal power supplies and some circuit boards are also obtainable from outside manufacturers to whom the plaintiffs **[**10]** have access equal to the defendants. [4] Defendants admit, however, that internal parts manufactured by Memtron are not readily available on the open market. In accordance with Memtron's standard practices, Memtron will not sell parts manufactured specifically for SPX without SPX's approval. SPX is only one of approximately 500 Memtron customers. Memtron's refusal to sell to third parties applies equally to all Memtron's customers. Its stated reason for this policy is that customers pay tool and die costs for manufacturing the part and are therefore entitled to determine to whom it is sold. Memtron will make the exact same item for any customer willing to pay the tool and die costs. It will also manufacture a part provided by a customer for duplication if the customer pays the engineering costs.

Sales and Service. Up to the early 1980's, the dominant player in the automotive diagnostic equipment **[**11]** business was Sun Electric. Sun used its own employees to sell and service its products. In contrast, authorized independent service organizations (ISOs), located throughout the United States and Canada, serviced products sold by Bear and Allen Testproducts. The authorized ISOs were able to purchase parts and upgrades from Bear or Allen Testproducts at substantial discounts. But in the early 1980's, Bear and Allen Testproducts followed Sun's example and began to replace independent sales and service organizations with their own employees. By 1990, Bear and Allen had replaced substantially all of their ISOs with their own employees. Presently, only three authorized ISOs remain in existence. Bear and Allen Testproducts' stated reasons for changing to in-house sales and service was that increased computerization made the machines more complicated to service. The defendants, therefore, trained in-house technicians to ensure that repairs would be properly and promptly made.

Significantly, the defendants' policies and practices with regard to the sale of replacement parts and the provision of service have remained essentially unchanged since the mid-1980's. Allen Testproducts' policies and **[**12]** practices for the sale of replacement parts and the provision of service have generally been identical to Bear's, with one exception. Until 1993, Allen Testproducts would not sell internal circuit boards to anyone without accompanying professional Allen Testproducts installation. But in 1993, when SPX bought Allen Testproducts, it changed the Allen Testproducts circuit board policy so it comported with Bear practices. Customers needing repairs for most Bear or Allen Testproducts equipment had three choices: (1) they could obtain service directly from the defendants' technicians; (2) they could perform the service themselves, or (3) they could **[*1351]** hire an ISO or other technician to perform the repairs.

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[3] Agosto affid. at paragraph 4, Martin affid. at paragraph 3, 6, Berry affid. at paragraph 3, Baker affid. at paragraph 5.

[4] Bailey affid. at paragraphs 26, 28, 34, Munelly affid. at paragraphs 24, 26, 34, Kepple affid. at paragraph 4.

Repair service was, and is, provided by the defendants either through service contracts or on a time and materials basis. The service contract is the equivalent of an extended warranty which obligates the defendants, for a predetermined price, to repair any problems arising during the contract period. Repairs performed on a time and material basis require the customer to pay for the repair on an hourly basis and to pay for any part needed in the repair.

The plaintiffs allege that the defendants **[**13]** illegally tie the sale of certain internal parts to the purchase of defendants' repair services. To support this contention, the plaintiffs submitted the affidavits of two former Bear employees, now independent service providers, who testified that they were instructed to tell customers that no one else could perform service but the defendants. Also submitted was the deposition of an independent service provider who stated that when he tried to order internal circuit boards from Bear, Allen, or SPX, he was told to contact the service department because circuit boards must be installed by SPX technicians. [5]

Warranty Coverage. SPX equipment is generally sold with a standard one-year factory warranty covering parts and labor from SPX during that period. An extended warranty or service contract is available, but not mandatory, for customers who want additional coverage.

Defendants also sell parts with warranty coverage. Warranty **[**14]** coverage on parts is optional with the customers. The plaintiff submitted the deposition of a former Allen employee who testified that for certain internal parts that defendants consider physically sensitive, such as circuit boards, no warranty is provided unless one of the defendants' technicians performs the installation. For purposes of summary judgment, each defendant concedes that it did not warrant internal parts sold without service.

Prices. Prior to 1983, the defendants gave large national accounts and ISOs a substantial discount on part prices. After the switch to in-house technicians, all customers, except large national accounts, paid list price for parts. Metzler and Allstate's claim that by refusing to give ISOs a discount on parts, the defendants have engaged in anticompetitive practices because without the discounts, it is difficult for the ISOs to compete with the defendants in the service market. Plaintiffs further contend that once the defendants switched from ISOs to in-house technicians, they began charging supracompetitive prices for parts and service. [6] Nonetheless, a careful review of the record shows that the plaintiffs submitted absolutely no credible **[**15]** evidence in support of a finding of supracompetitive prices. [7] **[**16]** To the contrary, the undisputed evidence shows that plaintiffs' service rates were comparable to the rates charged by the defendants. Bear and SPX's rate for service remained at $ 85 per hour from 1989 until 1997, when SPX raised its rate to $ 90 per hour. [8] The plaintiffs' hourly charge for service was $ 75 an hour from 1989 to 1993. In 1994 it rose to $ 80 an hour, and in 1995, it equaled SPX's rate of $ 85 an hour. The record contains no evidence regarding the prices charged for service by any other ISO, past or present.

[*1352] As for parts prices, the plaintiffs have failed to submit a complete list identifying the prices charged by the defendants for the 109 alleged tying parts. Nor did they submit evidence as to the prices charged by defendants' competitors for comparable internal parts. Likewise there is no evidence that the package price for defendants'

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[5] Agosto affid. at paragraph 3, Martin affid. at paragraph 3, Namon deposition.

[6] A price is supracompetitive if it is substantially higher than the defendants would charge in a competitive market. See Phillip E. Areeda, Herbert Hovenkamp, and John L. Solow, ***Antitrust Law*** PP 501-03 (1995).

[7] Some former employees of the defendant, now independent service providers, testified for the plaintiffs that the defendants charged high prices. Their testimony about high prices, however, was very general. They didn't explain the basis for their conclusion that the prices were high. They made no comparisons to the prices charged by the defendants' competitors. See e.g., Perry depo. at 258

Q. Do you have any knowledge as to whether any of these companies, these authorized ISOs, ever indicated to you that their customers were unhappy with the prices that these parts from Bear and Allen were being set at?

A. Oh, yeah, sure. Everybody complains about prices….Sometimes it is not justified but they complain anyhow.

[8] The defendants also add a milage charge.

equipment, parts, and service was, at any time, higher than the package price of equipment, parts, and service sold by any competing manufacturer.

Customer information. Metzler and Allstate's contend that defendants failed to inform potential customers about the lifecycle costs of Bear and Allen equipment, thereby creating a "de facto" lock-in because once the customers purchased the expensive diagnostic equipment, it was not economically feasible for them to switch to other brands of equipment. Nothing in the record, however, supports a finding of a "de facto" lock-in. The plaintiffs' own evidence shows that it is difficult for equipment owners to estimate the total expected costs for automotive diagnostic equipment, **[**17]** whether the brand is Bear, Allen, Sun, or any other brand. Useful life varies depending on a number of factors including frequency of use, weather, and accidents in the shop. [9] In discovery Metzler acknowledge that the defendants' policies with respect to parts and services has been well known since the early 1989's. [10] Furthermore, by 1989, a substantial majority of Bear and Allen customers had previously purchased machines from either the defendants or a competitor and were presumably knowledgeable about the market for automotive diagnostic machines and the practices of various manufacturers with regard to their service and parts policies. Contrary to plaintiffs' contentions, the evidence of record shows that the defendants' policies and practices with respect to parts and services was generally known. [11]

[**18] II. PROCEDURAL HISTORY

Plaintiffs' Second Amended Complaint for Damages and Injunctive Relief alleges the following claims: Count I is a state-law claim for breach of contract against Bear and SPX; Count II alleges a state-law claim for Intentional Infliction of Emotional Distress against Bear and SPX, Counts III and VII allege federal antitrust claims of unlawful tying; Counts V and VI allege federal antitrust violations of monopolization and attempted monopolization; Counts VII, VIII, IX, and X allege state antitrust violations for unlawful tying and monopolization; Counts XI, XII, and XIII allege state law claims for intentional interference with an existing and prospective business relationship; and Count XIV alleges a state law claim for wrongful termination of contract against Bear and SPX.

The parties have engaged in extensive discovery in this vigorously-litigated case which is now in its fifth year. [12] Counts I (breach of contract) and XIV (wrongful termination) are no longer viable because a predecessor judge granted summary judgment in favor of defendants, approving a Report and Recommendation of the magistrate. The plaintiffs had alleged that Bear and SPX breached **[**19]** an oral employment contract granting the plaintiffs the right to be exclusive distributors of the defendants' products in a specific sales territory in Dade County. Summary judgment was granted on the basis that the claim was barred by the statute of frauds and that the relationship was terminable at will. Count II for intentional infliction of emotional distress was dismissed.

Count XIII alleges a state-law claim against SPX for Intentional Interference with Existing and Prospective Business Relations. The gravamen of Count XIII is that SPX intentionally interfered with a business relationship the plaintiffs had with Hennessy by telling a Hennessy representative that **[*1353]** SPX was involved in litigation with the plaintiffs. The magistrate recommended that SPX's motion for **[**20]** summary judgment on the intentional interference claim be granted, finding that as a matter of law the plaintiffs have no basis in prevailing on the third element of the claim - an intentional and unjustified interference. This Court issued an order which concluded that the magistrate judge had erred when he relied on a state-law prohibition against pyramiding inference on inference when federal law was to the contrary. Consequently, Count XIII is viable at this time. Defendants, however, have filed a renewed motion for summary judgment or, in the alternative, motion in limine, to exclude evidence as to Count XIII.

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[9] See affidavit of independent automobile repair service owner, Andrews at 8.

[10] See plaintiffs' sworn interrogatory answers.

[11] E.g., Berry affid. at paragraph 7, Martin affid. at paragraph 3, Vega affid. at paragraph 3.

[12] The statute of limitations in an antitrust action is four years. 15 U.S.C. section 5b. Consequently, the relevant period for plaintiffs' antitrust claims commences on October 13, 1989, four years prior to the filing of the initial complaint.

The plaintiffs filed a motion for partial summary judgment on relevant market and monopoly, arguing that the undisputed facts show that there is no competitive after market for parts and service of internal parts. On January 26, 1998, the Magistrate Judge recommended that this motion for summary judgment be denied because there is evidence showing that the defendants do not control the market of available parts, including Metzler's own affidavit, which states that he has been successful in obtaining parts. Plaintiffs filed objections to the Report and Recommendation. On **[**21]** March 23, 1998, this Court affirmed the magistrate's report and denied summary judgment in favor of the plaintiffs on the relevant market, monopoly power, and related issues.

The motion presently before the Court is defendants' motion for summary judgment on Counts III through XII, the antitrust counts. Defendants argue that they are entitled to summary judgment because the plaintiffs cannot demonstrate the requisite elements of an illegal tie, nor can they show monopolization or attempted monopolization. On June 15, 1998, the magistrate judge issued a Report and Recommendation that defendants' motion for summary judgment be denied. The defendants filed objections.

III. MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

It is axiomatic that ***HN3***[] when an objection is made to a magistrate's findings or recommendations on a dispositive motion, the district court shall make a *de novo* determination of those portions of the report or proposed findings to which the objections are addressed. *United States v. Raddatz, 447 U.S. 667, 673, 100 S. Ct. 2406, 2411, 65 L. Ed. 2d 424 (1980)*. The report and recommendation issued in this case recommended that summary judgment be denied, stating, **[**22]** "regardless of whether a change in policy is or is not required under *Kodak*, there are issues of fact … which remain to be resolved at trial." After conducting a *de novo* review of the record, this Court disagrees. In accordance with the holdings of the First, Third, Sixth, and Seventh Circuits, as well as numerous federal courts and commentators, this Court finds that an antitrust plaintiff cannot succeed on a Kodak-type theory where the defendant has not, within the applicable statute of limitations period, exacteded supracompetitive prices by implementing a restrictive anticompetitive change of policy that locked in customers, or used other coercive anticompetitive methods to deceive customers about the prices they would have to pay for parts and service. On this record, there is no evidence of a restrictive policy change, coercive methods to prevent customers from learning the lifecycle costs of defendants' equipment, or the imposition of supracompetitive prices. Accordingly, defendants' objections to the magistrate's report and recommendation are well taken, as explained in detail in the sections to follow.

IV. SUMMARY JUDGMENT STANDARD

HN4[] *Rule 56(c) of the Federal* ***[**23]*** *Rules of Civil Procedure* authorizes summary judgment where the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Allen vs. Tyson Foods,* ***[*1354]*** *Inc., 121 F.3d 642, 646 (11th Cir. 1997)*. The moving party has the burden to establish the absence of a genuine issue as to any material fact. *Adickes v. S.H. Kress and Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970)*; *Tyson Foods, Inc., 121 F.3d at 646*.

HN5[] In considering the motion, the Court must construe the evidence and the inferences drawn from the underlying facts in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962)*. Furthermore, facts asserted by the **[**24]** party opposing a summary judgment must be regarded as true if supported by affidavit rendered an opinion or other evidentiary material. *Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 595 (5th Cir. 1981)*. Ultimately, "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Tyson Foods, Inc., 121 F.3d at 646*; *Matsushita, 475 U.S. 574 at 587, 106 S. Ct. 1348 at 1356, 89 L.*

Ed. 2d 538. Applying this standard, in order to avoid summary judgment, the plaintiffs are required to come forward with sufficient evidence in support of each element of their tying and monopoly claims for a jury to return a verdict in their favor. Southern Card & Novelty, Inc., v. Lawson Mardon Label, Inc., 138 F.3d 869, 873-74 (11th Cir. 1998).

V. APPLICABLE LAW

Metzler and Allstate's do not contend that the defendants' practices in selling replacement parts or providing repair services for their automotive diagnostic equipment enabled the defendants to secure a monopoly, or attempt a monopolization, over the numerous other competing brands of automotive diagnostic equipment. Rather, the plaintiffs ground their claims on **[**25]** the holding of the Supreme Court in Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992), that in some limited circumstances it is possible for "information costs," "switching costs," and a "lock-in" to create a potential for aftermarket power in the derivative aftermarkets for the manufacturer's own equipment.

A. Market Definition. Congress passed the antitrust laws to promote competition and to prevent monopoly. Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 100 at 3 (1997). ***HN6***[] Under those laws, the existence of "competition" is determined by market performance, not the number of competitors. *Id.* at 3-4. Thus, while the antitrust laws protect competition, they do not protect competitors. Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962).

In seeking to encourage competition, the primary focus of antitrust laws is the promotion of competition between competing brands, or interbrand competition. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988); Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. **[**26]** 36, 52 n.19, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). So long as there is sufficient interbrand competition, a firm's intrabrand policies will not be deemed a threat to competition. *See* GTE Sylvania, Inc., 433 U.S. at 54-56. Indeed, where there is interbrand competition, an intrabrand restraint may promote interbrand competition, rather than harm it. *See* Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 810 (6th Cir. 1988).

1. The Rule Against Single Brand Relevant Markets.

Given the antitrust laws' concern with interbrand competition, rather than intrabrand competition, courts have historically declined to limit their antitrust analysis to the defendant's brand of products alone. The rationale for this position is that under classic economic theory, cross-elasticity of demand in the basic equipment market prevents exploitation of the parts and service aftermarkets by consumers choosing not to buy the basic equipment. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400, 100 L. Ed. 1264, 76 S. Ct. 994 (1966). High prices for the defendant's brand can therefore be only a short-run phenomenon, which is simply not the type of problem with which **[**27]** antitrust laws are concerned. *Parts & Elec. Motors, Inc., v. Sterling Elec., Inc., 866 F.2d 228, 234-36 (7th Cir. 1988)* (Posner, J., **[*1355]** dissenting). As the Supreme Court stated in *E.I. du Pont de Nemours & Co.*, it simply makes no economic sense to punish a manufacturer for asserting the "natural" monopoly in the sale and distribution of its own products. 351 U.S. at 393-95 (1966). *See also* Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 282 (5th Cir. 1978).

Because it would be inappropriate to punish a firm for its natural monopoly in its own products, courts embraced a sweeping prohibition against analyzing alleged anticompetitive activity by focusing on single-brand relevant markets: ***HN7***[] "Absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market." Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 488 (5th Cir. 1984); *accord* Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 479-81 (3rd Cir. 1992); Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 797 (1st Cir. 1988); Mozart Co. v. Mercedes-Benz of North Am., Inc., 833 F.2d 1342, 1346-47 **[**28]** (9th Cir. 1987); A.I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673, 675-76 (6th Cir. 1986); Neumann v. Reinforced Earth Co., 252 U.S. App. D.C. 11, 786 F.2d 424, 428-30 (D.C. Cir. 1986); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 673-74 (7th Cir. 1985).

2. The Role of Market Imperfections.

Consistent with the rule against single-brand relevant markets, antitrust courts have declined to narrowly define a market based on market imperfections alone. *See* [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 25-26, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)]. For example, in *Jefferson Parish*, defendant East Jefferson hospital held a 30% market share in the New Orleans metropolitan area -- not enough to prove market power. [Id. at 7-8, 26-29]. Plaintiff, a doctor alleging illegal tying, tried to narrow the market by arguing that "market imperfections" -- inadequate price information and reduced price competition due to insurance companies -- effectively narrowed the market to one in which East Jefferson did have power. *Id.* The Supreme Court rejected that contention, holding that a relevant market may not be narrowed due to "market imperfections" **[**29]** alone. *Id.* The Court stated:

> While these factors [inadequate price information and insurance companies] may generate "market power" in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying.

[Jefferson Parish, 466 U.S. at 27].

3. The Kodak Case.

In June 1992, in [Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)], the Supreme Court rendered an opinion on whether Kodak's restrictive policies in the sales of Kodak equipment parts constituted an illegal tying arrangement. In a 6-3 decision, the Court rejected Kodak's argument that it was entitled to summary judgment merely because it lacked market power in its alleged tying product market for photocopier and micrographic equipment. Based on a relevant market analysis, the majority held that Kodak was subject to suit when it suddenly implemented policies to control sales in the tied product market - the service aftermarket for Kodak equipment.

It was undisputed that Kodak faced a highly competitive interbrand market for copier and micrographic equipment. Beginning in the early 1980's, ISOs began repairing **[**30]** and servicing Kodak machines. Some ISO customers purchased replacement parts themselves, and other obtained both parts and service through the ISOs. In 1985 and 1986, Kodak switched to a policy of selling replacement parts only to customers who used Kodak's service or performed their own servicing. Kodak also obtained an agreement from the original equipment manufacturers that produced parts for its machine, not to sell Kodak parts to ISOs. Equipment owners and independent parts distributors were pressured not to sell Kodak parts to ISOs. A group of eighteen ISOs sued Kodak over the sudden change in parts policy, claiming that Kodak had unlawfully tied the sale of service for Kodak equipment to the sales of parts for Kodak equipment in violation of [section 1] of the Sherman Act and had monopolized and attempted to monopolize the markets for the **[*1356]** sales and service for Kodak equipment in violation of [section 2] of the Sherman Act.

Before plaintiffs had initiated any discovery, Kodak moved for summary judgment. Rather than engaging in a factual analysis of the relevant market, Kodak took an absolute theoretical position on market definition, arguing that the Court should adopt as a matter **[**31]** of law, the basic equipment market as its relevant tying product market. The defendant asked the court to adopt a per se rule that where there is competition in the market for the sale of a particular product, the manufacturer of the product cannot exercise market power in the parts or service aftermarkets for the product.

The district court granted Kodak's summary judgment motion. But the court of appeals reversed, holding that market imperfections can keep economic theories about how consumers behave from mirroring reality. [903 F.2d 612 at 617]. The court did not identify any specific market imperfections in the relevant markets, but it did indicate that some existing Kodak customers could be locked in to particular Kodak machines and therefore might be forced to pay supracompetitive prices for service rather than switch to new equipment. [Id. at 616]. In the Supreme Court, Kodak made the same arguments. Specifically, it argued that if it raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests. **[**32]** Thus, due to fierce competition in the interbrand equipment markets, Kodak cannot exercise market power or act anticompetitively in any derivative parts or service aftermarkets.

The Supreme Court flatly rejected Kodak's urging of a formalistic rule that did not take into account the facts of a particular case. Like the Court of Appeals, the Supreme Court focused on Kodak's change in its parts and service policy mid-stream, after customers had already purchased their machines and built businesses around existing Kodak policies. *Kodak, 504 U.S. at 477* & n.24. If the cost of switching is high, consumers who already have purchased equipment are "locked in" and will therefore tolerate service price increases to avoid purchasing new equipment. The ISOs offered evidence showing that the initial outlay for Kodak equipment, combined with the required support, would make switching costs substantial. Under this scenario, a seller could maintain supracompetitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers was high relative to the number of new purchasers. The restrictive policy change, existing **[**33]** imperfections in the copier market such as high "information" costs and high "switching" costs, created an issue of fact as to whether Kodak had improperly locked in its customers, formed the basis to deny defendant's motion for summary judgment. *Id. at 477* & n.24. Kodak's assertion that its policies resulted in a procompetitive market was clearly contrary to the facts. The Court stated that market definition is quintessentially a factual matter. *504 U.S. at 453*. Kodak's failure to show any factual support for its contentions was therefore critical to the denial of summary judgment.

4. Post-Kodak Cases. Cases interpreting *Kodak* have imposed a sharp limitation on its sweep. The dissent in *Kodak* advanced a proposition that an up-front tie-in of equipment and service would not raise the same antitrust concerns. *504 U.S. at 491-92* (Scalia, J., dissenting). Circuit courts, discussing the holding of *Kodak*, have agreed, recognizing that the effect of an advance disclosure of a tying arrangement is to prevent the purchaser from being locked in. [13] For example, in *Digital Equip. Corp. v.* ***[*1357]*** *Uniq Digital Tech., Inc., 73 F.3d 756 (7th Cir. 1996)*, the Seventh Circuit characterized **[**34]** the triable issue in *Kodak* as "whether the change in policy enabled Kodak to exact supracompetitive prices from customers who had already purchased its machines." *Id. at 763*.

> The Court did not doubt in Kodak that if spare parts had been bundled with Kodak's copiers from the outset, or Kodak had informed customers about its policies before they bought its machines, purchasers could have shopped around for competitive life-cycle prices. The material dispute that called for a trial was whether the change in policy enabled Kodak to extract supra-competitive prices from customers who had already purchased its machines.

Id. at 763.

[35]** The First Circuit has also focused on the change in policy, stating, in *Lee v. Life Ins. Co. of N. Am., 23 F.3d 14 (1994)*, that "the timing of the 'lock-in' at issue in *Kodak* was central to the Supreme Court's decision."

> Had previous customers known, at the time they bought their Kodak copiers, that Kodak would implement its restrictive parts-servicing policy, Kodak's market power," i.e., its leverage to induce customers to purchase Kodak servicing, could only have been as significant as its [power] in the copier market, which was stipulated to be inconsequential or nonexistent.

23 F.3d at 19.

In *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997)*, the Third Circuit noted that "the *Kodak* case arose out of concerns about unilateral changes in Kodak's parts and repairs policies." *Id. at 440*.

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[13] Commentators have also discussed the importance of a mid-stream change in policy. See e.g., Daniel M. Wall, *Aftermarket Monopoly Five Years After Kodak*, 11 Antitrust 32 (Summer 1997); Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of Kodak*, 63 Antitrust L.J. 483 (1995); Michael W. Klass, Richard T. Rapp, *Litigating the Key Economic Issues After Kodak*, 7 Antitrust 14 (Spring 1993); Douglas S. Katz, *The Benefits and Burdens of Kodak from a Litigant's Perspective*, 7 Antitrust 8 (Winter 1992); Mark R. Patterson, *Coercion, Deception, and other Demand-Increasing Practices in* ***Antitrust Law***, 66 Antitrust L.J. 1 (1997).

"Because this change in policy was not foreseen as the time of the sale, buyers had no ability to calculate these higher costs at the time of purchase and incorporate them into their purchase decision." *Id.* The Third Circuit concluded that *Kodak* did not apply because the Domino's franchisees could assess the potential costs and **[**36]** economic risks at the time they signed the franchise agreement. Unlike *Kodak*, the transaction between plaintiff and defendant was "subjected to competition at the pre-contract stage." *Id.* Similarly, the Fifth Circuit has held that where the defendant's restrictive policies are disclosed in advance, information and switching costs are "virtually nonexistent." *United Farmers Agents Ass'n v. Farmers Ins. Exch., 89 F.3d 233 (5th Cir. 1996)*.

Perhaps the *post-Kodak* case most significant to the resolution of the issue before this Court, however, is *PSI Repair Services, Inc. v. Honeywell, Inc., 104 F.3d 811 (6th Cir. 1997)*. As in *Kodak* and the instant case, *PSI* involved a durable goods aftermarket. An ISO filed a lawsuit against Honeywell, a manufacturer of industrial machinery, alleging that it had violated antitrust laws by refusing to sell certain parts necessary for repairing internal circuit boards without accompanying service. The restrictive policy at issue had been in existence for many years. Relying on the holding in *Kodak*, the ISO argued that the relevant markets were the aftermarkets for Honeywell's circuit boards and service. The Sixth Circuit **[**37]** disagreed, finding that the absence of a change in Honeywell's policy was fatal to the ISO's claim, despite the fact that the policy made it impossible for the ISO to compete with Honeywell in repairing circuit boards.

> Information and switching costs were particularly high in *Kodak* because Kodak adopted its parts-restrictive policy after numerous customers had already purchased Kodak copiers, thus creating a "lock-in" effect. . . . The change in policy in *Kodak* was the crucial factor in the Court's decision. By changing its policy after its customers were "locked in," Kodak took advantage of the fact that its customers lacked the information to anticipate this change.

104 F.3d at 818-20.

The *PSI* court stressed the continued viability of the Supreme Court's decision in *Jefferson Parish*, which found that illegal market power could not derive from market imperfections alone. There must be change in policy that is coupled with any existing market imperfections. *104 F.3d at 829* ("we **[*1358]** thus hold that an antitrust plaintiff cannot succeed on a Kodak-type theory when the defendant has not changed its policy after locking in some of its customers, and the defendant **[**38]** has been otherwise forthcoming about its pricing structure and service policies.").

VI. APPLICATION OF LAW TO FACTS OF THIS CASE

The defendants contend that under the principles set forth in *Kodak* and its progeny, Metzler and Allstate's simply cannot establish their case because they cannot show that the defendants changed their policies to become restrictive, thereby locking in their customers, or otherwise failed to be forthcoming about their pricing structure and service policies. Without a showing of a change in business policy, or other coercive practice which concealed the true cost of parts and repairs, the exception to the general rule - that the relevant market is the primary equipment market - cannot apply because the purchasers of the automotive diagnostic equipment knew about repair costs at the time they bought the equipment. Under these circumstances, the relevant market is the primary equipment market.

THE RELEVANT MARKET. Central to the outcome of the *section 1* tying claim and the *section 2* monopoly claims is the Court's determination as to the relevant product market. This determination is critical because if the market is defined as the primary **[**39]** equipment market, the plaintiffs cannot prevail because the uncontradicted evidence of record shows that the defendants clearly have no market power in the primary equipment market.

The plaintiffs argue that through the use of coercive practices, such as a refusal to sell parts to ISOs, the defendants have gained sufficient market power in the tying product market (parts) to restrain competition in the tied product market (service). Consequently, as in *Kodak*, a trier of fact could conclude that competition in the equipment market does not really curb defendants' power in the parts and service aftermarket. Thus, according to the plaintiffs, the relevant market should be the aftermarket for parts and services.

In *Kodak*, the defendant sought summary judgment arguing that as a matter of law "equipment competition precludes any finding of monopoly power in derivative aftermarkets." *504 U.S. at 464, 112 S. Ct. at 2085*. Rejecting Kodak's economic theory, the Court denied summary judgment because the ISOs had presented a reasonable theory that due to Kodak's change in policy, Kodak's argument was factually incorrect: owners of Kodak equipment were unable to calculate lifecycle costs **[**40]** at the time of purchase because the seller's change in policy was not foreseer and significant switching costs discouraged them from changing to other equipment once the true costs were known. *504 U.S. at 471, 112 S. Ct. at 2086*. Because of these particular circumstances, ordinary market forces, which would have caused higher prices in the parts and service aftermarkets to be offset by lower profits in the primary equipment market as customers switched to lower-cost equipment, did not apply. The limited choices available to owners of Kodak equipment led the Court to conclude that under certain circumstances, one brand can form the relevant market for purposes of both *section 1* and *section 2* of the Sherman Act. *See Collins v. International Dairy Queen, Inc., 980 F. Supp. 1252, 1256-57 (M.D. Ga. 1997)*.

The Court finds that no particular circumstances exist in this case which would sustain a finding that the relevant market is the parts and service aftermarket for defendants' brand of products, rather than the primary equipment market. First, the plaintiffs have not identified a change in policy that locked in the defendants' customers. [14] **[**42]** Even plaintiffs' expert admitted that there **[**41]** has been no change in policy. [15] Until recently, Metzler **[*1359]** and Allstate's have not advanced the argument that the transition in the early 1980's from ISOs to in-house technicians was the change that locked in equipment purchasers to supracompetitive prices. [16] Nor would such an argument be persuasive. It is undisputed that the defendants' switch from ISOs to in-house technicians was a vertical integration. The elimination of a distribution network by vertical integration generally does not run afoul of the antitrust laws. *See University Life Ins. Co. v. Unimarc, Ltd, 699 F.2d 846, 852 (7th Cir. 1983)*("vertical ***HN8***[] integration," performance within one company of two or more steps in chain of production and distribution, does not violate the Sherman Antitrust Act). *Kodak* has very little to say about vertical restraints. *See* Ronald S. Katz, *The Benefits and Burdens of Kodak from a Litigant's Perspective* 7 Antitrust 8, 12 (Winter 1992). Furthermore, the defendants' decision to vertically integrate was made in the early 1980's, many years outside the statute of limitations period in this case.

Here the defendants never initiated a sudden restrictive change in policy which caused their customers to be unwittingly locked in to the use the defendants' services. To the extent that there are limited service options available in the market, those limited options have been in place for more than fifteen years.

Second, the plaintiffs have failed to establish a material fact in support of their contention that the defendants engaged in coercive practices which concealed the true **[**43]** cost of parts and repairs. They have made no showing that the defendants applied coercive tactics to prevent customers from estimating lifecycle costs prior to their equipment purchase. To the contrary, the evidence, in substance, establishes that customers knew or could readily obtain information about the defendants' parts and service policies. Customers unhappy with those policies could purchase equipment from other manufacturers. And customers were free to purchase their external parts and some internal parts from sources other than the defendants. This is in contrast to Kodak, which apparently tied the sale of <u>all</u> its parts with service.

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[14] The only change in policy show by the evidence was SPX's elimination of Allen's policy of making the sale of certain internal parts contingent on the purchase of service.

[15] When asked about whether there had been a change in the defendants' policies with respect to the alleged tying products, Dr. Seaman responded, "In my reading of the record, there has not particularly been a change in the policy of the companies involved, the defendants, regarding their policy towards these products."

[16] Plaintiffs' expert, Bruce Seaman, testified that "antitrust claims made by the plaintiffs in this case in no way depend upon any particular challenge to this historical shift toward a vertically integrated service system by the defendants." (Seaman's Exp. Rep. App. Ex. 1 at paragraph 11).

Third, the plaintiffs have failed to produce sufficient evidence to permit a reasonable jury to find that the defendants used a change in policy to exact supracompetitive prices from existing customers. Supracompetitive prices is the ultimate evil arising from the sudden change in policy that concerned the Supreme Court in *Kodak*. As noted in *PSI Repair Services*, "if there were any evidence in the record that [the defendant] took advantage of its customers' imperfect information in order to reap supracompetitive profits in the aftermarkets **[**44]** for its equipment, we would not hesitate to allow a Kodak-type theory to be submitted to the jury. However, we can find nothing in the record or [plaintiff's] brief that alleges that [the defendant] engaged in such activities. In this situation a Kodak-type theory is not applicable." *104 F.3d at 820*. Similarly, there is nothing in the record before this Court to support a finding that the defendants coerced their customers to pay supracompetitive prices for either parts or service. The plaintiffs have presented no evidence showing the defendants regularly charged higher prices for parts to Bear and Allen equipment than the prices charged by the defendants' competitors for similar parts. Moreover, the undisputed evidence shows that the defendants' service charges were consistent with the plaintiffs' own service charges. For the foregoing reasons, the Court finds that the circumstances of this case are readily distinguishable from *Kodak*, Accordingly, the primary market is the relevant market for *sections 1* and *2* antitrust purposes.

A. THE TYING CLAIMS. The plaintiffs contend that Bear and Allen, and later SPX, have illegally tied the sale of certain internal parts **[**45]** to their equipment to their repair services. ***HN9***[] A tying arrangement is "an agreement by a party to sell one **[*1360]** product but only on the condition that the buyer also purchases a different (or tied) product." *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462, 112 S. Ct. 2072, 2097, 119 L. Ed. 2d 265 (1992)*. Such an arrangement can violate the Sherman Act's prohibition against agreements "in restraint of trade." *15 U.S.C. section 1*. But not every refusal to sell two products separately can be said to restrain trade. *Jefferson Parish Hosp. Distr. v. Hyde, 466 U.S. 2, 9, 104 S. Ct. 1551, 1556, 80 L. Ed. 2d 2 (1984)*. Courts have long recognized that Congress intended to prohibit only unreasonable restraints. *Southern Card & Novelty, Inc., 138 F.3d 869, 874 (11th Cir. 1998)*. Most antitrust claims are therefore analyzed under a "rule of reason," according to which the finder of fact must decide whether the practice at issue imposes an unreasonable restraint on competition. *Id.* This determination requires a consideration of a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the **[**46]** restraint's history, nature, and effect. *Southern Card & Novelty, Inc., 138 F.3d at 874*.

Certain tying arrangements, however, pose a predictable and unacceptable risk of stifling competition and therefore are unreasonable per se. *Jefferson Parish Hosp. Distr., 466 U.S. at 9, 104 S. Ct. at 1556*. In the Eleventh Circuit, the per se rule is applied reluctantly, and only when experience with a particular type of restraint enables the court to predict with confidence that the rule of reason will condemn it. *Southern Card & Novelty, Inc., 138 F.3d at 874*. *Retina Assoc., P.A. v. Southern Baptist Hosp., 105 F.3d 1376, 1381 (11th Cir. 1997)*. The plaintiffs allege illegal tying under both the per se rule and the rule of reason. But it is far from certain that the practices at issue in this case would fall into the per se category. The Court will therefore first review all relevant considerations to determine whether the rule of reason would condemn them. *See All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 746 (11th Circuit 1998)*("a presumption exists that the circumstances of a case will be looked at in the light of the rule of reason standard **[**47]** and will not be deemed per se unreasonable"). ***HN10***[] An illegal tying arrangement has five elements:

> 1) a "tying" product and a "tied" product; 2) evidence that the seller forced the buyer to purchase the tied product to get the tying product; 3) that the seller has sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and 4) anticompetitive effects in the tied market; and 5) the involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502-1503 (11th Cir. 1985). ***HN11***[] A claim that a tying arrangement is illegal per se eliminates the requirement that the plaintiff show an actual anticompetitive effect. *Id.* The defendants contend that the plaintiffs have failed to carry their burden to come forward with sufficient evidence to create a genuine dispute of material fact in support of the second, third, and fourth elements of their illegal tying claim.

1. Separate Products. Two separate products are tied together if a difference exists in the "character and demand for the two items." *Id.* Thus to determine whether there **[**48]** are the parts and service are two separate products, the Court must focus on the demand for the two items. *Jefferson Parish, 466 U.S. at 19*; *104 S. Ct. at 1561-62*. In *Kodak*, the Court wrote that parts and service can be separate products if there is "sufficient consumer demand so that it is efficient for a firm to provide service separately from parts." *504 U.S. at 462*; *112 S. Ct. at 2080*. For the purposes of this summary judgment motion, the defendants concede that parts and service are separate products.

2. Evidence of actual coercion. The plaintiffs cannot satisfy the second element of the test because the evidence shows that (1) there was no change in policy which locked in existing customers; and (2) there is no evidence showing that defendants exacteded supracompetitive prices from customers who had already purchased their equipment. In *Kodak*, the defendant changed its business policy after customers had purchased **[*1361]** their equipment, thereby creating the opportunity to exact additional money from locked-in customers by raising prices to noncompetitive levels. These factors, which were critical to the holding in *Kodak*, are simply absent in this case. Metzler **[**49]** and Allstate claim that the defendants refuse to sell parts to ISOs, or to sell them parts at a discount. Assuming for the purposes of summary judgment that these allegations are true, this conduct is insufficient to constitute the coercive type of practice that gives rise to a monopoly claim if the primary market is competitive and potential customers are not locked in to unanticipated high prices. *See* *Jefferson Parish, 466 U.S. at 17, 104 S. Ct. at 1561* (when seller does not have either the degree or kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the first, tying product, antitrust violation can be established only by evidence of unreasonable restraint on competition in the relevant market); *Digital Equip. Corp. v. UNIQ Digital Technologies, Inc., 73 F.3d 756 (7th Cir. 1996)*(refusal to sell to distributor for discount is not antitrust violation).

3. Market Power. ***HN12***[] Market power is defined as the power "to force a purchaser to do something he would not do in a competitive market." *PSI, 104 F.3d at 817*. Market power is generally measured by market share. *Jefferson Parish, 466 U.S. at 27*. [17] The **[**50]** appropriate query is "whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market. *Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 504, 89 S. Ct. 1252, 1259, 22 L. Ed. 2d 495 (1969)*. If the seller has sufficient power in the tying market to "force" the buyer to purchase the tied product, then competition on the merits is restrained and the Sherman Act is violated. *Jefferson Parish, 466 U.S. at 12, 104 S. Ct. at 1558*. Without market power, the seller is unable to engage in the forcing necessary to establish a *section 1* violation. *PSI, 104 F.3d at 818*.

In this case, the plaintiffs have focused on the parts and service **[**51]** aftermarket and have provided no data regarding the primary equipment market. The only market-share evidence of record shows that the primary equipment market was and is competitive. In 1993 for example, Bear and Allen's combined share of the automotive diagnostic equipment market was 26 percent. Market shares below 30 percent are generally insufficient, as a matter of law, to constitute market power in tying and monopolization cases. *E.g.,* *Jefferson Parish, 466 U.S. at 26-29*; *PSI, 104 F.3d at 821* (granting summary judgment as to market power in monopolization and tying case where defendant had 27 percent share of primary equipment market); *ABA Section of **Antitrust Law**, **Antitrust Law** Developments* (Fourth) Vol. I, at 194 (1997)(since *Jefferson Parish* no court has accepted a market share below 30 percent as evidence of sufficient market power to warrant application of per se rule). Consequently, the plaintiffs cannot establish this fourth element of their tying claim.

4. Anticompetitive Effects on Tied Market. ***HN13***[] The fourth *Amey* element--anticompetitive effects in the tied market--is properly analyzed in terms of the price of the tied and tying bundle. Thus, the **[**52]** plaintiffs must establish that the combined price for the tying and tied products was greater than if they had been sold independently. *Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir. 1982)*.

[17] Market power can also be demonstrated by direct evidence that defendants raised prices and drove out competition in the tied product market. *Wilson v. Mobile Oil Corp.*, 1997 WL 675326 (E.D. La. 1997). No such evidence has been presented in this case.

> ***HN14***[] Injury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value. The rationale behind this requirement is apparent: A determination of the value of the tied products alone would not indicate whether the plaintiff indeed suffered any net economic harm, since a lower price might conceivably have been exacted by the [defendant] for the tying product. Unless the fair market value of both the tied and tying products are determined and an overcharge in the complete price found, no **[*1362]** injury can be claimed; suit then would be foreclosed.

Id. at 1285. Under *Krupta* then, even if the defendants had unreasonably restricted the availability of their parts, causing high prices for parts, Metzler and Bear cannot prevail on their tying claim unless they show that the defendants' service rates were supracompetitive, resulting in a higher package price for parts and service. The Court finds that **[**53]** the plaintiffs have totally failed to meet this burden. To the contrary, the undisputed evidence establishes that customers did not pay supracompetitive rates for the "tied product," that is, service for defendants' automotive diagnostic equipment. Defendants' service rates are and have been virtually the same as plaintiffs' service rates. [18] Consequently, the plaintiffs have not established this essential element of a tying claim.

> Plaintiffs did not claim, let alone offer evidence to show, that the price they paid for the franchise-computation package is higher than the price for those two products purchased in separate markets. . . . They therefore failed to show market power directly. *Kypta* . . . holds that unless . . . the package price was elevated the suit must be dismissed without further ado.

Will v. Comprehensive Accounting Corp., 776 F.2d 665, 673 (7th Cir. 1985). *Accord* *United Farmers Agents Ass'n v. Farmers Ins. Exchange, 89 F.3d 233, 237 (5th Cir. 1996)* (affirming summary judgment, noting "plaintiffs have failed to even allege that the tied bundle . . . cost more than the sum of their market prices.").

[54]** Even if the defendants did charge supracompetitive prices, the plaintiffs burden does not stop there. They must also establish a causal relationship between defendants' actions and plaintiffs' injury. ***HN15***[] A tying arrangement is illegal if it (1) has an actual anticompetitive effect or threatened to have such an effect and (2) that effect is not outweighed by procompetitive justifications. *Jefferson Parish, 466 U.S. at 29-31, 80 L. Ed. 2d 2, 104 S. Ct. 1551*; *Levine v. Central Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1551* (11th Cir.). Without showing a clear connection between the alleged tie and an actual injury, plaintiffs cannot withstand summary judgment.

> We simply hold that a plaintiff may not proceed to trial simply because it presents some evidence that the defendant is engaged in tying and some evidence that some injury is occurring. A plaintiff must link the two showings with a theory of causation that is both plausible and cognizable by the antitrust laws.

Town Sound Custom Tops, Inc., 959 F.2d 468, 486-87 (3rd Cir. 1992).

Plaintiffs present no evidence of failure of the market. The report by their expert, Dr. Seaman, presents no factual findings regarding **[**55]** the industry at issue, the market definition, or the causal relationship between the alleged conduct and the alleged injury. Dr. Seaman merely concludes that "This unique near absence of ISO's from automotive equipment servicing is consistent with plaintiff's arguments in this case that the behavior of the defendants has had the effect of excluding competitors . . . ." [19] But the absence of ISOs may also be consistent with legal, procompetitive behavior. *See e.g.*, George Vetter, *Vertical Restraints Post Kodak* 43 R.I. B.J. 7 (1994)("vertical restraints may actually enhance competition, particularly among interbrand competitors"). Dr. Seaman merely assumes the cause-and-effect relationship, rather than substantiates it. His testimony is ambiguous. Consequently, the plaintiffs cannot defeat summary judgment. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* ("***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case.").

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[18] As stated in the facts section of this opinion, Bear and ATP's hourly rate for service was $ 85 from 1989 until 1996; it went to $ 90 in 1997. In comparison, plaintiffs' hourly rate from 1989 to 1993 was $ 75; it went up $ 5 in 1994 and again in 1995 to equal to Defendants' pre-1997 rate of $ 85 per hour.

[19] *Seaman Report* at P 19 (emphasis added).

[56] 5. Amount of interstate commerce.** The fifth requirement for a tying arrangement is that a "not insubstantial" amount of interstate commerce be involved. The defendants **[*1363]** concede that this element has been met.

Because the plaintiffs cannot establish three out of the five essential elements of an illegal tying claim, the defendants are entitled to summary judgment on the *section 1* claim. *See* *Retina Assoc., P.A. v. Southern Baptist Hosp., 105 F.3d 1376, 1385 (11th Cir. 1997)*.

B. THE MONOPOLY AND ATTEMPTED MONOPOLY CLAIMS.

The amended complaint alleges two claims under *section 2* of the Sherman Act: a monopolization claim and an attempt to monopolize claim. ***HN16***[] Monopolization is "the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Kodak, 504 U.S. at 482-83, 112 S. Ct. at 2090* (quoting *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L. Ed. 1236 (1948)*. ***HN17***[] A *section 2* monopolization claim has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of **[**57]** a superior product, business acumen, or historic accident." *Eastman Kodak, 504 U.S. at 481, 112 S. Ct. at 2089* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966))*. A *section 2* claim requires a greater market share for a finding of market power than a *section 1* claim. *PSI, 104 F.3d at 821*; *see* *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)*(87 percent share of relevant market constitutes a monopoly). A defendant can escape *section 2* liability if the defendant's actions can be explained by legitimate business justifications. *See* *Eastman Kodak, 504 U.S. at 483, n. 32, 112 S. Ct. at 2091, n. 32*; *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 627, 73 S. Ct. 872, 890, 97 L. Ed. 1277 (1953)*. As this Court found previously, in its *section 1* analysis, the plaintiffs have not shown that the defendants possess market power in the primary equipment market. The plaintiffs therefore cannot prove their *section 2* claim. This Court need not reach the second part of the *section 2* monopoly analysis, that the defendants willfully acquired or maintained an alleged **[**58]** monopoly.

HN18[] To prove an attempt to monopolize claim under *section 2*, a plaintiff must show that (1) the defendant engaged in predatory or anticompetitive conduct, (2) the defendant had the specific intent to monopolize, and (3) there was a dangerous probability that the defendant might achieved monopoly power. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91, 122 L. Ed. 2d 247 (1993)*; *Technical Resource Servs., Inc., 134 F.3d 1458 at 1466*; *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 993 (11th Cir.1993)*. Proof of a dangerous probability of successful monopolization necessarily involves a determination of the relevant market and the defendant's power in that market. *Spectrum Sports, 506 U.S. at 459, 113 S. Ct. at 892* ("demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographical market and the defendants' economic power in that market"; *see also* *U.S. Anchor Mfg., 7 F.3d at 994*; *T. Harris Young & Assocs. v. Marquette Electronics, 931 F.2d 816, 823 (11th Cir. 1991)*. In this case the relevant market is the primary equipment market. Nowhere do the plaintiffs **[**59]** allege, nor does the evidence show, that the defendants engaged in predatory or anticompetitive conduct in the primary equipment market. Consequently, this claim must also fail. *See* *PSI, 104 F.3d at 821-22*. Defendants are entitled to summary judgment on the *section 2* claims.

VII. COUNTS XI AND XII

Metzler and Allstate's have also plead state-law claims for tortious interference with a business relationship based on the exact same conduct underlying the antitrust claims. ***HN19***[] The elements of a claim for tortious interference with a business relationship under Florida law are: (1) the existence of a business relationship; (2) defendant's knowledge of that relationship; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff. *Pyles v. United Airlines, Inc., 79 F.3d 1046, 1049 (11th Cir. 1996)*;

[*1364] *Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126 (Fla. 1985)*. A plaintiff must prove each element to recover for tortious interference. *See Pyles, 79 F.3d at 1049*.

HN20[] Lawful competitive practices are privileged under Florida tortious interference law. *Wackenhut Corp. v. Maimone, 389 So. 2d 656, 658 (Fla. 4th DCA **[**60]** 1980)*. As long as no improper means are employed, business activities taken to safeguard or promote one's own financial interests are not actionable. *Ethyl Corp. v. Balter, 386 So. 2d 1220, 1225 (Fla. 3d DCA 1980)*; *accord Perez v. Rivero, 534 So. 2d 914, 916 (Fla. 3d DCA 1988)*.

This Court has held that the defendants' conduct was not illegal under the antitrust laws. Plaintiffs have set forth no facts showing any other independent basis for finding the defendants' acts wrongful or tortious under state law. If the defendants' conduct is not wrongful or illegal, it is justified. Plaintiffs therefore cannot prove the third element of its claim - intentional and unjustified interference with a relationship by the defendant. Admittedly some conduct not in violation of the antitrust laws may constitute tortious interference. But where the tort is grounded on precisely the same "anticompetitive" behavior alleged in the failed antitrust claim, it cannot as a matter of law constitute tortious interference with a business relationship. *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101, 1114 (1st Cir. 1989)*(***antitrust law*** provides best **[**61]** barometer of whether alleged anticompetitive behavior can be found "wrongful" and hence tortious under state law); *Maxim Integrated Prods., Inc. v. Analog Devices, Inc., 1994 WL 514024 (N.D. Calif. 1994)*(where alleged interference involves same conduct as the antitrust violations, plaintiff's inability to raise a genuine issue on its antitrust claims dooms its state law interference claim); *Aviani v. Sisters of St. Mary, 1987 U.S. Dist. LEXIS 9824, 1987 WL 18934 (N.D. Ill. 1987)*(summary judgment granted in favor of defendant on tortious interference claim where tort was based on conduct found to be not an illegal restraint of trade). *See also* *Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422 (9th Cir. 1993)*(defendant's conduct that did not violate the antitrust laws was privileged competition which could not give rise to tortious interference claim). Consequently, the defendants are entitled to summary judgment on Counts XI and XII.

VIII. CONCLUSION

The plaintiffs' claims are insufficient to support a finding of illegal tying or monopoly. The evidence, construed in the light most favorable to the plaintiffs, shows that the defendants refused to sell parts to ISOs, tied the sale of some **[**62]** internal parts to service, and that some internal parts are available only from the defendants. But where, as here, the defendant lacks market power in the primary equipment market, there must be a showing of a restrictive change in policy or other coercive practice that enabled the manufacturer to exploit customers by charging supracompetitive prices. One reason for this result is that manufacturers of technical durable goods typically service a monopoly-like share of the installed parts to their own equipment. Published estimates show that 84 percent of mini-computers, 80 percent of ultrasound equipment, 90 percent of MRIs, and 70 percent of CT scanners are serviced by the manufacturer. Daniel M. Wall, *Aftermarket Monopoly Five Years After Kodak*, 11 Antitrust 32 (Summer 1997). Moreover, such manufacturers typically "monopolize" at least some of the parts to their equipment.

[This type of Monopoly] is an almost inevitable by-product of innovation or attempts to create product differentiation; some key components will have been specifically engineered, may be protected by intellectual property rights, and are therefore not produced by anyone else. The typical manufacturer will **[**63]** have not just one, but two or more (maybe dozens, if many parts are unique) "aftermarket monopolies."

Id. at 32-33.

In the aftermath of *Kodak*, courts and commentators alike have focused on the significance of Kodak's change in policy which enabled Kodak to coerce existing customers into paying service prices that were higher than reasonably anticipated at the time of contracting. They have noted that customers are entitled to the benefit of their reasonably anticipated bargain. A mid-stream policy **[*1365]** change is an opportunistic act. In this case, however, there was no mid-stream change in policy. The defendants' longstanding business practices are "common knowledge." Plaintiffs have failed to show that the defendants engaged in the type of blatant opportunism found in

Kodak. Furthermore, there is no evidence to support a finding that the defendants charged supracompetitive or even higher-than-anticipated prices. Higher-than-anticipated prices is a critical missing element. *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 1740 at 168 (1996)(if defendant lacks market power in the primary market, to survive summary judgment, plaintiff must show that price of **[**64]** defendants' entire package was noncompetitive); *See also* *Digital, 73 F.3d at 761*; *Kypta, 671 F.2d at 1286* (same). Although market imperfections exist, they are not the type that are of concern to antitrust laws. Accordingly, it is hereby

ORDERED AND ADJUDGED that summary judgment is granted in favor of the defendants on the antitrust counts and the tortious interference claims that are based on the conduct underlying the antitrust claims. [20]

DONE AND ORDERED in Chambers at Miami, Florida, this 1 day of Sept., 1998.

ALAN S. GOLD

[65]** UNITED STATES DISTRICT JUDGE

End of Document

[20] Counts 7 through 10 assert that the federal antitrust violations also constitute violations of *Florida Statute sections 542.18* or *542.19*. Florida's antitrust statutes are based on, and must be construed in accordance with, the federal statutes. *Fla. Stat. Section 542.32*. For this reason, defendants are entitled to summary judgment on the state antitrust claims. *Levine v. Central Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1556 n. 20 (11th Cir. 1996)*.

Morrison v. Viacom, Inc.

Court of Appeal of California, First Appellate District, Division Two

September 1, 1998, Decided

No. A081569.

Reporter

66 Cal. App. 4th 534 *; 78 Cal. Rptr. 2d 133 **; 1998 Cal. App. LEXIS 756 ***; 98 Cal. Daily Op. Service 6906; 98 Daily Journal DAR 9505; 1998-2 Trade Cas. (CCH) P72,270

CHRISTOPHER MORRISON et al., Plaintiffs and Appellants, v. VIACOM, INC., Defendant and Respondent.

Subsequent History: **[***1]** Review Denied November 18, 1998, Reported at: *1998 Cal. LEXIS 7454*.

Prior History: Superior Court of Marin County. Super. Ct. No. 161687. Peter Allen Smith, Judge. *

Disposition: The judgment is affirmed.

Core Terms

channels, broadcast, television, tied product, competitors, customers, commodity, cable, tying arrangement, satellite, Cartwright Act, appellants', antitrust, trial court, first amended complaint, cable television, tying product, airwaves, alleges, amended complaint, Clayton Act, programming, consumers, demurrer, premium, buyer, appellant's contention, television reception, leave to amend, merchandise

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Tying Arrangements, Per Se Rule**

* Retired judge of Marin Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

When reviewing a judgment based on an order sustaining a demurrer without leave to amend, the court accepts as accurate the factual allegations of appellants' complaint. If the complaint states a cause of action, the judgment must be reversed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN2[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is a requirement that a buyer purchase one product or service as a condition of the purchase of another. Traditionally the product which is the inducement for the arrangement is called the "tying product" and the product or service that the buyer is required to purchase is the "tied product." A tying arrangement may be condemned under either or both section *Cal. Bus. & Prof. Code §§ 16720* and *16727*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN3[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Cal. Bus. & Prof. Code § 16720 defines a trust as a combination of capital, skill or acts by two or more persons" for the purpose of restraining trade. Except as expressly provided in the Cartwright Act, every trust is unlawful, against public policy and void. *Cal. Bus. & Prof. Code, §16726*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN4[] **Monopolies & Monopolization, Conspiracy to Monopolize**

See *Cal. Bus. & Prof. Code § 16727*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5[] **Tying Arrangements, Per Se Rule**

See *Cal. Bus. & Prof. Code § 16720*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Business & Corporate Compliance > ... > Readjustments > Formation > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Readjustments > General Overview

HN6[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Cal. Bus. & Prof. Code § 16727 provides that a sale or contract for sale of goods, merchandise, machinery, supplies, commodities is unlawful when conditioned on the agreement that the purchaser shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors. The term "services" is used to describe tied items and is not used to describe tying items.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN7[] Private Actions, Remedies

The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. An "antitrust injury" must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Several customers brought an antitrust class action against a cable television supplier, asserting that defendant violated state antitrust laws by illegally tying the sale of satellite channels to the sale of broadcast channels and the sale of premium channels to the sale of both broadcast and satellite channels. The trial court sustained defendant's demurrer to plaintiffs' complaint and denied plaintiffs leave to amend, finding that plaintiffs failed to state a claim under either *Bus. & Prof. Code, § 16720*, or *Bus. & Prof. Code, § 16727*, of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*). The court entered judgment against plaintiffs. (Superior Court of Marin County, No. 161687, Peter Allen Smith, Judge. [+])

The Court of Appeal affirmed the judgment. The court held that the trial court properly found that plaintiffs failed to state a claim under *Bus. & Prof. Code, § 16720*, of the Cartwright Act, since plaintiffs failed to plead the requisite tied product market foreclosure. Plaintiff failed to identify any facts to show that defendant had any competitors in the tied product market for local broadcast television, and alleged that the tied product was available for free over the airwaves, which established that the challenged practice had no effect on competition. Moreover, the trial court did not abuse its discretion by denying plaintiffs leave to amend to clarify and/or refine their tied product market definition, since plaintiffs failed to establish a reasonable possibility that the defect in their pleadings was curable. The court further held that the trial court properly found that plaintiffs failed to state a claim under *Bus. & Prof. Code, § 16727*, of the act, since that statute does not apply when the tying item is a service, and cable television is a service. The court also held that the trial court's finding that plaintiffs alleged no facts to show an injury from restraints on competition was an appropriate alternate ground for sustaining defendant's demurrer to both of plaintiffs' Cartwright Act claims. (Opinion by Haerle, J., with Kline, P. J., and Lambden, J., concurring.)

Headnotes

[+] Retired judge of the Marin Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

CA(1)[] **(1)**

Appellate Review § 128—Scope of Review—Function of Appellate Court—Rulings on Demurrers.

--When reviewing a judgment based on an order sustaining a demurrer without leave to amend, the court accepts as accurate the factual allegations of the appellant's complaint. If the complaint states a cause of action, the judgment must be reversed.

CA(2)[] **(2)**

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Scope of Act.

--The Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) prohibits combinations in restraint of trade. Although the statutory language is all-encompassing, the courts have limited the act's reach to unreasonable restraints. Certain restraints that lack redeeming virtue are conclusively presumed to be unreasonable and illegal.

CA(3)[] **(3)**

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—General Principles.

--A tying arrangement is a requirement that a buyer purchase one product or service as a condition of the purchase of another. Traditionally, the product that is the inducement for the arrangement is called the "tying product," and the product or service that the buyer is required to purchase is called the "tied product." A tying arrangement may be condemned under either or both *Bus. & Prof. Code, §§ 16720* and *16727*, of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*).

CA(4)[] **(4)**

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Requirements for Per Se Illegality.

--The elements of a per se tying arrangement violative of *Bus. & Prof. Code, § 16720*, of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), include: (1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act. Under *Bus. & Prof. Code, § 16727*, of the act, a per se violation is established if either element (2) or (3) is established along with elements (1) and (4).

CA(5a)[] **(5a)** *CA(5b)*[] **(5b)**

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements—Requirements for Per Se Illegality—Adverse Impact on Competition in Tied Product Market—Cable Television.

--In an antitrust class action brought against a cable television supplier by several customers, asserting that defendant violated state antitrust laws by illegally tying the sale of satellite channels to the sale of broadcast channels and the sale of premium channels to the sale of both broadcast and satellite channels, the trial court properly found that plaintiffs failed to state a claim under *Bus. & Prof. Code, § 16720*, of the Cartwright Act (*Bus. &

Prof. Code, § 16700 et seq.). Plaintiffs were required to allege facts showing that a total amount of business, substantial enough in terms of dollar volume so as not to be merely de minimis, was foreclosed to competitors by the tie. However, they failed to plead the requisite tied product market foreclosure by failing to identify any facts to show that defendant had any competitors in the tied product market for local broadcast television, and by alleging that the tied product was available for free over the airwaves, which established that the challenged practice had no effect on competition. Moreover, the trial court did not abuse its discretion in sustaining defendant's demurrer to plaintiffs' complaint and by denying plaintiffs leave to amend to clarify or refine their tied product market definition, since plaintiffs failed to establish a reasonable possibility that the defect in their pleadings was curable.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 589.]

CA(6)[] **(6)**

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements—Requirements for Per Se Illegality—Adverse Impact on Competition in Tied Product Market.

--When a purchaser is forced to buy a product that he or she would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market that would otherwise have been available to other sellers has been foreclosed. When all buyers are forced to take a tied product they do not want and would not have purchased elsewhere, tied market foreclosure is zero and thus does not satisfy even the minimal requirements for per se illegality.

CA(7)[] **(7)**

Appellate Review § 128—Scope of Review—Function of Appellate Court—Rulings on Demurrers—Demurrer Sustained Without Leave to Amend—Determination Whether Defect Can Be Cured by Amendment.

--When a demurrer is sustained without leave to amend, the court decides whether there is a reasonable possibility that the defect can be cured by amendment. If it can be, the trial court has abused its discretion, and the appellate court reverses; if not, there has been no abuse of discretion, and the reviewing court affirms. The burden of proving such reasonable possibility is squarely on the plaintiff.

CA(8)[] **(8)**

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements—Per Se Illegality—When Tying Product Is a Service—Cable Television.

--In an antitrust class action brought against a cable television supplier by several customers, asserting that defendant violated state antitrust laws by illegally tying the sale of satellite channels to the sale of broadcast channels and the sale of premium channels to the sale of both broadcast and satellite channels, the trial court properly found that plaintiffs failed to state a claim under Bus. & Prof. Code, § 16727, of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.). Section 16727 does not apply when the tying item is a service. In this case, the alleged tying product, cable television, was a service and not a commodity; thus the statute did not apply.

CA(9)[] **(9)**

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements—Claim of Injury From Restraints on Competition—Cable Television.

--In an antitrust class action brought against a cable television supplier by several customers, asserting that defendant violated state antitrust laws by illegally tying the sale of satellite channels to the sale of broadcast channels and the sale of premium channels to the sale of both broadcast and satellite channels, the trial court's finding that plaintiffs alleged no facts to show an injury from restraints on competition was an appropriate alternate ground for sustaining defendant's demurrer to plaintiffs' claims under *Bus. & Prof. Code, §§ 16720* and *16727*, of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*). The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his or her injuries. An antitrust injury must be proved, that is, the type of injury the antitrust laws were intended to prevent, and that flows from the invidious conduct rendering the defendant's acts unlawful. In this case, plaintiffs failed to allege antitrust injury because they failed to allege any facts showing that they suffered an injury that was caused by restraints on competition. In light of plaintiffs' concession that local broadcast television was transmitted over the airwaves free of charge, the real injury about which plaintiffs complained was that defendant had inflated its cable rates by requiring that customers pay a fee for broadcast television even though broadcast television was available to other consumers for free. This practice did not constitute an anticompetitive tying arrangement.

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Skadden, Arps, Slate, Meagher & Flom and James E. Lyons for Defendant and Respondent.

Judges: Opinion by Haerle, J., with Kline, P. J., and Lambden, J., concurring.

Opinion by: HAERLE

Opinion

[*538] [135] HAERLE, J.**

I. INTRODUCTION

This is the second appeal in this antitrust action against Viacom, Inc., a supplier of cable television, by several of Viacom's customers. In the first appeal, we held that the superior court erroneously sustained a demurrer to appellants' complaint because the antitrust claims alleged therein were only partially preempted by federal law regulating the cable industry. (*Morrison v. Viacom, Inc. (1997) 52 Cal. App. 4th 1514 [61 Cal. Rptr. 2d 544]* (*Morrison I*).)

After our ruling in *Morrison I*, the superior **[***2]** court sustained Viacom's motion for judgment on the pleadings on the ground appellants' original complaint, filed September 22, 1994, failed to allege a cause of action under the Cartwright Act. Thereafter, the trial court sustained a demurrer to the first amended complaint, filed August 29, 1997, on the same ground. In this appeal, appellants contend they have alleged sufficient facts to support their claim that Viacom's business practices constitute illegal tying, a per se violation of both *section 16720* and *16727* of the Cartwright Act. (*Bus. & Prof. Code, § 16720*, *16727*.) Alternatively, appellants argue the trial court abused its discretion by denying them leave to amend. We affirm.

II. FACTS AND PROCEDURAL BACKGROUND

The first amended complaint alleges that appellants represent a class consisting of persons living in Marin, San Francisco and several East Bay communities who have purchased cable television from Viacom during the four-year period prior to the filing of the original complaint. Appellants contend Viacom has compelled members of the alleged class to participate in an illegal tying arrangement which has restrained trade "in the market for providing local broadcast **[***3]** television."

[*539] The "arrangement" appellants challenge is Viacom's organization of the cable channels it sells to its customers into three categories and its requirement that customers pay for certain categories to obtain access to others. According to appellants, Viacom has divided the channels into the following three categories: (1) broadcast channels, consisting of local television channels concurrently available over the noncable airwaves without charge, such as KGO, KPIX and KRON; (2) satellite cable channels, consisting of geographically remote broadcast television channels and nonbroadcast channels such as CNN and ESPN; and (3) premium channels, consisting of nonbroadcast channels such as HBO and Showtime.

The first amended complaint alleges that Viacom requires that a customer must purchase broadcast channels as a prerequisite for purchasing satellite cable channels and that he or she must purchase both broadcast channels and satellite cable channels in order to purchase premium channels. According to appellants these alleged requirements constitute a per se illegal tying arrangement; they claim Viacom has violated our state antitrust laws by illegally tying the **[***4]** sale of satellite channels to the sale of broadcast channels and the sale of premium channels to the sale of both broadcast and satellite channels. [1]

Appellants allege that they are unwilling coconspirators "coerced" by Viacom to participate in its illegal conspiracy to "boycott competing sources of television channels and to refuse to do business with entities providing other access to television channels." They claim they have suffered damage from the conspiracy because they were forced to purchase broadcast channels from Viacom even though (1) broadcast channels were "readily available **[***5]** . . . without charge over the airwaves," and (2) airwave reception of the broadcast channels interfered with cable reception of the broadcast channels and produced "multiple, 'ghost' images and otherwise **[**136]** impaired the reception of the broadcast channels."

The first amended complaint alleges that, if not for Viacom's tying arrangement, appellants would not have purchased broadcast channels from Viacom or any other cable company and that "[b]ut for the illegal tying arrangement alleged herein, [appellants] would have purchased television reception equipment and secured their television channels from competitors of [Viacom] thereby saving money."

[*540] On December 1, 1997, the superior court sustained Viacom's demurrer to the first amended complaint and denied appellants leave to amend. The basis for the lower court's order is readily discernible from the detailed tentative rulings it issued in this case. The court reasoned that appellants failed to state a claim under section 16727 of the Cartwright Act (Bus. & Prof. Code, § 16727 (hereafter § 16727)) because that provision does not apply when the alleged "tying" item is a service. Nor did appellants allege sufficient **[***6]** facts to constitute a violation of section 16720 of the Cartwright Act (Bus. & Prof. Code, § 16720 (hereafter § 16720)) because they failed to allege an adverse impact on competition in the tied product market or injury resulting from a restraint on competition in that market.

Judgment was entered on January 2, 1998, and, on January 30, 1998, appellants filed this timely appeal.

III. DISCUSSION

Appellants contend they have adequately alleged facts to show that Viacom's tiering practice is a tying arrangement which constitutes a per se violation of sections 16720 and 16727. **CA(1)**[] **(1)** **HN1**[] "When reviewing a judgment based on an order sustaining a demurrer without leave to amend, we accept as accurate the factual allegations of appellants' complaint. [Citation.] If the complaint states a cause of action, the judgment must be reversed. [Citation.]" (*Morrison I, supra*, 52 Cal. App. 4th at p. 1519.)

A. *Tying May Constitute a Per Se Violation of the Cartwright Act*

CA(2)[] **(2)** The Cartwright Act prohibits combinations in restraint of trade. *(* Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1042 [219 Cal. Rptr. 203]; Suburban Mobile Homes, Inc. v. AMFAC Communities, **[***7]** Inc. (1980) 101 Cal. App. 3d 532, 541 [161 Cal. Rptr. 811] (*Suburban Mobile Homes*.)

[1] Appellants further allege that, to the extent Viacom's business practices violate the Cartwright Act, they also constitute unfair business practices within the meaning of section 17200 of the Business and Professions Code (hereafter section 17200.) We need not separately address the section 17200 claim as its validity depends on whether appellants have adequately alleged a cause of action under the Cartwright Act.

Although the statutory language is all-encompassing, the courts have limited the Cartwright Act's reach to unreasonable restraints. Certain restraints which lack redeeming virtue are conclusively presumed to be unreasonable and illegal. Under certain conditions, which appellants have attempted to allege, tying constitutes such a per se illegal practice. (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal. 3d 842, 853 [94 Cal. Rptr. 785, 484 P.2d 953]*; *Suburban Mobile Homes, supra, 101 Cal. App. 3d at pp. 541-542*.)

CA(3)[] **(3)** ***HN2***[] A tying arrangement is "a requirement that a buyer purchase one product or service as a condition of the purchase of another. [Citation.] Traditionally the product which is the inducement for the arrangement is **[*541]** called the 'tying product' and the product or service that the buyer is required to purchase is the 'tied product.' " (*Classen v. Weller (1983) 145 Cal. App. 3d 27, 36 [192 Cal. Rptr. 914]*.) A tying arrangement may be condemned under either or both section 16720 and section 16727.

HN3[] Section 16720 defines a trust as "a combination **[***8]** of capital, skill or acts by two or more persons" for the purpose of restraining trade. Except as expressly provided in the Cartwright Act, "every trust is unlawful, against public policy and void." (*Bus. & Prof. Code, § 16726*.) Federal law interpreting Sherman Antitrust Act *section 1* (*15 U.S.C. § 1*) is useful when addressing issues arising under section 16720. (*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1164 [252 Cal. Rptr. 221, 762 P.2d 385]*, superseded by statute on other grounds as stated in *Stop Youth Addiction, Inc*. v. *Lucky Stores, Inc*. *(1998) 17 Cal. 4th 553, 570 [71 Cal. Rptr. 2d 731, 950 P.2d 1086]*; *Biljac Associates v. First Interstate* ***[**137]*** *Bank (1990) 218 Cal. App. 3d 1410, 1420-1421 [267 Cal. Rptr. 819]*.) [2]

[*9]** Section 16727 provides that it is unlawful for any person to sell or contract "***HN4***[] for the sale of goods, merchandise, machinery, supplies, commodities . . . on the condition, agreement or understanding that the . . . purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the . . . seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State." Section 16727, added to the Cartwright Act in 1961, was patterned after section 3 of the federal Clayton Act, and cases interpreting Clayton Act section 3 are applicable when construing section 16727. (*Corwin v. Los Angeles Newspaper Service Bureau, Inc*., *supra*, 4 Cal. 3d at pp. 852-853; *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal. 2d 305, 315 [70 Cal. Rptr. 849, 444 P.2d 481]*; *Bert G. Gianelli Distributing Co. v. Beck & Co*., *supra*, 172 Cal. App. 3d at p. 1050.)

CA(4)[] **(4)** The elements of a per se tying arrangement violative of *section 16720* are: ***HN5***[] "(1) a tying agreement, arrangement or condition existed whereby **[*542]** **[***10]** the sale of the tying product was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act. [Citations.]" (*Classen v. Weller, supra, 145 Cal. App. 3d at pp. 37-38*; see also *MacManus v. A.E. Realty Partners (1983) 146 Cal. App. 3d 275, 286 [194 Cal. Rptr. 567]*; cf. *Corwin v. Los Angeles Newspaper Service Bureau, Inc*., *supra*, 4 Cal. 3d at pp. 856-857; see generally, Fontana & Hunsader, *Application of the California Cartwright Act to Vertical Restraints* (PLI 1989) 659 Corp. 655.)

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[2] Many cases state that section 16720 was patterned after *section 1* of the Sherman Act and that federal law construing *section 1* is applicable to resolve problems arising under section 16720. (See, e.g., *Corwin v. Los Angeles Newspaper Service Bureau, Inc*., *supra*, 4 Cal. 3d at p. 852*; Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal. 3d 920, 925 [130 Cal. Rptr. 1, 549 P.2d 833]* (*Palsson*); *Bert G. Gianelli Distributing Co. v. Beck & Co., supra*, 172 Cal. App. 3d at p. 1042*; Suburban Mobile Homes*, *supra*, 101 Cal. App. 3d at p. 540.) However, in *State of California ex rel. Van de Kamp v. Texaco, Inc., supra, 46 Cal. 3d at page 1168*, our Supreme Court stated that "the Sherman Act is not, contrary to our past statements, directly probative on interpretation of the Cartwright Act." Though not always directly probative of the Cartwright Act drafters' intent, judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language and purpose between the federal and state statutes. (*Id. at p. 1164; Biljac Associates v. First Interstate Bank*, *supra*, *218 Cal. App. 3d at pp. 1420-1421*.)

Under section 16727, a per se violation is established if *either* element (2) or (3) is established along with elements (1) and (4). (*Classen v. Weller, supra, 145 Cal. App. 3d at p. 37*; *Suburban Mobile Homes*, *supra*, 101 Cal. App. 3d at pp. 549-550; see also *People v. National Association of Realtors (1984) 155 Cal. App. 3d 578, 583 [202 Cal. Rptr. 243]*.)

B. *Appellants Have Not Alleged a Violation* **[***11]** *of Section 16720*

CA(5a)[] **(5a)** The trial court found the amended complaint does not sufficiently allege element (3) set forth above, i.e., that a substantial amount of sale was affected in the tied product for local broadcast television. To plead this element, appellants must allege facts to show that " 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie.' " (*Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal. 3d at pp. 856-857*; *Kim v. Servosnax, Inc. (1992) 10 Cal. App. 4th 1346, 1361 [13 Cal. Rptr. 2d 422]*.)

The amended complaint alleges that "[i]n each and every market that Defendants did business, Defendants were the dominant if not sole provider of satellite television such **[**138]** that Defendant [*sic*] had sufficient economic power to impose an appreciable restraint on free competition in the market for local broadcast television." However, appellants failed to allege any facts which, if proven, would establish that there was any actual effect on competition *in the tied product market for local broadcast television*. Indeed, the facts appellants *do* **[***12]** allege are inconsistent with establishing there was any such effect. [3]

[*13] [*543]** Appellants define the tied product (broadcast television) as "local broadcast television channels which were concurrently available to Plaintiff without charge over the airwaves." They contend Viacom compelled them to purchase the tied product "even though Plaintiff neither needed nor desired to purchase from Defendants or any other cable company, that which is readily available to plaintiff without charge over the air waves."

Appellants have failed to plead the requisite tied product market foreclosure because they do not allege that plaintiffs would have purchased the broadcast channels from someone else if not forced to buy them from Viacom. Indeed, appellants have not even alleged sufficient facts to show that Viacom has competitors in the tied product market. A transaction cannot restrain trade when no competitor exists from whom to purchase the tied product. (See *MDC Data Centers, Inc. v. International Bus. Mach. Corp. (E.D.Pa. 1972) 342 F. Supp. 502, 505*.)

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[3] At oral argument, appellants' counsel argued for the first time during this appeal that there are two tied product markets in this case, i.e., that "cable programming" is the tied product with respect to some of the activities challenged in the first amended complaint.

As we have noted, the first amended complaint does allege that Viacom customers are required to purchase satellite cable channels in order to purchase premium channels. However, appellants have clearly failed to allege sufficient facts to support a claim that Viacom illegally ties their premium cable service to their satellite cable service. Not only have appellants failed to allege injury to competition in the satellite cable market or damage to them resulting from such an injury, they have not even alleged facts to establish that satellite channels and premium channels constitute distinct product markets.

The first amended complaint also alleges that, at some unspecified time in the past, Viacom required that customers purchase satellite cable channels in order to purchase broadcast channels, but that Viacom discontinued this practice "[a]t some time prior to the initiation of this action." Since this alleged practice was not at issue in the lower court and is never even mentioned in the appellate briefs, we assumed that appellants had abandoned any plan they may have had to use this alleged business practice as a basis of an antitrust claim against Viacom. However, in light of appellants' counsel's reference at oral argument to a tied product market consisting of cable programming, we note just a few reasons why allegations regarding Viacom's former practice of requiring customers to purchase broadcast channels in order to purchase satellite channels do not state an antitrust cause of action: (1) the first amended complaint does not allege that Viacom engaged in this practice during the four-year period prior to the filing of the original complaint in this action; (2) there is no allegation that this alleged practice restrained trade in the market for satellite cable channels; (3) appellants have not alleged any injury resulting from restraint on competition in the market for satellite cable television; (4) there is no allegation that Viacom has or had sufficient market power in the broadcast television market to coerce a sale in the satellite cable market. (Indeed, with respect to this last point, appellants implicitly concede they were not coerced to purchase satellite channels in order to obtain broadcast channels by admitting that broadcast channels are transmitted over the airwaves free of charge.)

More devastating to their case is appellants' concession in their pleading that, if not for Viacom's business practice, plaintiffs would not buy broadcast channels at all because they are available for **[***14]** free over the airwaves. This concession establishes that the challenged practice has no effect on competition in the tied product market. ***CA(6)***[ ] **(6)** The United States Supreme Court articulated the applicable rule in *Jefferson Parish Hospital Dist. No. 2 v. Hyde (1984) 466 U.S. 2, 16 [104 S. Ct. 1551, 1560, 80 L. Ed. 2d 2]*. The court stated: "[W]hen a purchaser is 'forced' to buy a product he would not **[*544]** have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." (*Ibid*.) Phillip Areeda explains the rule this way: "When all buyers are forced to take a tied product they do not want and would not have purchased elsewhere, tied-market foreclosure is zero **[**139]** and thus does not satisfy even the minimal requirements for per se illegality." (10 Areeda et al., ***Antitrust Law*** (1996) P 1769e1, pp. 439-440.)

Perhaps as an attempt to counteract the effect of their concession, appellants attempted, in their first amended complaint, to shift the focus of this case from broadcast channels themselves to the means by **[***15]** which those channels are transmitted to customers. They added to the most recent version of their complaint allegations that Viacom coerced consumers into "joining an illegal conspiracy to boycott competing sources of television channels and to refuse to do business with entities providing other access to television channels" and that, "[b]ut for the illegal tying arrangement alleged herein, Plaintiffs would have purchased television reception equipment and secured their television channels from competitors of Defendants thereby saving money." Apparently, appellants intended for these additional allegations to show there are other entities that compete with Viacom to provide consumers access to broadcast television. The only competitors alluded to in the amended complaint are suppliers of television reception equipment, i.e., television antennae.

The trial court found that the amended complaint fails to allege facts to show that cable television services are in the same market with television antennae. In this court, appellants maintain that the tied product market is not the cable television services market but rather the market for "providing local broadcast television programming" **[***16]** and that suppliers of television antennae and others are in that market.

There are at least two problems with appellants' argument. First, the first amended complaint does not allege any facts to show that there are any competitors in appellants' proposed alternative tied product market for providing local broadcast television. Sellers of "television reception equipment" do not provide television. They supply a product which surely may help improve the *quality* of television reception, but antennae purchased by consumers to improve reception do not, by definition, transmit or supply broadcast television to customers.

Second, and more fundamentally, appellants' proposed alternative characterization of the tied product market is inconsistent with the basic premise of **[*545]** this lawsuit, i.e., that Viacom makes its customers *purchase the broadcast channels* themselves in order to receive satellite and premium channels. The alleged tying arrangement does not involve the tangible equipment or means that Viacom uses to physically transmit cable to its customers. The amended complaint contains no allegation or suggestion that Viacom requires its customers to purchase different **[***17]** equipment to access each tier of service. Rather, the implicit message of appellants' complaint is that it is unfair for Viacom to require customers who have paid for Viacom's cable equipment to be required to pay for certain programs before they can watch other programs. Since the alleged tying arrangement pertains to the pricing and access requirements of Viacom's tiered programming, and not to the tangible means Viacom uses to deliver those programs to customers, the tied product market must be broadcast television itself and not the physical method by which broadcast television (as well as satellite and premium channels) are delivered.

The amended complaint does not allege that anyone else aside from Viacom *sells* broadcast channels to consumers (i.e., as distinguished from providing them for free over the airwaves). As discussed above, television antenna suppliers do not compete in the tied product market since they do not sell broadcast channels. The only other potential competitors appellants identify in their appellate briefs are microwave systems and satellite systems. But appellants do not allege that suppliers of these systems offer broadcast television as a distinct **[***18]** service. Further, appellants have not and cannot seriously contend that any Viacom customer would also purchase a microwave or satellite system in order to obtain broadcast channels if not required to purchase broadcast channels from Viacom. Microwave and satellite systems may offer consumers a total package alternative to Viacom's comprehensive service, but we have been provided with no information indicating they are or could be **[**140]** competitors in the local broadcast television market.

Appellants contend the trial court abused its discretion by denying them leave to amend to clarify and/or refine their tied product market definition. ***CA(7)***[] **(7)** When a demurrer is "sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan (1985) 39 Cal. 3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58]*.)

CA(5b)[] **(5b)** As the foregoing analysis illustrates, appellants have not established a reasonable possibility **[***19]** that the defect in their pleadings is curable. **[*546]** They have not identified any facts to show that Viacom has any competitors in the tied product market and they continue to allege that the tied product is available for free. Under these circumstances, Viacom's conduct could not have foreclosed competition in the tied product market. Therefore, the superior court did not abuse its discretion by denying appellants leave to again amend.

C. *Appellants Have Not Alleged a Violation of Section 16727*

CA(8)[] **(8)** The trial court sustained the demurrer with respect to appellants' *section 16727* claim on the ground that that section does not apply when the tying item is a service. The complaint alleges that the tying item is satellite and/or premium channels; that, in order to obtain satellite and or premium cable channels, Viacom coerces customers to purchase broadcast channels. Appellants contend the trial court's ruling was erroneous; that *section 16727* does apply when the tying item is a service.

Appellants ignore the language of *section 16727*, which supports the trial court's ***HN6***[] conclusion. The statute provides that a sale or contract for sale of "*goods, merchandise, machinery, supplies,* **[***20]** *commodities*" is unlawful when conditioned on the agreement that the purchaser "shall not use or deal in the *goods, merchandise, machinery, supplies, commodities, or services* of a competitor or competitors." The term "services" is used to describe tied items and is not used to describe tying items.

Although we have found no California authority directly on point, this court has stated in dicta that section 16727 does not apply when the tying item is a service. (*Suburban Mobile Homes*, *supra*, 101 Cal. App. 3d at p. 550.) In *Suburban Mobile Homes*, the plaintiff was a mobilehome dealer who alleged that several other dealers and a mobilehome park owner established an illegal tying arrangement by restricting use of a significant portion of the mobilehome park to tenants who bought their mobilehomes from the dealer defendants (who then shared proceeds from those sales with the defendant mobilehome park owner). We held that the trial court erred by granting the defendants' motion for nonsuit with respect to the plaintiff's section 16720 claim but affirmed the nonsuit as to its section 16727 claim.

In *Suburban Mobile Homes*, we recognized that section 16727 is based **[***21]** on section 3 of the Clayton Act and we applied federal law construing that act to hold that section 16727 does not apply when the tying item is land. (*Suburban Mobile Homes*, *supra*, 101 Cal. App. 3d at p. 549.) Specifically, we acknowledged the federal rule that " '[i]f the tie does not involve a commodity but concerns land, services or credit which do not fit the Clayton Act's **[*547]** language, it is governed by the Sherman Act and the plaintiff is required to bear the additional burden of proving that the defendant's economic power with respect to the tying product is sufficient to produce an appreciable restraint.' " (*Id. at p. 550*, quoting *N.W. Controls, Inc. v. Outboard Marine Corporation (D.Del. 1971) 333 F. Supp. 493, 500*, italics omitted.) By finding this rule dispositive, we implicitly acknowledged that (1) section 16727's definition of commodity, like the definition applicable to the Clayton Act, does not include land, *services* or credit, and (2) neither land, *services* nor credit fits section 16727's language describing the tying product.

[141]** Appellants contend that our Supreme Court defined commodity to include services in *Palsson, supra, **[***22]** 16 Cal. 3d 920*. In *Palsson*, the Supreme Court held that a county board of realtors violated section 16720 and 16726 of the Cartwright Act by "limiting its membership to persons primarily engaged in the real estate business and by denying nonmembers access to its multiple listing service." (16 Cal. 3d at p. 924.) In reaching this conclusion, the court rejected the argument that the Cartwright Act is concerned primarily with problems relating to merchandise or commodities and does not apply to services. The court relied heavily on federal law establishing that the Sherman Act applies to activities of real estate brokers. (Id. at pp. 925-927.) The court rejected an inhibiting interpretation of the term "commodity," reasoning that the broad and comprehensive language of section 16720 prohibiting "restrictions in trade or commerce" compelled its application to service industries. (16 Cal. 3d at pp. 927-928.)

As the trial court in the present case recognized, and as we stated in *Suburban Mobile Homes*, in *Palsson* the word "commodity" was interpreted under section 16720, which the *Palsson* court characterized as the equivalent of section 1 of the Sherman Act. (*Palsson,* **[***23]** *supra, 16 Cal. 3d at p. 925*.) The *Palsson* analysis does not apply to section 16727 "which is governed by the Clayton Act and the case interpretation thereunder." (*Suburban Mobile Homes*, *supra*, 101 Cal. App. 3d at p. 550.)

In an apparent attempt to portray the alleged tying item as a commodity, appellants have deleted the term "service" from their amended complaint and characterize the tying product markets as the markets for providing cable television. However, appellants cite no authority (nor have we found any) to support their characterization of cable television as a commodity rather than a service. Indeed, applicable federal authority construing the parallel provision of Clayton Act section 3 establishes that cable television is a service and not a commodity. (*Satellite T Assoc. v. Continental Cablevision of Va. (E.D.Va. 1982) 586 F. Supp. 973, 975-976*; *Rankin Cty. Cablevision v.* **[*548]** *Pearl River Val. Water (S.D.Miss. 1988) 692 F. Supp. 691, 693*; see also *TV Communications Network, Inc. v. ESPN, Inc. (D.Colo. 1991) 767 F. Supp. 1062, 1076* [cable is a service and not a commodity under section 2 of the Clayton Act]; *Gall v. Home Box Office,* **[***24]** *Inc*. (S.D.N.Y. 1992) 1992 WL 230245 [same].)

The foregoing authority confirms the superior court's conclusion that appellants have failed to state a cause of action under section 16727 because the alleged tying product in this case, cable television, is a service and section 16727 does not apply when the tying product is a service.

D. *Appellants Have Failed to Adequately Allege Antitrust Injury*

CA(9)[] **(9)** The trial court found that appellants "have still alleged no facts to show an injury *from restraints on competition*." We conclude this finding was an appropriate alternate ground for sustaining Viacom's demurrer to both of appellants' Cartwright Act claims.

"***HN7***[] The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. [Citation.] . . . An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. [Citations.]" (*Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 723 [187 Cal. Rptr. 797]*.)

Appellants allege that the fact that they are not competitors of Viacom does **[***25]** not prevent them from establishing antitrust injury. Although we agree (see *Saxer v. Philip Morris, Inc. (1975) 54 Cal. App. 3d 7, 26 [126 Cal. Rptr. 327]*), appellants completely miss the point. Appellants failed to allege antitrust injury not because they are customers rather than competitors of Viacom, but because they have failed to allege any facts to show they suffered an injury which was *caused* by restraints on competition.

The pecuniary injury alleged in the first amended complaint is that appellants were **[**142]** forced to purchase broadcast channels from Viacom even though broadcast channels were "readily available . . . without charge over the airwaves." We have already explained why forcing a consumer to buy something that he or she would not buy elsewhere does not injure competition; if the buyer would not have purchased the tied product elsewhere, the challenged business practice could not have foreclosed competition in the tied product market. For the same reason, the buyer has not suffered antitrust injury. "[S]uch buyers are not injured in fact, for this tie simply increases the effective price of the tying product. If that effective price exceeds the market **[*549]** **[***26]** price, no one would patronize the tying seller; if it does not, the effective price paid the defendant is the market price for his product. Hence, these buyers can claim neither per se illegality nor injury-in-fact." (10 Areeda et al., ***Antitrust Law***, *supra*, P 1769e1, p. 440, fn. omitted.)

In their opening brief to this court, appellants suggest that their injury was not simply paying too high a price for Viacom's cable programming but that they could have actually paid a lower price to obtain local broadcast television programming by alternative means. But, as we have already explained, appellants have not alleged or stated in their briefs any facts to show that there is an alternative means of purchasing local broadcast television. The only allegation bearing on this issue, an allegation we believe is dispositive, is appellants' concession that local broadcast television is transmitted over the airwaves free of charge. In light of this concession, the real injury about which appellants complain is that Viacom has inflated its cable rates by requiring that customers pay a fee for broadcast television even though broadcast television is available to other consumers for free. This **[***27]** practice may implicate rate regulations but it does not constitute an anticompetitive tying arrangement.

IV. DISPOSITION

The judgment is affirmed.

Kline, P. J., and Lambden, J., concurred.

Appellants' petition for review by the Supreme Court was denied November 18, 1998.

St. Louis Convention & Visitors Comm'n v. Nfl

United States Court of Appeals for the Eighth Circuit

June 10, 1998, Submitted ; September 3, 1998, Filed

Nos. 97-4055/97-4223

Reporter

154 F.3d 851 *; 1998 U.S. App. LEXIS 21483 **; 1998-2 Trade Cas. (CCH) P72,258

St. Louis Convention & Visitors Commission, Plaintiff - Appellant/Cross - Appellee, v. National Football League; B & B Holdings, Inc.; The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cleveland Browns Football Company, Inc.; Dallas Cowboys Football Club, Ltd.; PBD Sports, LTD; The Detroit Lions, Inc.; The Green Bay Packers, Inc; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots, Limited Partnership; The New Orleans Saints; New York Football Giants, Inc.; New York Jets Football Club, Inc.; Philadelphia Eagles Holdings, L.P.; Pittsburgh Steelers Sports, Inc.; Chargers Football Company; San Francisco Forty-Niners, Limited; Seattle Seahawks, Inc.; Pro-Football Inc., Defendants - Appellees/Cross - Appellant.

Prior History: [1]** Appeals from the United States District Court for the Eastern District of Missouri. 4:95-CV-2443(JCH). Honorable Jean C. Hamilton.

Disposition: Affirmed.

Core Terms

team, relocation, lease, league, bidding, antitrust, district court, negotiations, stadium, no evidence, conspiracy, tortious interference, guidelines, football, competitive bidding, causation, Dome, matter of law, anticompetitive, obligations, atmosphere, tending, games, professional football, enterprise, franchise, deterred, policies, parties, argues

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

A parent and wholly owned subsidiary cannot conspire with each other under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN2[] **Estoppel, Collateral Estoppel**

A change in law required to prevent collateral estoppel.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3[] **Trials, Judgment as Matter of Law**

Fed. R. Civ. P. 50 requires the court to: 1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN4[] **Standards of Review, De Novo Review**

The circuit court of appeals reviews the grant of a motion for judgment as a matter of law de novo, using the same standard as the district court.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN5[] **Standards of Review, De Novo Review**

The circuit court of appeals reviews the decision to grant judgment as a matter of law de novo, which is appropriate where a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party. *Fed. R. Civ. P. 50(a)(1)*. Although the plaintiff is awarded the benefit of all reasonable inferences, it is not given the benefit of unreasonable inferences or those at war with the undisputed facts. If the record contains no proof beyond speculation to support the verdict, judgment as a matter of law is appropriate.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN6[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Antitrust Act makes it unlawful to form a conspiracy in restraint of trade. *15 U.S.C.S. § 1*. Restraints which have pernicious effect on competition and lack of any redeeming virtue are illegal per se under *§ 1* without inquiry into the reasonableness of the restraint or the harm caused. Analysis of whether a restriction's harm to competition outweighs any procompetitive effects is necessary if the anticompetitive impact of a restraint is less clear or the restraint is necessary for a product to exist at all. Some trade restrictions by sports leagues fall into this category.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

In order to prevail under 15 U.S.C.S. §, a plaintiff must prove that: (1) there was an agreement among the defendants in restraint of trade; (2) plaintiff was injured as a direct and proximate result; and (3) its damages are capable of ascertainment and not speculative. The first element is established by proof that there was an agreement in restraint of trade and that the challenged action was part of or pursuant to that agreement.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

In order to prove that *15 U.S.C.S. § 1* defendants were acting pursuant to a conspiracy, a plaintiff must present evidence that tends to exclude the possibility that the alleged coconspirators acted independently, because conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN9[] **Defenses, Ambiguities & Mistakes**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

In order to satisfy the causation element of a *15 U.S.C.S. § 1* case, the plaintiff has to show that the defendant's anticompetitive acts were an actual, material cause of the alleged harm to competition.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN11[] **Testimony, Expert Witnesses**

A jury may not rest its verdict on an expert's conclusion without some underlying facts and reasons, or a logical inferential process to support the expert's opinion.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN12[] **Trials, Judgment as Matter of Law**

Judgment as a matter of law is appropriate where the plaintiff only relies on speculation to support its theory.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Evidence > Inferences & Presumptions > General Overview

HN13[] **Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products**

Causal links also may properly be a matter of inference from the circumstances and evidence as a whole.

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

If a plaintiff has otherwise failed to present evidence of causation under *15 U.S.C.S. § 1*, he must show that he made a demand on the defendant to allow the plaintiff to take some action or obtain some benefit, which the defendant's challenged practice is allegedly preventing the plaintiff from taking or obtaining, in order to prove that the practice caused injury in fact.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN15[] **Private Actions, Remedies**

A plaintiff may not recover for losses due to factors other than the defendant's anticompetitive violations.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN16[] **Private Actions, Remedies**

Antitrust injury is injury of the type the antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Regulated Industries, Higher Education & Professional Associations**

A showing of antitrust injury requires proof that the possibility for the alleged harm to competition actually existed and that competition was diminished by the defendants' actions. The Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not require competitive bidding; it prohibits unreasonable restraints on competition.

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN18[] **Contracts Law, Breach**

Missouri law requires a plaintiff alleging tortious interference with a contract to prove: (1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendant's intentional interference; (4) the absence of justification; and (5) damages.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN19[] **Federal & State Interrelationships, Erie Doctrine**

A federal court ruling on a point of state law is obligated to follow the law as announced by that state's highest court.

Counsel: Counsel who presented argument on behalf of the appellant was Alan Popkin, St. Louis, MO. Additional attorneys appearing on the brief were Arthur L. Smith and Charles S. Kramer.

Counsel who presented argument on behalf of the appellee was Gregg H. Levy, Washington, D.C. Additional attorneys appearing on the brief were: Sonya D. Winner, Frank Rothman, James Keyte, Alan C. Kohn and John A. Klobasa.

Judges: Before WOLLMAN and MURPHY, Circuit Judges, and KYLE, [1] District Judge.

Opinion by: MURPHY

Opinion

[*852] MURPHY, Circuit Judge.

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[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota, sitting by designation.

After St. Louis lost its professional football team to Phoenix in 1988, extensive efforts began to obtain another team and resulted in the successful relocation of the Los Angeles Rams in 1995. Many millions of dollars were spent in order to accomplish the relocation, and the St. Louis Convention and Visitors Center (CVC) sued the National Football League and twenty four of **[**2]** its member teams (collectively the NFL) alleging that these expenditures were made necessary by actions of the NFL in violation of antitrust and **[*853]** tort law. The case was tried before a jury for over four weeks before it ended in a judgment in favor of the NFL. CVC appeals the dismissal of its claim for Sherman Act conspiracy and tortious interference with contract. The NFL cross appeals the refusal of the district court [2] to rule that the league and the member teams do not amount to a single entity for antitrust purposes. We affirm the judgment.

I.

A.

The move of the St. Louis Cardinals football team to Phoenix in 1988 caused the Missouri state legislature, the city of St. Louis and the surrounding county to undertake to find a replacement by the beginning of the 1995 season. The legislature assigned the effort to procure a team to CVC, a body previously created by **[**3]** the Missouri legislature and empowered to promote the convention and tourism business in St. Louis. *See* Mo. St. Ann. §§ 67.601, 67.607. The initial goal was to obtain one of the two NFL expansion franchises to be established in 1993. In order to attract a team the city resolved to build a convention center in downtown St. Louis called America's Center which would include a new football stadium. The football stadium was called the Trans World Dome, and its $ 258 million cost was paid from state and local government funds. The stadium lease was assigned to CVC which became its manager and initially subleased the right to present football in the dome to private parties.

Problems associated with control over the lease and the potential ownership group caused St. Louis to be passed over in the NFL's expansion voting. The new franchises were awarded to Jacksonville, Florida and Charlotte, North Carolina. This forced the St. Louis football enthusiasts to adopt another strategy, and they turned their attention toward attracting an existing team. They founded a civic organization called FANS, Inc. (Football at the New Stadium), to assist their efforts. FANS, acting on behalf of CVC, then **[**4]** approached the Los Angeles Rams and began to negotiate a deal for the team to move to St. Louis. As a result a written agreement was eventually signed by CVC and the Rams.

The NFL League Constitution and Bylaws require a favorable vote by three fourths of the team owners to permit relocation, and the proposal for the Rams to move was initially voted down by the owners. It was later approved after the Rams agreed to pay the NFL a $ 29 million relocation fee. CVC eventually agreed with the Rams to pay $ 20 million of this fee, despite a clause in their contract allowing CVC to cancel if the fee were to exceed $ 7.5 million.

The Rams began playing in St. Louis in 1995, and in that year CVC was unable to make some of the payments owed to the team. CVC then brought this suit against the league and twenty four of its member teams. It also made an agreement with the Rams that they would receive half of any recovery obtained in the case in return for forgiveness of the money CVC owed them. The theory CVC presented at trial was that the league's relocation rules and the way they had been applied had created an atmosphere in which teams were unwilling to relocate. It contended that this anti-relocation **[**5]** atmosphere had discouraged interested teams from bidding on the St. Louis lease. The result was a one buyer market which forced the CVC to give more favorable lease terms than it would have in a competitive market.

B.

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[2] The Honorable Jean C. Hamilton, Chief Judge, United States District Court for the Eastern District of Missouri.

The league was formed in 1966 by a union of the American Football League and the National Football League, and it functions as the governing body of a joint venture of thirty professional football teams producing "NFL football." The teams are independently owned and managed by different business interests. The league is organized through the League Constitution and Bylaws, **[*854]** an agreement among team members that sets out rules for league management of matters such as game rules, game schedules, team ownership, and location of teams. Most decisions affecting the league are made by vote of team representatives at NFL meetings. When NFL members decided to create two new team franchises for 1993, representatives from various cities made presentations to team owners in order to win a franchise.

St. Louis political leaders and business people were among those who made presentations to the league, and they emphasized the benefits an NFL team could expect **[**6]** from the stadium lease and the city. But there were problems with the St. Louis application for a team. At the time of the expansion decisions the exclusive right to use the Trans World Dome for professional football games was held by St. Louis NFL, Inc., which was controlled by two St. Louis businessmen, Jerry Clinton who owned one third and Jim Orthwein who owned the remaining two thirds. The fact that rights to lease the stadium for football were held by individuals who were unrelated to CVC caused the owners to pass over St. Louis as the site of an expansion team.

CVC's next option was to arrange for an existing team to leave its home city and relocate to St. Louis. Community members formed the civic organization FANS, Inc. in January of 1994, headed by former Senator Thomas Eagleton, to accomplish the task which they were increasingly anxious to complete. Around this time Congressman Richard Gephardt alerted FANS that the Los Angeles Rams were considering relocating from their stadium in Anaheim, California. He had seen a newspaper report that the Rams were discussing a possible move to Baltimore, Maryland. Congressman Gephardt concluded that since Baltimore had been one of **[**7]** St. Louis' main competitors during the expansion process, the city should follow Baltimore's lead and approach the Rams. FANS then contacted John Shaw, the Rams president, and began negotiations on a relocation agreement and stadium lease. During this period, St. Louis was competing with Hartford and Anaheim in addition to Baltimore.

FANS made an initial presentation to the Rams, but talks ended because of problems with Clinton and Orthwein having control over the lease and because FANS had leaked information about the negotiations to the press, including the Rams' list of features it desired in a new stadium (the "wish list"). Discussions resumed only after CVC gained control over the lease, and the Rams told CVC that they would discontinue any business dealings if the CVC approached any other team about moving to St. Louis. CVC never contacted any other team to solicit a bid on the lease. CVC considered it the better course to focus on only one team, and it believed its presentation during the expansion process should have been sufficient to stimulate the interest of other teams.

The Rams and CVC eventually agreed on a lease. The Rams agreed to pay to CVC $ 25,000 rent per game, **[**8]** plus half of the game day expenses. In return the Rams would receive all of the ticket revenue from Rams games, 75% of the first $ 6 million in advertising revenue and 90% of the remainder, 100% of the profit from the concessions at Rams games and a portion of the concessions profit from other events. Rams president John Shaw estimated the lease would produce approximately $ 40 million per season in revenue for the Rams. CVC agreed to a number of other obligations, including promises to pay $ 28 million to fulfill bond obligations which the Rams owed on Anaheim Stadium, to build a $ 9.9 million training facility for the team, and to pay the team's moving costs. Once the Rams and CVC reached their agreement, the Rams presented their relocation application to the league owners for approval in March, 1995.

C.

Relocation decisions by the NFL come under Article 4.3 of the league constitution which provides that "no member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the **[*855]** league." While **[**9]** not expressed in the governing documents, the league claims the right to assess a relocation fee on any team seeking to move. At the time CVC was dealing with the Rams, the NFL had levied one previous relocation fee; the Cardinals had been assessed $ 7.5 million for their move to Phoenix.

After a successful antitrust challenge to an application of Article 4.3 to the relocation of the Oakland Raiders to Los Angeles, *see* Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984) (*Raiders I*), [3] **[**10]** the NFL commissioner had issued procedures for obtaining league approval of any proposed relocation and nine non-exclusive factors (the guidelines) [4] that team owners should consider in deciding how to vote on a move. No guidelines have been promulgated on the imposition or computation of a relocation fee. Under the rules in effect at the time of the Rams move, a NFL team which wanted to move would negotiate a lease and relocation agreement with its new landlord and then apply to the league for permission to relocate. Only the moving team participated in the NFL application process; the new landlord had no direct involvement.

Owners voted down the initial application by the Rams because of disagreements between the league and the team on several of the relocation terms, including payment of a relocation fee, sharing of revenues from the sale of "personal seat licenses" (options to purchase tickets), and possible indemnification of the league for television payments it might owe as a consequence of the move. After the initial league vote, and in anticipation of the assessment of a relocation fee, CVC agreed with the Rams it would pay up to $ 7.5 million of any fee. Either party had the right to void the agreement should the fee exceed that amount

The Rams and the NFL reentered negotiations, and the NFL commissioner said that the relocation could be approved if the Rams would pay a higher fee. The NFL had "the right to assess whatever fee they thought necessary" since the initial relocation proposal had **[**11]** not satisfied the league guidelines. The Rams then agreed to pay a $ 29 million relocation fee, [5] to forgo any share in the next two relocation fees levied by the league, to share $ 17 million in personal seat license revenue with the NFL, and to indemnify the league for up to $ 12.5 million of any extra expenses arising from the league's television contract. The Rams relocation was approved on April 12, 1995.

The agreement between CVC and the Rams about CVC's obligating itself on any relocation fee was not revealed to the NFL owners during these negotiations, and it does not appear that the owners were informed about it until after the April 12 vote. [6] Following the vote, the Rams and CVC once again entered negotiations, this time on how the charges assessed by the NFL on the Rams would be paid. **[**12]** The parties agreed in June of 1995 that CVC would pay $ 20 million of the relocation fee and that CVC would be **[*856]** directly liable to the NFL for its payment. CVC did not exercise the agreement's escape clause, and the Rams began playing in St. Louis in 1995. During that year CVC experienced difficulties meeting its financial obligations to the Rams and did not pay approximately $ 14 million of the amount due. CVC and Rams president Shaw then agreed that CVC would sue the NFL and that the Rams would receive a right to half of any recovery in place of the payments due.

[13] II.**

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[3] In *Raiders I* the Ninth Circuit held that Article 4.3 had impermissibly foreclosed competition between stadia seeking NFL tenants and granted exclusive territories to NFL teams. 726 F.2d at 1395. Future applications of the rule could withstand scrutiny, however, if the NFL adopted objective factors for consideration by team owners before voting, as well as clarified procedures including an opportunity for any applicant to make a presentation to the league. *Id. at 1397*. The NFL commissioner subsequently issued such guidelines. CVC complains that the guidelines and the rule have had the effect of discouraging competitive bidding for available stadia, thereby driving up the cost for a locality seeking a team.

[4] These factors include consideration of the adequacy of the team's current stadium, the extent of demonstrated fan support for the team, and the extent to which the owner has contributed to the need for relocation.

[5] The relocation fee was described by the commissioner as reflecting among other things the increased value of the team after the move to St. Louis and the value of that franchise opportunity compared to Anaheim.

[6] The record is not clear on when the NFL owners learned about CVC's agreement to contribute to any relocation fee. John Shaw testified that he informed Commissioner Tagliabue of the agreement before the April 12 vote, but on cross he said that he had withheld information about the agreement from the NFL and team owners and had insisted that CVC do the same. Tagliabue testified that he did not inform the owners about CVC's undertaking in regard to the fee until after they had voted.

A.

CVC filed this case against the league and twenty four member teams on December 18, 1995, claiming that their actions had violated *Sections 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1*, *2*, and that the imposition of the high relocation fee tortiously interfered with CVC's contract with the Rams. CVC's theory was that Article 4.3, the accompanying guidelines, and their application over time functioned as an agreement among the league and the individual teams to restrain relocations, creating an atmosphere which deterred teams from moving and therefore from bidding on the Trans World Dome lease. It contended that the Rams were the only team willing to take the risk of an attempted relocation so they were the only bidder on the lease. As a consequence the Rams were able to obtain very favorable terms from CVC which caused it to lose between $ 77 and $ 122 million. CVC requested damages under the Clayton Act which, if established, would be trebled to between $ 241 and $ 366 million, and attorney fees. *See* *15 U.S.C. § 15*. The tortious interference claim was based on the theory that the $ 29 million relocation **[**14]** fee assessed on the Rams was levied through economic duress, since its only choices were to agree to increase its share of the fee from $ 7.5 million to $ 20 million or abandon the deal with the Rams. It asserted that the fee made its contract with the Rams substantially more burdensome which constituted tortious interference under Missouri law, as did the use of economic duress.

B.

A number of motions were brought during the pretrial period, including one by the NFL for summary judgment on the *Section 1* claim. The NFL argued that the league and teams form a single economic enterprise incapable of conspiring among themselves. The court denied the motion on the basis of collateral estoppel. The Ninth Circuit had previously ruled against the NFL on the same issue in *Raiders I, 726 F.2d at 1387-90* (league not a single economic enterprise because teams have independent value, are separately owned and managed, earn different profits, and compete in various ways). The district court was not persuaded that two subsequent cases dealing with the concept of single economic enterprise required a different result. *Copperweld Corp v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* **[**15]** (***HN1***[] parent and wholly owned subsidiary cannot conspire with each other under *Section 1*) and *City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 274-76 (8th Cir. 1988)* (test is whether entities have "pursued interests diverse from those of the cooperative itself"). *See* *White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1134 (8th Cir. 1982)* (***HN2***[] change in law required to prevent collateral estoppel).

In a second summary judgment motion the NFL argued for dismissal of all of CVC's claims. The district court granted the motion as to the Missouri antitrust claims on the basis that they were preempted by federal law, citing *Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (Cal. 1983)* (en banc), and denied it in all other respects. The remaining issues for trial were discussed in some detail in the course of its ruling.

The court's discussion of the *Section 1* claim gave direction on several legal points. It indicated that CVC could not succeed on this antitrust claim with a theory that Article 4.3 was per se anticompetitive, but instead would have to show that the alleged **[**16]** anticompetitive effect of the rule outweighed its procompetitive features. The court relied on *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 100-103,* ***[*857]*** *104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (*NCAA*) (league limits on number of televised games), and *Raiders I, 726 F.2d at 1387* (league rule requiring vote to allow a team to relocate). These cases had held that certain rules of sports leagues governing matters such as the number of games to be televised and the division of home territories among professional teams, while perhaps ordinarily per se anticompetitive, were necessary for the existence of the league and should therefore be judged under a rule of reason analysis. CVC would also have to offer proof that the alleged conspiracy to suppress movement of teams in fact caused the absence of competing bids on the Trans World Dome lease before a jury would be permitted to decide whether harm to competition from Article 4.3 and its enforcement outweighed the positive effects on competition. *See* *NCAA, 468 U.S. at 100*; *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918).* **[**17]** This was because CVC's claim was unlike cases alleging damage from a direct application of a regulation, *see* Raiders I, 726 F.2d at 1384-85 (case arose from owners' vote against relocation under Article 4.3 which required approval for a move). There was nothing in the NFL Constitution and Bylaws or in the deposition evidence to suggest that there was an explicit ban or limit on competitive bidding for leases.

The court also denied summary judgment on CVC's Section 2 and tortious interference claims. It held that CVC could make out a Section 2 monopoly leveraging claim if it could show that the NFL used a monopoly position in the professional football market to gain an advantage in the market for stadia. More evidence was necessary in order to evaluate the NFL's claim that the stadium market was not distinct from the market for professional football. The court determined that there were questions of material fact on the tortious interference claim. These included whether CVC's renegotiation of its lease agreement with the Rams was a necessary consequence of enforcement of Article 4.3 and whether the NFL intended to interfere with that contract. With the case focused **[**18]** on these issues, the parties went to trial.

C.

CVC's case consisted largely of the testimony of various owners, league commissioner Paul Tagliabue, Rams president John Shaw, and several experts. It also presented testimony of individuals involved in the Rams relocation to St. Louis. FANS leader Senator Eagleton, Congressman Gephardt, and St. Louis County Executive George Westfall all testified about their involvement in the relocation and the interaction with NFL officials. CVC focuses in this appeal on three bodies of evidence.

CVC attempted to show that past applications of Article 4.3 and the related guidelines and the NFL approach to team relocations had created an atmosphere in which teams were afraid to move and that they did not bid on CVC's lease as a result. Several team owners stated in deposition testimony that the purpose of the rules was to ensure stability, and they also testified to differing interpretations of the guidelines and of their relative importance in deciding how to vote. CVC argued that this evidence showed teams could anticipate league disapproval of any moves or use of the rules to extract concessions upon relocating and that teams would therefore **[**19]** not seek out and bid on opportunities to move. Leonard Tose, the former owner of the Philadelphia Eagles, testified that the NFL had sued to stop the Eagles from moving to Phoenix and taken actions which CVC claims necessitated sale of the team. Victor Kiam, the former owner of the New England Patriots, also testified about the attempt to relocate his team, which met with resistance and a forced sale.

CVC claims that the uncertainty about imposition of a relocation fee and its amount was one reason why teams did not seek out relocation opportunities. The league had assessed a relocation fee of $ 7.5 million on the St. Louis Cardinals when the team moved to Phoenix in the first team relocation after the guidelines were issued. CVC offered evidence on the benefits a predictable formula for calculating the fee would have and pointed out that the NFL has not adopted one.

[*858] CVC called Rams president John Shaw in its case in chief. He explained during his testimony that the Rams would obtain a portion of any recovery in this case. Shaw testified about the negotiations between the Rams and CVC and about the Rams' dealings with the NFL during the voting on the relocation proposal. **[**20]** In addition to testifying about the Rams interest in relocating and their negotiations with CVC, he also discussed his own experience with the league and his views about other teams. Shaw testified that based on his experience representing the Rams at league meetings Article 4.3 prevented team movement, that the NFL took an antagonistic approach toward relocations, and that there were high risks of alienating the league or possible penalties in any attempt to move a NFL team. The Rams benefitted in their negotiations with CVC because no other team was bidding as a result of Article 4.3 and its application, and this enabled him to demand a more favorable lease from CVC than he would have been able to get in a competitive environment.

Among the experts called by CVC was Professor John Siegfried, an economics professor at Vanderbilt University who has done research on the economics of sports. Siegfried said that in his opinion the relocation policies had a direct effect on the lease price. He testified that any team which challenged the regulations would be the only bidder on an available lease (in antitrust terms, a "monopsony") and could therefore extract favorable terms from the **[**21]** captive buyer. In a "freely competitive marketplace with full dissemination of information" he would expect teams to seek out the best lease opportunities and to bid against each other on them. He based his conclusions on "observed market behavior" and the "prospect of earning higher returns at the Trans World Dome."

CVC also used circumstantial evidence to support its argument that the NFL culture caused the lack of bidding on its lease. CVC argued that the purpose of the NFL rules was to deter relocation and that they accomplished that purpose and prevented other teams from bidding on the lease. It claimed that the market would normally produce competition for a lucrative lease, and offered the testimony of Stanley "Bud" Adams, Jr., owner of the Houston Oilers football team, who stated he would have expected high competition for the lease. CVC contends in its brief that from this evidence "a reasonable jury could infer that some external factor was disrupting free competition -- and that a set of relocation policies designed and intended to frustrate team movement were the most likely candidate."

D.

The NFL moved for judgment as a matter of law at the close of CVC's **[**22]** case, after four weeks of evidence, and the district court granted the motion as to two of CVC's three remaining claims. The court found that CVC had failed to present evidence that the relocation fee caused a breach in its lease agreement with the Rams, and breach is a necessary element of tortious interference under Missouri law. CVC instead modified its agreement with the Rams to accommodate the size of the fee. The court also found that there had been no evidence that the NFL had intended to interfere with the contract, another required element under state law. Judgment was granted in the NFL's favor on the *Section 2* claim as well, since CVC had not shown that the NFL had a monopoly in the professional football market or that there was a secondary market in NFL stadia. CVC has not appealed the ruling on the *Section 2* claim. The court permitted the *Section 1* claim to proceed, despite expressing misgivings about CVC's case.

After the NFL had presented two days of evidence and was close to finishing its case, the court convened the charge conference to prepare for submission of the *Section 1* claim to the jury. The parties again disagreed about whether CVC could make a submissible **[**23]** case by showing that the NFL's rules and actions must have been what had prevented other teams from bidding on the Trans World Dome lease, as opposed to showing that there had been a connection in fact between the allegedly anticompetitive behavior and the absence of competitive bidding. CVC was asked to explain its *Section 1* theory at the conference. Counsel responded that "this application and enforcement **[*859]** of the relocation policies had a very substantial deterrent effect upon anybody but the Rams entering into negotiations with CVC." At this point the NFL moved again for judgment as a matter of law, *see* *Fed. R. Civ. P. 50(a)*. It argued that without a showing that the NFL's rules and actions had in fact deterred bidding on the St. Louis lease, CVC's claim was in essence a per se attack on Article 4.3 and the guidelines, and the court had already indicated that the rule of reason was the proper method of analysis.

After further briefing and oral argument, the court described the critical question as whether there was evidence tending to show that "the alleged restraint arises out of 'the agreement of the teams to adopt Article 4.3 to empower the commissioner to adopt **[**24]** and promulgate rules in enforcing 4.3 which has resulted in conduct which has precluded teams from coming to bid competitively in St. Louis.'" In other words, in order to go to the jury CVC had to show more than a theoretical connection between the allegedly anticompetitive actions and the events surrounding the Rams move to St. Louis.

Since the court concluded that CVC had presented no evidence to show that the NFL's rule and the guidelines actually had caused league teams other than the Rams to refrain from competitive bidding on the Trans World Dome lease, it granted the *Rule 50* motion. CVC had not shown that it had either tried to learn if other teams might be interested in relocating, that there were teams actually interested in moving to St. Louis, or that the failure of the others to bid on the lease was due to the NFL's policies and acts. There was no showing that there had been interested teams who had failed to contact CVC or that at the time CVC was seeking a team there were team owners who had not bid because of past application of league rules or acts of the commissioner to stop relocations. Finally, the court held that CVC had failed to present evidence of antitrust **[**25]** injury. It said there had been no evidence that collusive activity of the league and member teams reduced competitive bidding and that the opinion testimony of CVC's expert on damages lacked foundation in the record and was not consistent with its theory of liability.

III.

CVC's appeal from the judgment focuses on the dismissal of its claim under *Section 1* of the Sherman Act and of its claim for tortious interference with contract. It seeks a new trial. CVC argues that its evidence was sufficient to establish a *Section 1* violation, contending that it had shown a connection in fact between the NFL rules and actions and the lack of competitive bidding on the lease. It also argues that the tortious interference claim should not have been dismissed because it had established both economic duress and actions which made its agreement with the Rams more burdensome. The NFL responds that CVC did not produce sufficient evidence and no evidence that it sought bids from other teams or that other teams were even in a position to move. The league and teams also suggest that Article 4.3 and the related guidelines could not have affected the number of bidders on the lease because the **[**26]** rules did not become relevant until after the agreement between the Rams and CVC was completed and the Rams made their application to move, in other words well after any bidding period. Finally, the NFL argues that CVC was unable to show there were not independent reasons for the absence of other bids, especially since other owners did not know that the St. Louis lease problems which surfaced during the expansion period had been corrected or that certain acts alleged to have been taken by the commissioner to prevent team relocation had occurred.

The league and teams also cross appeal. They challenge the district court ruling that they were collaterally estopped from arguing that they are a single economic enterprise incapable of conspiracy under *Section 1* of the Sherman Act. They contend that the Supreme Court decision in *Copperweld Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, and this court's decision in *City of Mt. Pleasant, 838 F.2d 268*, have changed the law on single economic enterprise since the Ninth Circuit decision in *Raiders I*. They seek reversal of the collateral estoppel ruling and dismissal of CVC's **[*860]** *Section [**27] 1* claim on the ground that they amount to a single economic enterprise.

A.

CVC claims that the district court failed to use the correct legal standard for ***HN3***[] *Rule 50*, which required it to "1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn." *Sip-Top, Inc. v. Ekco Group, Inc., 86 F.3d 827, 830 (8th Cir. 1996)* (quoting *Pumps & Power Co. v. Southern States Indus. Inc., 787 F.2d 1252, 1258 (8th Cir. 1986)* (cites omitted). CVC does not believe that the district court viewed the evidence in the light most favorable to it, particularly its evidence on causation. Since it presented enough evidence to survive the earlier motion for summary judgment and introduced more evidence at trial, the *Rule 50* motion should have been denied and the case submitted to the jury.

The district court stated the correct legal standard at the time it granted the *Rule 50* **[**28]** motion, and our review of the record does not lead to the conclusion that it failed to apply it. *See Admiral Theatre v. Douglas Theatre, 585 F.2d 877, 883 (8th Cir. 1978)*. ***HN4***[] We review the grant of a motion for judgment as a matter of law de novo, using the same standard as the district court. *Id.* Although CVC claims that the court explicitly declined to consider its evidence of causation, the passages it cites in the district court opinion do not contain any such statement. Rather, the court explained in its opinion that even after weeks of trial it was not clear what legal theory CVC was proceeding with on its *Section 1* claim. The court restated its consistent ruling that CVC would not be able to rely solely on the existence of the NFL rules to prove its case. That principle of law was not incorrect, and CVC does not point to any other example to support its argument that the court did not follow the standard.

The court's prior decision on summary judgment did not control the outcome of the Rule 50 motion. The Rule 50 motion was made and considered after the court had had the benefit of over four weeks of trial. It had heard the testimony of many witnesses and **[**29]** received numerous exhibits. There had been the opportunity for extensive legal arguments by the parties. At the time of the summary judgment motion it had been even less clear what CVC's precise legal theory was and what its evidence would be. By the time the district court ruled on the Rule 50 motion, it was able to review all the evidence in light of the legal discussions at the charge conference. It concluded that CVC had not met its burden. Given these facts and the posture of the case, the court was not required to reject the Rule 50 motion because of its earlier order on summary judgment.

B.

CVC contends that its evidence was sufficient to withstand a Rule 50 motion. CVC says that the testimony of John Shaw and Professor Siegfried, together with circumstantial evidence, tended to show that actions by the NFL caused the lack of bidding and the damages it seeks. The NFL replies that none of the evidence shows that the NFL policies, or their implementation, had the actual effect of deterring any team from making a bid on the stadium lease.

HN5[] We review the decision to grant judgment as a matter of law de novo, which is appropriate where "a party has been fully heard on **[**30]** an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party." Fed. R. Civ. P. 50(a)(1); *see also* Deneen v. Northwest Airlines, Inc., 132 F.3d 431, 435 (8th Cir. 1998). Although the plaintiff is awarded the benefit of all reasonable inferences, it is not given "the benefit of unreasonable inferences or those at war with the undisputed facts." Sip-Top, 86 F.3d at 830 (quoting Marcoux v. Van Wyk, 572 F.2d 651, 653 (8th Cir. 1978)) (internal quotations and citations omitted). "Where the record contains no proof beyond speculation to support the verdict, judgment as a matter of law is appropriate." *Id.*

[*861] **HN6**[] Section 1 of the Sherman Antitrust act makes it unlawful to form a conspiracy in restraint of trade. 15 U.S.C. § 1. Restraints which have "pernicious effect on competition and lack of any redeeming virtue" are illegal per se under Section 1 without inquiry into the reasonableness of the restraint or the harm caused. Northern Pac. Rw'y v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958); *see also* Copperweld Corp., 467 U.S. at 768; **[**31]** United States v. Topco Associates, Inc., 405 U.S. 596, 607-08, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972). Analysis of whether a restriction's harm to competition outweighs any procompetitive effects is necessary if the anticompetitive impact of a restraint is less clear or the restraint is necessary for a product to exist at all. *See* Chicago Board of Trade, 246 U.S. at 238; Broadcast Music, Inc. v. Columbia Broadcast Sys., Inc., 441 U.S. 1, 9-10, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979). Some trade restrictions by sports leagues have been held to fall into this category. NCAA, 468 U.S. at 94 (restriction on broadcasts of league games); NBA v. SDC Basketball Club, Inc., 815 F.2d 562, 567-68 (9th Cir. 1987) (relocation rules); Sullivan v. NFL, 34 F.3d 1091, 1096 (1st Cir. 1994) (prohibition of public ownership of teams). The district court held in this case that the franchise relocation rule and guidelines for evaluation of proposed team moves do not fit the per se category of restraints and should therefore be addressed under a rule of reason analysis. This ruling has not been appealed.

[32]** **1.**

HN7[] In order to prevail under Section 1, CVC must prove that: (1) there was an agreement among the league and member teams in restraint of trade; (2) it was injured as a direct and proximate result; and (3) its damages are capable of ascertainment and not speculative. Admiral Theatre Corp. v. Douglas Theatre Corp., 585 F.2d 877, 883-84 (8th Cir. 1978). The first element is established by proof that there was an agreement in restraint of trade and that the challenged action was "part of or pursuant to that agreement." Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 767, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984). Other Section 1 challenges to rules of sports leagues have involved situations where the defendants had taken action pursuant to an allegedly anticompetitive rule and the plaintiff attacked the rule itself or the application of the rule. *See* NCAA, 468 U.S. at 100-101 ; Sullivan, 34 F.3d 1091; SDC Basketball Club., 815 F.2d 562. In those cases there was no question that the defendants were acting pursuant to an agreement in restraint of trade, and the issue was whether the **[**33]** agreement was unreasonable.

See id. This case is different because CVC has not challenged a vote by team owners or a particular application of the rules, *see* *Raiders I, 726 F.2d at 1385*, nor was St. Louis unable to obtain a NFL team. CVC complains instead about market conditions and attributes the conditions existing at the time it was seeking a tenant to an atmosphere created by the rules and the handling of prior relocations.

CVC did not present evidence tending to show that there was even one other team besides the Rams that failed to bid on its lease because of the NFL rules and past applications of them. *See* *Monsanto, 465 U.S. at 764*. ***HN8***[] In order to prove that *Section 1* defendants were acting pursuant to a conspiracy, a plaintiff must present evidence that tends "to exclude the possibility that the alleged coconspirators acted independently," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 at 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538* (quoting *Monsanto, 465 U.S. at 764*), because "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support **[**34]** an inference of antitrust conspiracy," *The Corner Pocket of Sioux Falls, Inc. v. Video Lottery Technologies, Inc., 123 F.3d 1107, 1109 (8th Cir. 1997)*, *cert. denied 140 L. Ed. 2d 116, 118 S. Ct. 1054 (1998)* (quoting *Matsushita, 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986))*. *See also* *Monsanto, 465 U.S. at 764 (1984)*; *Lovett v. General Motors Corp., 998 F.2d 575, 578-79 (8th Cir. 1993)*. [7]

[*862] CVC presented no evidence to exclude the possibility that the owners who did not bid on the St. Louis lease were acting for independent business **[**35]** reasons rather than pursuant to the alleged agreement in restraint of trade. Indeed, the evidence at trial was to the contrary. The deposition testimony of the owners reflected their awareness of problems with the St. Louis lease, concern for their existing leases, and loyalty to their communities. These were all independent reasons why teams might not have bid. Moreover, CVC did not present evidence tending to show that all NFL teams would use the same criteria to evaluate a relocation opportunity or automatically attempt to move to the city offering the most lucrative lease. CVC argues that the parties' pretrial stipulation that the league Constitution and Bylaws amounted to an agreement among the NFL and its members was all that was necessary to show the existence of a conspiracy. This evidence did not tend to prove that any team acted pursuant to a conspiracy to prevent bidding on the stadium lease, however. "***HN9***[] ***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case," and the trial evidence did not support an inference that NFL teams were acting pursuant to the alleged conspiracy when they declined to bid on the Trans World Dome lease. *Matsushita, 475 U.S. at 588*.

[36]** 2.

The district court rested its summary judgment ruling on the issue of causation. ***HN10***[] In order to satisfy the causation element of a *Section 1* case, CVC had to show that the NFL's anticompetitive acts were an actual, material cause of the alleged harm to competition. *See* *National Association of Review Appraisers v. Appraisal Found., 64 F.3d 1130, 1135 (8th Cir. 1995)*; *Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 883-84 (8th Cir. 1978)*. Since nothing in the NFL rules expressly prevented competition among teams for leases or stated that only one team could negotiate with a leaseholder at a time, CVC had to show that past suppression of movement and the alleged anti-relocation atmosphere created by previous rule applications effectively prevented all other teams from dealing with the CVC about the St. Louis lease and entering bids on it.

CVC argues that Shaw's testimony was sufficient to prove causation, but his testimony did not tend to prove that the rules deterred any interested owner from bidding in St. Louis or that other owners considered the rules a factor in their lack of interest in the lease. Shaw could not identify **[**37]** a single team that was expressly interested in moving to St. Louis or was prevented from bidding on the lease because of past applications of league relocation rules, and there was no additional evidence that any particular team was able to move at the time CVC was seeking a tenant. [8] In fact, CVC failed to ask any NFL owner whether they were interested **[*863]** in moving to St. Louis at

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[7] The cited cases involved situations which could amount to a per se violation of the antitrust laws. In a rule of reason case like this one, where there is an issue as to the cause of the lack of competitive bidding, evidence about whether the alleged agreement affected the actions of the other team owners is relevant, as is evidence tending to exclude independent action.

[8] CVC claims that eight teams had expressed interest in moving since 1991, but the testimony it cites in support contains no indication that any team was interested in moving in 1995, CVC's deadline for a team. It cites the deposition testimony of New

the time it was seeking a team. Shaw was not a disinterested witness, and in the absence of other evidence his testimony was not enough to establish that the rule and its past application had created an anti-relocation atmosphere in the NFL which caused the lack of bidders, especially in light of the fact that Shaw's own team succeeded in moving after negotiating with several cities. *See* H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 247 (5th Cir. 1978) (plaintiff could not show causation based on corporate officer's testimony alone). Shaw was not a participant in what is alleged to have been a refusal to approach CVC, and his testimony on the motivation of other owners to refrain from bidding could not support a reasonable inference that the rules prevented **[**38]** the competitive bidding which CVC wished to have on the St. Louis stadium.

[39]** CVC contends that the testimony of its expert, Professor John Siegfried, establishes a causal link between the NFL's actions and the lack of competitive bidding on the lease. ***HN11***[] A jury may not rest its verdict on an expert's conclusion "without some underlying facts and reasons, or a logical inferential process to support the expert's opinion." *Sullivan, 34 F.3d at 1105* (citing *Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, 1339 (7th Cir. 1989))*. Here, there was no evidence on which the jury could have drawn a logical inference from Siegfried's opinion. Siegfried testified that he would have expected to see bidding on the lease, but there was no evidence to support a finding that there were teams that were actually able and desiring to bid, but were prevented from doing it. Moreover, Siegfried rested his conclusions on economic theory that states that in a freely competitive market NFL teams would want to move to the most advantageous lease opportunity, but there was no evidence which tended to show that this was actually the case, especially in light of admissions by CVC witnesses that several team owners would not move because **[**40]** of loyalty to their communities or ownership of their stadia. Siegfried also testified that he had not seen any of the lease agreements involved in the case, any relocation agreement, or any documentation on the lease negotiations. Without evidence tending to show that Siegfried's economic model actually applied to the NFL and the CVC efforts to obtain a team, his testimony is insufficient to create a jury question on the issue of causation. *Sip-Top, 86 F.3d at 830* (***HN12***[] judgment as a matter of law appropriate where plaintiff only relies on speculation to support theory).

CVC relies also on circumstantial evidence to prove causation. It claims that since the purpose of the rules was to deter team movement and there was a lack of competitive bidding on the Trans World Dome lease, it can be inferred that the rules were the cause of the harm allegedly suffered. *See* *Alexander v. National Farmers Org., 687 F.2d 1173, 1209-10 (8th Cir. 1982)* ("***HN13***[] causal links also may properly be a matter of inference from the circumstances and evidence as a whole."). CVC cites the *Alexander* case to support its position, but the facts there were significantly different. The **[**41]** plaintiff had produced substantial evidence that its competitor in the dairy distribution business threatened and harassed buyers to stop dealing with it; the defendant's actions were planned at its board meetings and "there was no doubt that the unlawful conspiracy was the material cause" of the plaintiff's injury. *Id.* . The fact that the rules were allegedly intended to discourage relocation does not support the inference that they prevented all other teams besides the Rams from pursuing a possible move to St. Louis. There were many legitimate reasons why owners may not have bid, and without evidence from those who did not bid about why they had not, the circumstantial evidence was insufficient to allow the case to be presented to the jury on causation.

The district court found it particularly significant that CVC had not presented evidence to show that it had sought bids from other teams. *See* *Read v. Medical X-Ray Center, P.C., 110 F.3d 543, 546 (8th Cir.)*, *cert. denied 139 L.*

Orleans Saints owner Tom Benson who said that teams had expressed interest in St. Louis, but Benson did not identify any teams or the nature of any interest. CVC also does not cite any support elsewhere in the record for Shaw's testimony that the Houston Oilers, Cincinnati Bengals, and New England Patriots could move.

CVC argues that the Tampa Bay Buccaneers were available to move, citing the deposition testimony of a league official. That official stated, however, that the team would have had to pay a penalty on its lease in order to relocate, and CVC does not point to any testimony by team officials indicating they were prepared to move. Senator Eagleton testified, however, that Jerry Clinton had negotiated with the Buccaneers and claimed he could bring them to St. Louis on the same terms as the Rams if an additional $ 5 million were made available, but Eagleton did not indicate why St. Louis had not attempted to create a competitive bidding situation between the teams.

CVC also claims that the Minnesota Vikings were available, citing testimony by Senator Eagleton, but Eagleton testified that FANS concluded that the Vikings were not interested in St. Louis.

Ed. 2d 230, 118 S. Ct. 299 (1997); *Admiral Theatre Corp., 585 F.2d at 893-94*. ***HN14***[] Where a plaintiff has otherwise failed to present evidence of causation, **[**42]** he must show that he made "a demand on the defendant to allow the plaintiff to take some action or obtain some benefit, which the defendant's challenged practice is allegedly **[*864]** preventing the plaintiff from taking or obtaining, in order to prove that the practice caused injury in fact." *Sullivan v. National Football League, 34 F.3d 1091, 1103 (1st Cir. 1994)*; *see also Out Front Productions, Inc. v. Magid, 748 F.2d 166, 169-70 (3d Cir. 1984)*. The record shows no effort by CVC to solicit bids from other NFL teams and CVC did not contact any other NFL team to encourage it to consider the St. Louis opportunity. The negotiations between CVC and the Rams were carried out in secret, and there was undisputed evidence that CVC had made a conscious decision to negotiate with only one team at a time. In fact, the Rams had informed CVC they would back away if there were negotiations with other teams and even suspended talks when CVC leaked information to the press.

CVC claims that the evidence about its presentation to the NFL owners during the expansion process and its publication of the Rams "wish list" during its negotiations was sufficient to **[**43]** show that it had sought interest from other teams. There was undisputed testimony that St. Louis had been passed over for expansion because of problems with its ownership group and lease, and there was no evidence that CVC made owners aware that these problems had been rectified. Publication of the benefits the Rams sought in St. Louis was not the same as informing other owners CVC was seeking additional bidders. ***HN15***[] CVC "may not recover for losses due to factors other than the [NFL's] anticompetitive violations." *National Association of Review Appraisers, 64 F.3d at 1135* (quoting *Amerinet Inc. v. Xerox Corp., 972 F.2d 1483, 1494 (8th Cir. 1992))*. Since CVC failed to present evidence showing that the alleged conspiracy caused it injury, it did not make out the element of causation necessary for a *Section 1* claim.

3.

The district court also ruled that CVC failed to present evidence to make out a submissible case of antitrust injury. CVC says that its evidence tended to prove that the NFL's policies caused a reduction in competitive bidding which is an antitrust injury. The NFL replies that the theory of CVC's case was that the very existence **[**44]** of Article 4.3 and the guidelines limited team bidding. It did not show that they operated to make CVC's financial obligations greater than they should have been, there was no antitrust injury. The league and team also argue that the rules did not result in a reduction in output of the number of NFL games, teams, or stadia which would be necessary to show antitrust injury, citing *Chicago Prof'l Sports Ltd. Partnership v. NBA, 95 F.3d 593 (7th Cir. 1996)*.

HN16[] Antitrust injury is "injury of the type the antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. CVC failed to offer proof of antitrust injury because it did not present evidence to show that there was a suppression of bidding on the St. Louis lease. There was no evidence at trial that any other willing and able bidder besides the Rams was in the market for a stadium and interested in the St. Louis opportunity at the time CVC was in the market for a tenant. ***HN17***[] A showing of antitrust injury requires proof that the possibility for the alleged harm to competition **[**45]** actually existed and that competition was diminished by the defendants' actions. "The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition." *National Society of Professional Engineers v. United States, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)* (organization's ethical rules prohibited competitive bidding). CVC presented no evidence that it was injured by a restraint on competition.

In sum, CVC did not make out a claim under *Section 1* of the Sherman Act, and appellees were entitled to judgment as a matter of law. [9] It failed to present sufficient evidence to prove that the lack of expressed **[*865]** interest from

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[9] Because the league and teams are entitled to judgment as a matter of law on the *Section 1* claim for the reasons discussed, it is not necessary to reach the issue raised by their cross appeal as to whether they are unable to conspire among themselves because they are a single economic enterprise under *Copperweld Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* and *City of Mt. Pleasant, 838 F.2d 268 (8th Cir. 1988)*.

other teams in the St. Louis opportunity was caused by Article 4.3 and other acts of a conspiracy consisting of the league and its members, and there was no evidence of antitrust injury.

[46]** IV.

CVC also claims that the NFL tortiously interfered with its contract with the Rams by charging the $ 29 million relocation fee after initially voting down the Rams' application to move. CVC argues that it was forced to pay the fee because of economic duress and that the required fee made its obligations to the Rams substantially more burdensome. The NFL responds that CVC failed to establish several of the essential elements of a tortious interference claim under Missouri law. The district court dismissed this claim because of lack of evidence of a breach induced by the NFL's conduct or of any intentional interference.

HN18[] Missouri law requires a plaintiff alleging tortious interference with a contract to prove "(1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendant's intentional interference; (4) the absence of justification; and (5) damages." *Rice v. Hodapp, 919 S.W.2d 240, 245 (Mo 1996)* (en banc). CVC presented no evidence that the NFL's imposition of a high relocation fee caused a breach in its contract with the Rams. Despite having the option to terminate its **[**47]** contract with the Rams once it was decided that the fee would exceed $ 7.5 million, CVC agreed to pay the fee in order to be sure the Rams would play in St. Louis in 1995, the target year it had set. There was also no evidence that the intent behind the NFL's fee was to disrupt the contract between CVC and the Rams. It is not even clear that the team owners knew about the contract at the time the fee was set. CVC contends, however, that the NFL can be liable for tortious interference even without a breach if it caused the performance of the contract to be more burdensome and expensive, citing *Restatement (Second) of Torts, § 766(A)*. CVC points to no Missouri authority which has recognized this theory, and ***HN19***[] a federal court ruling on a point of state law is obligated to follow the law as announced by that state's highest court. *Gilstrap v. Amtrak, 998 F.2d 559, 560 (8th Cir. 1993)*; *Carman v. Harrison, 362 F.2d 694, 698 (8th Cir. 1966)*. To adopt CVC's theory would be contrary to the Missouri requirement that a plaintiff prove that the defendant induce a breach of contract. Since CVC did not make out the required elements of this state tort, appellees **[**48]** were entitled to a judgment as a matter of law on it.

V.

CVC had ample opportunity to prove the causes of action that are the subject of its appeal, and it took some four weeks to put in its evidence at trial. The many legal issues were briefed and argued by the parties before the district court ruled on them. Since CVC failed to produce sufficient evidence to make out essential elements required under *Section 1* of the Sherman Act and under Missouri law on tortious interference, the league and the member teams were entitled to judgment as a matter of law. CVC has not shown on its appeal that it should have a new trial, and the cross appeal is dismissed as moot. Accordingly, we affirm the judgment of the district court.

End of Document

Addamax Corp. v. Open Software Found.

United States Court of Appeals for the First Circuit

September 4, 1998, Decided

No. 97-1807

Reporter
152 F.3d 48 *; 1998 U.S. App. LEXIS 22049 **; 1998-2 Trade Cas. (CCH) P72,260

ADDAMAX CORPORATION, Plaintiff, Appellant, v. OPEN SOFTWARE FOUNDATION, INC., DIGITAL EQUIPMENT CORPORATION and HEWLETT-PACKARD COMPANY, Defendants, Appellees.

Subsequent History: **[**1]** As Amended September 29, 1998.

Prior History: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Joseph L. Tauro, U.S. District Judge.

Disposition: Affirmed.

Core Terms

software, district court, defendants', material cause, damages, venture, joint venture, anticompetitive, programs, operating system, rule of reason, antitrust, arguendo, risky

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

Where a plaintiff proves conduct that falls within a per se category under the Sherman Act, 15 U.S.C.S. § 1, nothing more is needed for liability; the defendants' power, illicit purpose and anticompetitive effect are all said to be irrelevant.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Joint Ventures > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

HN2[] **Antitrust & Trade Law, Sherman Act**

Joint venture enterprises, unless they amount to complete shams, are rarely susceptible to per se treatment. Where the venture is producing a new product, there is patently a potential for a productive contribution to the economy, and conduct that is strictly ancillary to this productive effort (e.g., the joint venture's decision as to the price at which it will purchase inputs) is evaluated under the rule of reason.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Types of Contracts, Joint Contracts**

A joint venture is not "per se" legal. Any joint venture, especially one that involves competitors, tends to be susceptible to attack under the Sherman Act *§ 1*'s rule of reason--on the theory that the operations of the joint venture represent collaboration of the separate entities that own or control it.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

A plaintiff's mismanagement is not a bar to recovery where an antitrust violation is a material cause of injury. But mismanagement is certainly relevant to the factual question whether the antitrust violation had such an effect or whether the plaintiff is entirely the cause of its own failure.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

HN5[] **Standards of Review, Clearly Erroneous Review**

On the issue of whether the antitrust violation is a material cause of injury or whether the plaintiff is entirely cause of its own failure, the plaintiff bears the burden of proof at trial. On appeal, the district court's findings and ultimate conclusion of fact are entitled to stand unless found to be clearly erroneous.

Governments > Courts > Rule Application & Interpretation

HN6[] **Courts, Rule Application & Interpretation**

There is no mechanical rule for determining the exact level of findings required by *Fed. R. Civ. P. 52(a)*.

Counsel: Alan R. Kusinitz with whom Samuel Adams, Keith C. Long, and Warner & Stackpole LLP were on brief for appellant.

James C. Burling with whom Michelle D. Miller, Hale and Dorr LLP, William L. Patton, Jane E. Willis, Ropes & Gray, Kevin P. Light and Choate, Hall & Stewart were on brief for appellees.

Judges: Before Boudin, Circuit Judge, Coffin, Senior Circuit Judge, and Shadur, [*] Senior District Judge.

Opinion by: BOUDIN

Opinion

[*49] BOUDIN, *Circuit Judge*. Addamax Corporation brought a federal antitrust suit against Open Software Foundation ("OSF"), Hewlett-Packard Company and Digital Equipment Corporation. After a bench trial limited to the issues of causation and damages, the district court found that antitrust violations, even if they were assumed to have occurred, were not a material cause of Addamax's failure in the line of business at issue. Addamax now appeals and we affirm.

We begin with a statement of those background facts **[**2]** that are more or less undisputed. Addamax was created by Dr. Peter A. Alsberg in 1986 and, in 1987, began to focus on developing security software for Unix operating systems. Unix is a very popular operating system for larger computers, and security software is a component that can be used with the operating system to restrict outside access to sensitive information and to restrict a particular user to information consistent with that user's security classification.

During this period, the National Computer Security Center, a division of the federal government's National Security Agency, rated security software, giving ratings (ranging from the most to the least secure) of A, B-3, B-2, B-1, C-2, C-1 and D. Addamax decided to produce B-1 software for Unix operating systems, a level of security demanded primarily by government users. During the years 1988-89, Addamax did develop B-1 security software for at least two different versions of Unix. [1]

[3]** While Addamax was trying to produce its security software, a different struggle was developing between AT&T--the inventor of Unix--and a number of major computer manufacturers. Although originally Unix had been freely licensed by AT&T, it **[*50]** appears that in the late 1980s AT&T began restricting its licenses in the face of various software modifications being introduced by individual licensees; and at the same time, AT&T began to develop a close working relationship with Sun Microsystems, a major microprocessor manufacturer. Other hardware manufacturers professed to fear that AT&T was trying to establish a single dominant version of Unix, intending to exclude the proprietary Unix variations from the market.

Accordingly, in May 1988, a number of important computer manufacturers--including defendants Hewlett-Packard and Digital Equipment Corp.--formed the Open Software Foundation as a non-profit joint research and development venture. [2] OSF registered under the National Cooperative Research Act of 1984, *15 U.S.C. § 4301*, although that status has no direct importance for the issues before us. At least one of OSF's professed objectives was to

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[*] Of the Northern District of Illinois, sitting by designation.

[1] Because such software products emerge through test versions and then successive upgrades, it is difficult to pinpoint from the testimony precisely when the "product" was on the market. The district court gave June 1989 as the date, but Addamax claims some licenses dating back to 1988; the discrepancy is not critical to our resolution.

[2] The phrase "joint venture" is often used to describe a venture, other than one engaged in naked per se violations (like a price fixing cartel), that represents a collaborative effort between companies--who may or may not be competitors--to achieve a particular end (*e.g.*, joint research and development, production of an individual product, or efficient joint purchasing).

develop **[**4]** an alternative Unix operating system, denominated OSF-1, as a competitor to the Unix system being developed jointly by AT&T and Sun Microsystems.

In 1989, while OSF-1 was still being developed, OSF decided that it should include security software at the B-1 level. At that time, only three companies--AT&T, Addamax and SecureWare, Inc.--were producing security software for the Unix system. On November 1, 1989, OSF sent a "request for technology" to Addamax and SecureWare, soliciting bids for a B-1 security component for the new OSF-1 system. Bids were submitted on November 27, 1989, and OSF selected SecureWare on December 22, 1989. There **[**5]** is some indication that the Addamax security software was more sophisticated--one witness agreed that the contrast was between a Cadillac and a Chevette--but the Addamax price may also have appeared more substantial. [3] In any event, OSF-1 itself was never a very successful product.

Addamax continued to sell its own B-1 software for some period after losing the bid. Nothing prevented OSF "sponsors" (the founding members of OSF) or "members" (a great many other companies) from using Addamax security software for their own programs; and OSF sponsors and members were not the only potential buyers of Addamax's program. However, by 1991, Addamax began to phase out its B-1 security software, turning away new buyers so that it could devote **[**6]** its resources to the development of a new security software product, in which it appears that the company was successful.

In April 1991, Addamax filed a complaint in the district court against OSF, Hewlett-Packard and Digital, alleging various violations of federal and state ***antitrust law***. As later amended, the complaint charged the defendants, together with other companies associated with OSF, with horizontal price fixing, boycott, and otherwise unlawful joint venture behavior in violation of the Sherman and the Clayton Acts, *15 U.S.C. §§ 1-2*, *18*. A central theme, although not the only one, was that the defendants had conspired to force down the price for security software below the free-market level and otherwise to limit or impair the ability of Addamax to compete as a supplier of security software. [4]

[7]** Considerable discovery was conducted, and in due course the defendants moved for summary judgment. In a thoughtful decision in May 1995, the district judge dismissed Addamax's per se claims on the ground that the alleged conduct of the defendants did not fit within the narrow categories for which per se treatment was appropriate; but the court **[*51]** declined to dismiss Addamax's rule of reason claims, saying that the factual issues involving market power and anticompetitive effect were unsuitable for disposition on summary judgment. *Addamax Corporation v. Open Software Foundation, Inc., 888 F. Supp. 274 (D. Mass. 1995)*.

Thereafter, the parties entered into a stipulation that the damage phase of the case would be tried first, on a jury waived basis, to determine "whether the defendants' conduct was a material cause of injury in fact to the plaintiff and, if so, the amount of damages." The stipulation further provided:

> Solely for purposes of this stipulation, the Court will assume that the defendants' conduct as alleged in the Amended Complaint and described in the non-damages portions of the expert reports of Drs. Comanor and Howe occurred and violates **[**8]** the federal and state law accounts. However, the Court will not assume, but will hear and take evidence on, whether there was injury in fact to the plaintiff as a result of that conduct and, if so, the amount of damages, which is the subject of this phase of the trial.

Trial was conducted over 12 days between November 18 and December 16, 1996. Addamax presented as live witnesses Dr. Alsberg, three experts, and a single Addamax customer. The defendants did not present live witnesses but did cross-examine extensively and relied on documentary submissions and deposition testimony.

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[3] SecureWare sought a single up-front payment of $ 3 million. Addamax requested an up-front payment of half this amount with royalties on OSF-1 systems sold before 1992. If one were optimistic about OSF-1 prospects, Addamax's bid could have appeared higher, although not in retrospect.

[4] Similar claims under Massachusetts ***antitrust law*** and a state law claim based on interference with business relations in violation of Massachusetts common law have not been separately pressed on this appeal and are not further discussed.

In May 1997, the district court issued a decision concluding that the defendants' conduct was "not a material cause" of Addamax's losses. *Addamax Corporation v. Open Software Foundation, Inc., 964 F. Supp. 549, 555 (D. Mass 1997)*. The court found that the B-1 software market was a highly risky business, that Addamax's belatedly-offered product was "too expensive and too complex, and . . . actually exceeded B-1 requirements." *Id. at 553*. The court said that Addamax faced severe competition from AT&T in the B-1 market and that SecureWare's product was "a cheaper and simpler" **[**9]** one. *Id.* Accordingly, the court held on the merits that Addamax was not entitled to any damages.

Addamax has now appealed and argues what in substance are three different points: that the district court erred in its factual determination that defendants' conduct was not a material cause of Addamax's losses in the B-1 security software market; that the stipulation, pertinent case law or both required the district court to find that the defendants' conduct had caused damage to Addamax; and that the court erred in dismissing the per se claims against the defendants. Because the legal issues set the frame for the factual ones, it is more convenient to take these claims in reverse order.

1. As we explained in an earlier case, per se rules under *section 1* of the Sherman Act have left only a couple of "serious candidates" for per se treatment: these include price or output fixing agreements (horizontal market division agreements are of essentially the same character) and "*certain* group boycotts or concerted refusals to deal." *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993)*. Since those words were written, the categories have been **[**10]** narrowed even further by the Supreme Court's decision to overrule *Albrecht v. The Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)* and thereby to exclude from per se treatment vertical maximum resale price fixing agreements. *State Oil Co. v. Khan, 522 U.S. 3, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)*.

HN1[] Where a plaintiff proves conduct that falls within a per se category, nothing more is needed for liability; the defendants' power, illicit purpose and anticompetitive effect are all said to be irrelevant. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. But courts have been very careful to confine per se treatment to conduct of the type that is almost always actually or potentially anticompetitive and has no redeeming benefits (*e.g.*, reduced costs, increased competition) worthy of being weighed against the negative effects. *Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. Per se offenses remain very important--they include horizontal price fixing--but only for conduct that **[*52]** fits **[**11]** squarely within the "ever narrowing per se niche." *U.S. Healthcare, 986 F.2d at 593*.

HN2[] Joint venture enterprises like OFC, unless they amount to complete shams, *cf. Palmer v. BRG of Georgia, 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 (1990)*, are rarely susceptible to per se treatment. Where the venture is producing a new product--here, the OFC-1 software package--there is patently a potential for a productive contribution to the economy, and conduct that is strictly ancillary to this productive effort (*e.g.*, the joint venture's decision as to the price at which it will purchase inputs) is evaluated under the rule of reason. [5] This is so even if we accept, pursuant to the stipulation, the *arguendo* premise that OSF and those connected with it represented a large portion of the market for purchasing B-1 security software and represented a large portion of some kind of output market for integrated Unix software programs.

[12]** Addamax points to fragments of evidence that, assuming a full context were established, might or might not suggest that OSF was an aggressive response to the AT&T Sun venture and that Hewlett-Packard had a secret agenda to favor SecureWare over Addamax (for reasons that are never made quite clear), regardless of whether

[5] *Northwest Wholesale Stationers v. Pacific Stationery and Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1984)*; *BMI v. CBS, 441 U.S. 1*; *NCAA v. Board of Regents, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*. *United States v. Topco Associates, 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*, would probably be explained today by noting that the anticompetition restraint in question was considerably broader than necessary to make the joint venture work. *United States v. Topco Assoc., 1972 U.S. Dist. LEXIS 11845, 1972 WL 669 (N.D. Ill. 1972)* (on remand), ***414 U.S. 801 (1973)*** (affirming judgment). *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979)*, cited by Addamax on this issue, involved naked horizontal restraints that were not ancillary to any actual joint venture.

Addamax offered a superior product. None of the evidence pointed to by Addamax suggests that OSF-1 was other than a legitimate, if ultimately unsuccessful, product; and there is nothing to suggest that the ancillary decisions--what inputs to purchase, at what price, and from whom--were not legitimately related to this effort. In this context, flinging around terms like "cartel" and "boycott" do not convert a rule of reason claim into a per se one.

2. On the other hand, ***HN3***[] neither is a joint venture "per se" legal. Any joint venture, especially one that involves competitors, tends to be susceptible to attack under *section 1*'s rule of reason--on the theory that the operations of the joint venture represent collaboration of the separate entities that own or control it. How far this theory can be pressed in the case of a truly integrated enterprise, whose "owners" were **[**13]** no more than stockholders, is a matter we need not pursue; we will assume here that the OSF joint venture, or some aspect of it, could be condemned under *section 1* if the balance of harms and benefits tipped in favor of harms; questions of power and motive are primarily clues to such effects. [6]

At this point, Addamax's most straightforward claim would be that OSF's concentration of purchasing power in the supposed "market" for acquiring B-1 security software was so great that it imposed a significant risk of forcing prices below competitive levels, and that those risks outweighed any benefit from the venture or, more plausibly, that the venture could achieve those benefits in a less restrictive fashion, *i.e.*, without creating a substantial threat of monopsony pricing. Whether or not this **[**14]** theory could be proved, we are here assuming liability *arguendo*. The question remains whether Addamax established--either as a matter of law or based on the evidence--some causal connection between this assumed violation by defendants and Addamax's failure in the B-1 security software business.

Addamax first argues that the stipulation required the district court to find that the assumed violation was a material cause of injury to Addamax. Addamax's reading is contrary both to the explicit language of the stipulation and to its evident purpose. The **[*53]** stipulation said that the first phase of the bench trial was to determine "whether" defendants' conduct was "a material cause of injury in fact" to Addamax (and, if so, the amount of damages), assuming *arguendo* that a violation of law had occurred. Pointedly, the stipulation went on to emphasize that although the existence of a violation was to be assumed, the court "will not assume, but will hear and take evidence on," the question whether there was "injury in fact to the plaintiff as a result of" the attributed conduct.

Certainly both Addamax's complaint and its experts *asserted* that the alleged conduct has caused **[**15]** injury, but this was not part of the facts to be assumed *arguendo*. The stipulation did not assume the truth of the complaint, but only that defendants had engaged in the "conduct" alleged in the complaint. Under the stipulation, the reports of Addamax's experts were assumed to be true only in describing the conduct and not its consequences; that is made clear by the reference in the stipulation to assuming the truth of the "non damages portions of the expert reports."

Addamax's more interesting argument is its claim that the case law, and the economic theory that underlies it, require a conclusion that the conduct assumed *arguendo* to comprise a violation must have caused injury to Addamax. The broadest version of this proposition is Addamax's claim that under the rule of reason, conduct is condemned only because it has an anticompetitive effect. Therefore, Addamax argues, there must have been some injury to it, and the only question that remains is to calculate the amount of damages.

A more specific version of the argument, also advanced, is that in this very case the complaint's straightforward charge is that the defendants engaged in an agreement that had the effect of **[**16]** reducing price for B-1 security systems and since Addamax was a provider of B-1 security programs, it necessarily was injured by a reduction in price. An alternative version is Addamax's claim that the joint venturers were engaged in suppressing demand for their own output--Unix programs like OSF-1 embodying B-1 software--and this in turn reduced the demand, and presumably therefore price, volume or both, for suppliers of the input.

It is technically an overstatement to say that actual anticompetitive impact is a requirement of liability in a rule-of-reason case. True, as a practical matter, most courts would be unlikely to condemn an otherwise legitimate joint

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[6] Addamax's briefs in this court do not separately develop the asserted claims under section 2 and section 7; and in any event it is not clear on the present facts why those sections would give Addamax any additional help.

venture absent some showing of anticompetitive effect. But in principle, a sufficiently high *risk* of an anticompetitive effect, coupled with marginal benefits (or none at all that could not be achieved through an easily available less restrictive alternative) might justify condemnation under the rule of reason.

But all this is beside the point. Even if we assume that the OSF purchasing consortium was capable of exercising monopsony power directly or through coordination of its sponsor/members' actions, it does not follow **[**17]** that Addamax was a victim or that the alleged below-market price offered by the consortium materially affected Addamax. The only formal purchase by OSF involving Addamax was based on the November 1989 request for technology, in which SecureWare was the successful supplier. If below market price was paid, SecureWare, and not Addamax, was directly injured.

To be sure, Addamax claims that its sales opportunities were indirectly curtailed. While the OSF sponsors and members were free to purchase B-1 security programs from anyone they wanted on an individual basis, Addamax claims that winning the OSF-1 sale would have amounted to a valuable OSF endorsement, spurring other sales. But it is hard to see this loss as a consequence of monopsony pricing. In all events, Addamax's claim of secondary injury reduces itself to an issue of fact--not an issue that can be taken as resolved by stipulation or case law.

3. As a preface to its factual claims, Addamax asserts that the district court's decision recognizes a "defense" of mismanagement. ***HN4***[] A plaintiff's mismanagement is not a bar to recovery where an antitrust violation is a material cause of injury. *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d at 14 n.21*. **[**18]** But mismanagement is certainly **[*54]** relevant to the factual question whether the antitrust violation had such an effect or whether the plaintiff is entirely the cause of its own failure. *Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 42-45 (2d Cir. 1986)*.

We turn then to the question whether the district court erred in its factual determination that Addamax's inability to succeed in its efforts to sell its B-1 security program for Unix more widely was materially caused by the defendants' conduct. ***HN5***[] On this issue, Addamax bore the burden of proof at trial. *Irvin Industries, Inc. v. Goodyear Aerospace Corp., 974 F.2d 241, 244 (2d Cir. 1992)*. On appeal, the district court's findings and ultimate conclusion of fact are entitled to stand unless found to be clearly erroneous. *La Esperanza De P.R., Inc. v. Perez Y Cia. De Puerto Rico, Inc., 124 F.3d 10, 15 (1st Cir. 1997)*.

Addamax is mistaken in its suggestion that the district court misunderstood the legal standard for causation: quite unlike *Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798 (1st Cir. 1964)*, the district judge properly asked whether the **[**19]** defendants' assumed conduct had been a substantial or material cause of the losses claimed by Addamax. Although we there cautioned against an unduly rigid view of causation in computing damages once injury had been established, *id. at 808 n.16*, nothing in the opinion relieved the plaintiff from making the statutory showing (fully satisfied in *Haverhill*) that the violation had caused at least some injury to the plaintiff's business or property. *15 U.S.C. § 15*.

Here, the district court was presented with two competing versions of reality. Addamax's witnesses took the view that Addamax developed a superior B-1 product and its failure to succeed resulted from defendants' machinations which forced down the price of the product to sub-competitive levels and suppressed output for Unix software incorporating B-1 security programs. In some places, Addamax describes itself as the target, and elsewhere as the accidental victim, of a larger conspiracy directed against AT&T.

The defense version, which the district court adopted, was derived from defense depositions, cross-examination of the plaintiffs' experts and numerous documents. In this view, **[**20]** Addamax engaged in risky entry into a market dominated by AT&T, an established supplier of B-1 security software for Unix; the Addamax system was oversophisticated, expensive, arrived late, and never received the important certification from NSA's National Computer Security Center. And, in a market characterized by ever-changing demands, AT&T's promised development of a follow-on B-2 system made the market for B-1 security software for Unix inherently risky and in some measure transitional. There is nothing inherently implausible about either version; everything depends on the evidence.

In fairness to Addamax, the factual analysis in its brief represents exactly the kind of detailed critique of the evidence that fairly presents the question whether the district judge's findings are adequately supported by the record. Addamax identifies specific findings with which it disagrees, cites to record evidence it thinks was misconstrued, furnishes citations to the record for propositions it advances, points to counterveiling evidence that it says the district judge ignored and misinterpreted. In this respect, the brief deserves to be taken seriously, and we have done so.

But while in a few **[**21]** instances the district court may have misinterpreted an exhibit or ignored some fact that softens or qualifies the inference it draws, Addamax's own critique is filled with one-sided versions of events and refusals to confront evidence in support of the district court's findings. What emerges from our own review of the record is that the district court had evidence to support each of its key findings: that the business was a risky one; that Addamax entered late, with a high-priced, overbuilt and uncertified product; that AT&T and SecureWare, in different ways, posed major problems for Addamax; that many of Addamax's problems, including losses of customers, had begun before the OSF selection of SecureWare; and that changes in market conditions proved to be adverse to Addamax.

Further, the evidence is largely derived from Addamax itself, including the deposition **[*55]** and trial testimony of Dr. Alsberg. The risky nature of Addamax's venture was stressed in its disclosures to investors, and the delays and cost overruns concerning its B-1 product emerge from its own records; it was Addamax that expressed concern with competition from AT&T and especially its ability to offer a smooth **[**22]** transition to its own promised B-2 offering; and the defection of existing and prospective customers to AT&T, apparently before OSF-1, can be traced through Addamax records. The district court did not commit "clear error" in finding the facts in favor of defendants.

Addamax attacks the district court's findings as inadequate under *Fed. R. Civ. P. 52(a)*. By this, it means not that the explicit findings were wrong (it argues this elsewhere) but that the findings are either not sufficiently detailed or did not affirmatively find specific facts helpful to Addamax or did not address evidence that favored Addamax where there was evidence both ways. But the district court was not required to make findings on every detail, was not required to discuss all of the evidence that supports each of the findings made, and was not required to respond individually to each evidentiary or factual contention made by the losing side. *Knapp Shoes, Inc. v. Sylvania Mills Co., 15 F.3d 1222, 1228 (1st Cir. 1994)*; *Applewood Landscape & Nursery Co. v. Hollingsworth, 884 F.2d 1502, 1503-04 (1st Cir. 1989)*.

HN6[] There is no mechanical rule for determining the exact level of findings **[**23]** required by *Rule 52(a)*. In this instance, the district court made explicit intermediate findings (*e.g.*, competition from AT&T, the strengths and weaknesses of Addamax's product) making clear the bases for its ultimate finding on causation; and, with the help of counsel, it has been relatively easy to discern the evidence underlying these key findings. The district court could have written a 200-page decision on this case, but the far more compact assessment it made was entirely adequate under *Rule 52(a)*.

Affirmed.

End of Document

Concord Boat Corp. v. Brunswick Corp.

United States District Court for the Eastern District of Arkansas, Western Division

September 4, 1998, Decided ; September 4, 1998, Filed; September 8, 1998, Entered on Docket

NO. LR-C-95-781

Reporter
1998 U.S. Dist. LEXIS 14569 *

CONCORD BOAT CORPORATION, et al, PLAINTIFFS v. BRUNSWICK CORPORATION, DEFENDANT

Disposition: [*1] Defendant Brunswick Corporation's Motion for Judgment as a Matter of Law on Count I of its Counterclaim (Docket # 1176) GRANTED in part and DENIED in part. Plaintiffs' Motions for Judgment as a Matter of Law on Count I of Brunswick's Counterclaim (Docket #'s 1155, 1157, 1159, 1160, 1163, and 1167) GRANTED in part and DENIED in part.

Core Terms

conspiracy, purchases, damages, member of the board, engines, Counterclaim, board of directors, blackout, reasons, unlawful conspiracy, Plaintiffs', boycott, competitors, conspire, Sherman Act, antitrust, joined, boat, minutes, matter of law, entities, motion for judgment as a matter of law, no evidence, unlawful agreement, per se violation, reductions, benchmark, nonmovant, Marine, drive

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Weight & Sufficiency

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN1[] Trials, Judgment as Matter of Law

A motion for judgment as a matter of law under *Fed. R. Civ. P. 50* poses the legal question as to whether sufficient evidence was presented to support a jury verdict. The motion is properly granted only if the nonmoving party has not offered sufficient evidence to support a jury verdict in its favor. Before ruling on such a motion, a court must (a) resolve direct factual conflicts in favor of the nonmovant; (b) assume as true all facts supporting the nonmovant that the evidence tended to prove; (c) give the nonmovant the benefit of all reasonable inferences; and (d) deny the motion if the evidence would allow reasonable jurors to differ as to the conclusions that could be drawn. Judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible to no reasonable inference sustaining the position of the nonmoving party.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN2[] Sherman Act, Claims

Section 1 of the Sherman Act condemns contracts, combinations, and conspiracies which unduly restrain trade. 15 U.S.C.S § 1.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

Torts > Vicarious Liability > Corporations > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

Unilateral actions of a single entity do not give rise to antitrust liability under § 1 of the Sherman Act (Act), 15 U.S.C.S. § 1. Section 1 of the Act applies only to concerted action. Proof of concerted action requires evidence of a relationship between two or more legally distinct persons or entities. A corporation and its wholly owned subsidiary are incapable of conspiring in violation of § 1.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Unauthorized Acts

Business & Corporate Law > Agency Relationships > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

When the interests of principal and agents diverge, and the agents at the time of the conspiracy are acting beyond the scope of their authority or for their own benefit rather than that of the principal, they may be legally capable of engaging in an antitrust conspiracy with their corporate principal.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN5[] Antitrust & Trade Law, Sherman Act

Economic reality, not corporate form, should control the decision of whether related entities can conspire. Antitrust policy requires the courts to seek the economic substance of an agreement, not merely its form.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN6[] Remedies, Damages

A plaintiff seeking treble damages under § 4 of the Clayton Act must establish: (1) an antitrust violation; (2) the fact of damage or injury; (3) a causal relationship between the violation and the injury; and (4) the amount of damages.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN7[] Remedies, Damages

A plaintiff's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to amount and not the fact of damage.

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For BRUNSWICK CORPORATION, counter-claimant: James M. Simpson, Jr., Friday, Eldredge & Clark, Little Rock, AR.

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For ALBEMARLE BOATS, INCORPORATED, counter-defendant: Jerry C. Jones, Rose Law Firm, Little Rock, AR.

For CONCORD BOAT CORPORATION, GALAXIE BOAT WORKS, INC., SEA ARROW MARINE INC, MARIAH BOATS INC, HARRIS KAYOT INC, ARMADA MANUFACTURING COMPANY, INC., BAHA CRUISERS/FRP INDUSTRIES, INC., CAMPION MARINE INC, CARAVELLE BOATS INC, KCS INTERNATIONAL/CRUISERS, INC., MIRAGE HOLDINGS INC, PLAY TIME MANUFACTURING BY OHIO MARINE DISTRIBUTOR, INC., POWERQUEST BOATS INC, SILVERTON MARINE CORPORATION, VANGUARD INDUSTRIES, INDEPENDENT BOAT BUILDERS, INC., G W INVADER, MALIBU BOATS WEST, MAVERICK BOAT COMPANY, INC., counter-defendants: K. Craig Wildfang, Robert R. Weinstine, Steven C. Tourek, Brooks F. Poley, Christopher W. Madel, Benjamin R. Mulcahy, Winthrop & Weinstine, P.A., Minneapolis, MN.

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For ALBEMARLE BOATS, INCORPORATED, counter-defendant: K. Craig Wildfang, Winthrop & Weinstine, P.A., Minneapolis, MN.

Judges: James M. Moody, United States District Judge.

Opinion by: James M. Moody

Opinion

ORDER

Before the Court are Defendant Brunswick Corporation's Motion for Judgment as a Matter of Law on Count I of its Counterclaim and Plaintiffs' Motions for Judgment as a Matter of Law on Count I of Brunswick's Counterclaim. For the reasons set forth herein, Brunswick's motion will be GRANTED in part and DENIED in part. Plaintiffs' motions will also be GRANTED in part and DENIED in part.

I.

Brunswick Corporation is a large, multi-national conglomerate engaged in part in the production of stern drive and inboard marine engines. In Count I of its Counterclaim, Brunswick alleged that the Stern Drive Plaintiffs ("Plaintiffs") and their buying cooperative, Independent Boat Builders Inc. ("IBBI") engaged in a *per se* unlawful conspiracy to boycott MerCruiser engines **[*2]** at industry boat shows and to price MerCruiser engines at a disadvantage to

MerCruiser's competitors. [1] At the conclusion of its case-in-chief, Brunswick moved to dismiss as to 13 of the original Plaintiffs, leaving only IBBI and the five Plaintiffs who were represented on the IBBI board of directors. The Court granted Brunswick's motion to dismiss, and allowed Count I to proceed to the jury. The jury's verdict of June 19, 1998, found that none of the remaining Plaintiffs engaged in an unreasonable restraint of trade in violation of *Section 1* of the Sherman Act.

Brunswick has moved for judgment as a matter of law with respect to liability on Count I of the Counterclaim. Plaintiffs have also filed a motion for judgment as a matter of law as to both liability and **[*3]** damages, a motion which was mooted by the jury verdict unless the Court grants Brunswick's motion. Before addressing the merits of the arguments, the Court must consider the standard by which these motions shall be judged.

II.

HN1[] A motion for judgment as a matter of law under *Federal Rule of Civil Procedure 50* poses the legal question as to whether sufficient evidence was presented to support a jury verdict. *Gray v. Bicknell, 86 F.3d 1472, 1478 (8th Cir. 1996)*. The motion is properly granted only if the nonmoving party has not offered sufficient evidence to support a jury verdict in its favor. *Parrish v. Immanuel Med. Ctr., 92 F.3d 727, 731 (8th Cir. 1996)*; *Gray, 86 F.3d at 1478*; *Abbott v. Crocker, Mo., 30 F.3d 994, 997 (8th Cir. 1994)*. Before ruling on such a motion, a court must (a) resolve direct factual conflicts in favor of the nonmovant; (b) assume as true all facts supporting the nonmovant that the evidence tended to prove; (c) give the nonmovant the benefit of all reasonable inferences; and (d) deny the motion if the evidence would allow reasonable jurors to differ as to the conclusions that could be drawn. *Parrish, 92 F.3d at 731*; *Gray, 86 F.3d* ***[*4]*** *at 1478*; *Sherlock v. Quality Control Equip. Co., 79 F.3d 731, 735 (8th Cir. 1996)*. "Judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible to no reasonable inference sustaining the position of the nonmoving party." *Kehoe v. Anheuser-Busch, Inc., 96 F.3d 1095, 1100 (8th Cir. 1996)* (*quoting* *Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490, 494 (8th Cir. 1996))*.

III.

HN2[] *Section 1* of the Sherman Act condemns contracts, combinations, and conspiracies which unduly restrain trade. *15 U.S.C. § 1*. Because the alleged conduct, if proven, would amount to a *per se* violation of the antitrust laws, Brunswick was not required to prove any impact on interstate commerce or prove the unreasonableness of Plaintiffs' conduct. [2] In order to prevail on Count I of the Counterclaim, Brunswick was only required to prove by a preponderance of the evidence that one or more of the remaining Plaintiffs agreed to enter into the unlawful conspiracy. The agreement must have reflected "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States, 328 U.S.* ***[*5]*** *781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*; *ES Devel. Inc. v. RWM Enters., Inc., 939 F.2d 547, 554 (8th Cir. 1991)*. In its motion, Brunswick argues that the evidence establishes as a matter of law that such an agreement or understanding was reached by IBBI and the five boat manufacturers.

The evidence of an initial agreement between IBBI and the five individual members of the board of **[*6]** directors is overwhelming. The board met on May 18, 1993. The minutes reflect that the meeting was attended by Jimmy Fulks of Mariah Boats, Don Dacus of Galaxie Boats, Pete Gillon of Harris-Kayot Inc., Kevin Hirdes of Powerquest Boats,

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[1] Brunswick manufactures MerCruiser stern drive engines. The Court will refer to Brunswick and MerCruiser interchangeably. For simplicity, the Court will refer to the "Stern Drive Plaintiffs" as the "Plaintiffs" instead of the "Counter-Defendants."

[2] For a discussion of the *per se* unlawful nature of this alleged conspiracy, see the Court's Order dated March 18, 1998. In their motion, Plaintiffs invite the Court to reconsider this finding. The Court declines to do so. The aspects of this boycott which rendered it *per se* unlawful are just as present following the close of the evidence as they were at the summary judgment phase. Furthermore, the issue here is not whether there are pro-competitive reasons for the existence of purchasing cooperatives. The issue here is whether IBBI and its members' actions exceeded the scope of lawful buying group activity.

and Rex Jardine of Campion Marine. The meeting was also attended by David Ball, the President of IBBI, and Barbara Coffey, the Secretary/Treasurer of IBBI. According to the minutes of the board meeting the IBBI board of directors unanimously approved a proposal to "blackout" MerCruiser engines at industry boat shows. In light of the plain language of the minutes, it is not hard to find the elements of an agreement:

> The board unanimously and enthusiastically accepted Pete Gillon's proposal to pick a trade show, AND SHOW NOT ONE MERCURY there. The board chose IMTEC in Chicago to be the main target, where IBBI will come as close as possible to a TOTAL MERCURY BLACKOUT for the outboards and the sterndrives. Pete further suggested and the board agreed that the Southwest Marine Trade Show in Dallas, where many IBBI members plan to exhibit, would be a good starting point to ZERO OUT MERCURY. At all other trade and each member's own dealer shows, the **[*7]** goal is a 100% MERCURY BLACKOUT, to send Mercury a clear message of IBBI solidarity.

DX 1168 (emphasis in original). The minutes also clearly reflect an agreement to "price position Volvo and Yamaha favorably":

> It was the *consensus of the board* that IBBI would seek 100% support from each and every member to not only list Volvo and Yamaha on their price lists but to position them favorably, or at least equal to Mercury, on their '94 price lists . . .

Id. (emphasis added). Finally, the minutes reflect an agreement to jointly limit the spending of Mercury cooperative advertising funds. According to the minutes, "the board felt that this would be a powerful tool to get Mercury's attention." *Id.*

The minutes also demonstrate that the board members actually agreed to implement the boycott through the respective companies:

> Pete Gillon stated that Harris-Kayot would not be displaying ANY Mercury's at this year's trade shows, including IMTEC, and Don Dacus said that Galaxie would also have a complete Mercury boycott. Jimmy Fulks said that his company had not planned to show in Dallas but would now plan to be there just for the purpose of zeroing out **[*8]** Mercury. All other board members expressed similar intentions, to completely boycott showing any Mercury's where possible and to greatly reduce the presence of any Mercury's where not possible to completely boycott.

Id. (emphasis in original). Brunswick produced several other documents corroborating the passage of the proposal and demonstrating that IBBI monitored the results of the boycott for its members.

At trial Plaintiffs attempted to distinguish their actions from an "agreement" by arguing that the boycott reflected in the minutes was "saber rattling," a mere hollow threat that they never actually intended to carry out. Jimmy Fulks, Kevin Hirdes, and David Ball were the only IBBI board members who testified at trial, and they admitted the passage of the resolution at the May 18, 1993 board meeting. In an effort to justify their actions, Fulks testified that the blackout was meant to be a "bargaining chip" in IBBI's negotiations with MerCruiser. Ball and Hirdes gave similar testimony. They also portrayed the boycott as an attempt to "level the playing field" with Brunswick.

Regardless of the likely merit of these contentions, this evidence has no bearing on the **[*9]** legality of the board's actions. Competitors violate the Sherman Act at the moment they agree to pursue a *per se* unlawful course of action. It does not matter what their motivation and intent are at the time of reaching the agreement, nor does it matter that their actions are objectively futile. [3] And unless they completely withdraw from the conspiracy (which is fairly difficult to do), it does not matter what they do following the consummation of the agreement. There are no "take backs" of *per se* violations of the Sherman Act. Once the existence of the agreement is shown, questions of intent and actual participation are relevant *only* to the issue of damages.

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[3] The futility of a certain course of action might be relevant to the issue of liability if the evidence requires inferences to be drawn as to the existence of an agreement. But it is not relevant where the existence of the agreement is undisputed or blatantly obvious.

In spite of the unanimous passage of the proposal, the legal ramifications **[*10]** of this evidence are less than clear. This evidence is the only evidence that Brunswick introduced to prove an unlawful agreement. In fact, at trial, every member of the board who testified flatly denied that his individual company agreed to, or actually did participate in, any blackout or conspiracy. Brunswick was unable to produce any *additional* evidence demonstrating that any of the five specific Plaintiff companies actually agreed to the recommendation. With respect to the other members of IBBI during the alleged blackout, Brunswick simply produced no evidence at all.

Plaintiffs argue that these gaps in the proof mandate a finding that no unlawful agreement was reached. More specifically, Plaintiffs maintain that the members of the IBBI board of directors were incapable of conspiring among themselves or with IBBI, and that their actions taken in the capacity as directors can in no way be imputed to their companies so as to constitute an agreement between IBBI and the individual companies.

It is undisputed that ***HN3***[] unilateral actions of a single entity do not give rise to antitrust liability under *Section 1* of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp., 467* ***[*11]*** *U.S. 752, 769, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. *Section 1* of the Act applies only to concerted action. *Fisher v. City of Berkeley, 475 U.S. 260, 266, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986)*; *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. Proof of concerted action requires evidence of a relationship between two or more legally distinct persons or entities. *Copperweld, 467 U.S. at 769*. In *Copperweld*, the Supreme Court held a corporation and its wholly owned subsidiary are incapable of conspiring in violation of *Section 1*. The rationale of *Copperweld* has broader implications, and courts have applied it in a variety of intraenterprise situations to preclude a conspiracy finding.

The real issue here is not whether IBBI and its member companies can conspire among themselves for purposes of *Section 1* of the Sherman Act. Under well-established authority they can. The companies themselves are competitors and their affiliation represents a joining of independent sources of economic power previously pursuing separate interests. *See* *Copperweld, 467 U.S. at 771*; *see also* *City of Mt. Pleasant, Iowa v. Associated* ***[*12]*** *Electric Coop. Inc., 838 F.2d 268, 274-78 (8th Cir. 1988)*; [4] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210, 214-15 (D.C. Cir. 1986)*. Instead, the issue here is whether *individual* agents of IBBI's representative companies, sitting on IBBI's board of directors, can be found to bind their representative corporations in an unlawful conspiracy *solely* upon acts that they take while in the capacity as an IBBI board member. In other words, can the passage of the resolution by the board provide the predicate plurality of actors necessary for *Section 1* liability as to IBBI and the five Plaintiffs. Plaintiffs dispute such a proposition, maintaining that the actions of the board are solely the actions of IBBI.

[*13] There are well recognized exceptions to the *Copperweld* rule. In some instances an officer or employee clearly can conspire with its corporate principal. As the Eighth Circuit stated in *Pink Supply Corp. v. Hiebert, 788 F.2d 1313 (8th Cir. 1986)*:

> ***HN4***[] When the interests of principal and agents diverge, and the agents at the time of the conspiracy are acting beyond the scope of their authority *or for their own benefit rather than that of the principal*, they may be legally capable of engaging in an antitrust conspiracy with their corporate principal.

Id. (emphasis added); *see also* *Green v. Associated Milk Producers, Inc., 692 F.2d 1153, 1156-57 (8th Cir. 1982)*; *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910, 916-17 (8th Cir. 1976)*; *Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466, 469 (8th Cir. 1985)*.

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[4] The court in *City of Mt. Pleasant* noted that the critical inquiry is whether the alleged antitrust conspirators have a "unity of interests" or whether, instead, "any of the defendants has pursued interests diverse from those of the cooperative itself." *City of Mt. Pleasant, 838 F.2d at 274-77*. The Eighth Circuit defined "diverse" as "interests which tend to show that any two of the defendants are, or have been, actual or potential competitors" *Id.* All of the members of IBBI compete in the sale of recreational boats.

Likewise, a trade association or joint venture can conspire with its board of directors. For example, in *Rothery Storage & Van Co. v. Atlas Van Lines Inc., 253 U.S. App. D.C. 142, 792 F.2d 210 (D.C. Cir. 1986)*, a group of motor carriers challenged as a group boycott a competition suppressing membership policy **[*14]** promulgated by Atlas Van Lines' board of directors. The Atlas board of directors consisted of executives of other carrier companies that were "agents" within the Atlas system. The plaintiffs maintained that Atlas conspired with its board in promulgating the restrictions. The district court characterized the argument as follows:

> Plaintiffs attempt to invoke this exception on the ground that Atlas's board of directors included the executives of some of Atlas's own agents and carrier-agents, which are separate corporate entities, independent from Atlas and from each other; plaintiffs argue that the new Atlas policies would necessarily affect both the Atlas and non-Atlas business potential of these separate companies in some fashion and thus give the agent companies on the board an independent stake in whether the policy was adopted.

Rothery Storage and Van Co. v. Atlas Van Lines, Inc., 597 F. Supp. 217, 225-26 (D. D.C. 1984). The district court rejected the plaintiffs' argument, citing *Copperweld* and holding that the plaintiffs had not produced evidence that the board members possessed an "independent personal stake" separate from their obligations to Atlas. **[*15]** *Id. at 228-229*. The court went to great pains to demonstrate that the agent companies' interests were substantially similar to Atlas's interests as an organization. *Id.* ("Atlas's success is to a large extent dependent upon--rather than divergent from or inconsistent with--the success of its agent companies, either individually or as a group.")

On appeal, the District of Columbia Circuit reversed. *Rothery Storage & Van Co. v. Atlas Van Lines Inc., 253 U.S. App. D.C. 142, 792 F.2d 210 (D.C. Cir. 1986)*(Bork, J.). The court found that all but two members of the board represented legally separate entities that were direct competitors, not only among themselves, but with Atlas as well. The court was unswayed by the intraenterprise nature of the board's relationship with Atlas, finding it *dispositive* that a group of legally separate corporate entities agreed to a policy that restricted competition. The court's ruling is instructive:

> If it is deemed important, it may be noted that the Atlas Board of Directors consisted of actual or potential competitors of Atlas and that is also sufficient to take this case out of the *Copperweld* rule. *See* *United States v. Sealy* ***[*16]*** *Corp., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)*; *see also* *Topco Associates, Inc. v. United States, 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. The two non-carrier agents represented on the eleven-person Board when Atlas adopted the policy were capable of competing by acquiring interstate authority. The four carrier agents represented on the Board at the time were actual competitors of Atlas. Three of the remaining members of the board were officers of Atlas. *Thus, all but two members of the board represented separate legal entities that competed in interstate commerce*. This brings the case within the rule of *Sealy* and *Topco* and shows the existence of a horizontal restraint.

Rothery Storage & Van Co., 792 F.2d at 215 (emphasis added). The court's reasoning in *Rothery* has been embraced by leading antitrust commentators:

> [In *Sealy* and *Topco*], as well as [*National Collegiate Athletic Assn. v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)]*, which was also invoked by the [*Rothery*] court, the central rulemaking organization was wholly owned and controlled by the members who were thus making rules for themselves **[*17]** and its rules did indeed amount to a horizontal agreement among the members who remained independent actors in the marketplace. The *Rothery* court emphasized that the firms actually carrying the goods competed with each other and, in part, with Atlas, and that the rules governing their association, though formally promulgated by Atlas, reflected an understanding among the constituent parts, which remained independent forces in the market to which the Atlas rules applied. This conclusion seems correct even though the affiliated firms did not own Atlas or entirely control it.

AREEDA & HOVENKAMP, ***ANTITRUST LAW***, P 1478' (Supp. 1997).

A similar situation was addressed in *Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1496 (3rd Cir. 1985)*, *vacated and remanded*, *475 U.S. 1105 (1986)*, *reinstated*, *823 F.2d 49 (1987)*, *cert. denied*, *484 U.S. 1060 (1988)*, a case involving a conspiracy relating to a dealer termination. The plaintiff alleged a conspiracy between defendant

Ford Motor Company and a Ford dealership, Wenner Ford. The plaintiffs also added as defendants two individuals, Fraher and Hasel, who served simultaneously as directors of Wenner Ford and management **[*18]** employees of Ford Motor Company. The plaintiffs maintained that Wenner Ford conspired with Ford Motor Company *through* the two employees. *838 F.2d at 273-74*. The district court rejected the plaintiffs' argument, finding that the employees did not engage in the unlawful activity while performing a duty for Wenner Ford. *Id. at 274*. In other words, the district court found that the employees were solely representing Ford Motor Company at the time of the illegal act.

The Third Circuit reversed, finding that the plaintiffs had raised genuine issues of fact regarding issues of "motive, intent, and conflict of interest." *Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1499 (3rd Cir. 1985)*. The court further reasoned:

> It is reasonable to infer that Fraher and Hasel were mindful of their corporate obligations as officers and directors of Wenner Ford when they considered the matter of Tunis Brothers in 1980 and 1981. Fraher and Hasel served "two masters"--one Wenner Ford, the other Ford Motor Company. There is no reason why a jury must find that they made some of their Ford decisions adverse to plaintiffs with an obliviousness to its advantages to Wenner Ford. *He who wears* **[*19]** *two hats simultaneously should not be surprised if a jury wonders which hat he prefers. He should not be surprised if the jury concludes, by his actions, that he favors only one of the hats . . . .*

Id. at 1499 (emphasis added).

Applying these various legal principles to the facts of the instant case compels a similar conclusion, albeit a conclusion that there are no genuine issues of fact. As described above, there is no factual dispute that the members of the IBBI board unanimously agreed to the passage of a resolution, the purpose of which was a *per se* violation of the antitrust laws. Thus, the key issues here are the relationship of these board members to IBBI and among themselves, and the extent of their "personal stake" in the passage of the resolution.

The very nature of IBBI is such that the board members were never acting solely in the interests of IBBI, which is only a buying cooperative formed to pursue the economic interests of its individual members. [5] The members of IBBI, including the board members, are direct competitors of one another. When the IBBI board members voted to pursue the blackout, they were not taking an action that would accrue exclusively **[*20]** to IBBI's benefit. IBBI, as an organization, does not purchase marine engines and would itself stand to gain very little from the boycott. The board members, on the other hand, had everything to gain by pursuing the objectives of the boycott and the passage of the resolution was unquestionably intended for the primary benefit of their respective companies. [6] **[*21]** They wanted lower engine prices and higher volume discount thresholds. [7] They wanted Brunswick to accede to demands which would have likely increased the prices of engines to their smaller competitors. The board members were serving "two masters," and their actions cannot reasonably be described as the unilateral actions of IBBI.

Furthermore, Plaintiffs' repeated assertions that acts of the IBBI board were not binding on its members is irrelevant to the existence of this unlawful agreement. The board members themselves, as representatives of their competing companies, formulated and adopted the agreement. Thus, there is no issue as to whether the board had authority

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[5] IBBI serves as a "conduit" through which many small companies are able to aggregate their buying power. With respect to engines, this aggregation of buying power is extremely beneficial, as the engine is by far the most expensive component of a completed boat.

[6] The Court is not saying that IBBI, as an organization, had no interest in the boycott. Clearly it did, because one of the stated objectives of the boycott was to preserve IBBI's status as a significant purchasing cooperative. However, the primary benefits flowing from the boycott, i.e., the financial benefits of the boycott, would ultimately flow to the individual members.

[7] Plaintiffs presented evidence at trial that Brunswick drastically lowered the volume discount threshold as part of an anticompetitive scheme to fragment large buying groups such as IBBI. Thus, it is not surprising that IBBI and the board members were pursuing this course of action. But again, their motivation in entering into the agreement is not relevant here.

to bind the board's representative companies. Plaintiffs' theory completely ignores the economic realities of the board members' actions.

Any other interpretation of this evidence would certainly spell the demise of *Section 1* enforcement. Under Plaintiffs' interpretation of intraenterprise conspiracy law, competitors would be encouraged to unite in unlawful conspiracies. Competitors could merely **[*22]** form a separate trade association and then pawn off, for example, their group price-fixing decisions as "unilateral acts" of a "board of directors." They could then point to a provision in a charter or operating agreement stating that board resolutions are "non-binding." The antitrust laws do not allow for such conduct. ***HN5***[] "Economic reality, not corporate form, should control the decision of whether related entities can conspire." *City of Mt. Pleasant, 838 F.2d at 275*. "Antitrust policy requires the courts to seek the economic substance of an agreement, not merely its form." *Weiss v. York Hospital, 745 F.2d 786, 815 (3rd Cir. 1984)*.

The Court finds that as a matter of law, IBBI and the board members entered into a *per se* unlawful agreement for the economic benefit of their representative companies, and as such, their actions rise to an unlawful agreement between IBBI and the board members' representative companies. Thus, the predicate plurality of actors necessary for *Section 1* liability has been established, and Brunswick is entitled to the entry of judgment as a matter of law as to the existence of a conspiracy in violation of *Section 1* of the Sherman Act.

In the verdict, **[*23]** the jury never reached the question of damages on the Counterclaim, instead finding that there had been no violation of *Section 1*. As indicated above, the Court should have instructed the jury as to the existence of an unlawful conspiracy between the five Plaintiffs and IBBI. Because the Court did not do so, Brunswick is potentially entitled to a new trial on the Counterclaim solely on the issue of injury and damages. However, the Court must still determine whether Plaintiffs are correct in their argument that Brunswick failed in the first instance to present legally sufficient evidence of injury and damage.

IV.

HN6[] A plaintiff seeking treble damages under § 4 of the Clayton Act must establish: (1) an antitrust violation; (2) the fact of damage or injury; (3) a causal relationship between the violation and the injury; and (4) the amount of damages. *Rosebrough Monument Co. v. Memorial Park Cemetery Assoc., 666 F.2d 1130 (8th Cir. 1981)*. Brunswick has demonstrated the existence of the violation. However, the fact of injury cannot merely be presumed due the *per se* nature of the violation. The fact of injury must be proven "to a reasonable certainty." *Id. at 1146*. The **[*24]** quantum of proof necessary to demonstrate fact of injury is somewhat less than that required to establish the amount of damage. ***HN7***[] Plaintiffs' "burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to amount and not the fact of damage." *Rosebrough Monument Co., 666 F.2d at 1145* (*quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969))*. Thus, if Brunswick demonstrated *any* injury to its business or property caused by the conspiracy, such as lost profits or lost sales, then the fact of damage has been established. Once fact of injury is demonstrated, a more relaxed standard will apply as to proof of the actual amount of damages. The ultimate issue will be whether Brunswick demonstrated reasonably ascertainable, non-speculative damages actually *caused by* the conspiracy.

Brunswick's expert, Dr. Richard Rapp, presented a damage study on behalf of Brunswick. Dr. Rapp chose a "before-and-after" model for his damages study. Dr. Rapp analyzed IBBI purchases of stern drive engines from **[*25]** MerCruiser during a "benchmark" period before the alleged conspiracy. He then compared those purchases to IBBI's purchases during the "conspiracy" period to determine the impact of the unlawful conspiracy on IBBI's purchases. Dr. Rapp concluded that IBBI members bought 254 fewer stern drive and inboard engines because of the unlawful conspiracy. The lost engine sales are the only theory of injury and damage that Brunswick has advanced.

The Court finds that Brunswick has submitted sufficient evidence of injury in fact. IBBI's internal documents corroborate the conclusion that Brunswick lost at least *some* engine sales because of the conspiracy. David Ball's September 15, 1993 letter to IBBI members stated that "the blackout strategy developed by your board of directors is taking root and reflecting solid results." DX 1283. Ball then outlined member participation in the blackout at two boat shows, and described increases in Volvo purchases through IBBI. Likewise, Ball's December 23, 1993 letter to Rex Jardine of Campion Marine further described the effects of the conspiracy. DX 1355. In sum, this evidence is sufficient to demonstrate the threshold issue of injury in fact.

The issue **[*26]** of the actual amount of damages is more complicated. Plaintiffs argue that Dr. Rapp's damage study is flawed in number of respects, but, as will be seen, the dispositive issue here relates to Dr. Rapp's decision to base his damage calculations on the purchases of IBBI as a group. Brunswick originally brought Count I of the Counterclaim against 18 members of IBBI. Near the end of its case-in-chief Brunswick moved to dismiss all of the Plaintiffs from the counterclaim with the exception of the five companies represented by the IBBI board of directors and IBBI itself. Curiously, Brunswick presented absolutely no evidence that any of the dismissed companies or companies that were not sued ever joined or participated in the unlawful conspiracy. In fact, Brunswick presented absolutely no evidence relating to these companies. [8] Thus, while Brunswick's damage study calculates damages based upon the purchasing patterns of approximately *twenty-five* companies, Brunswick only presented evidence that *five* companies actually joined the conspiracy. [9] Such an analysis is highly suspect considering that Dr. Rapp testified that the validity of his damage study depended upon a "substantial" **[*27]** number of IBBI members joining the conspiracy.

In defense of the damage study, Brunswick argues that the jury is entitled to conclude that *all* of IBBI's reductions in purchases during the conspiracy period are attributable to the conspiracy. Brunswick points to an IBBI document stating that "at Dallas 10 out of 11 members and at Chicago 18 out of 20 members hung Volvo Penta and/or Yamaha power either exclusively or jointly with MerCruiser." The Court believes that such a statement is so ambiguous as to be relatively meaningless. The statement does not identify who the members were, nor does **[*28]** it identify how many actually showed MerCruiser exclusively. Brunswick also points to David Ball's blackout "updates" quantifying how much Volvo orders through IBBI had increased. While such statements are certainly relevant, they in no way identify which Plaintiffs were increasing their Volvo orders, and more importantly they do not identify *why*.

Brunswick further argues that it was not required to sue all of the co-conspirators, and that it has demonstrated that the remaining members were later joining members of the conspiracy. One theory is that the balance of the IBBI members joined the conspiracy when they filed this lawsuit. Brunswick then cites the joint and several liability rule, arguing that it cures any problems presented by the study.

Brunswick is entirely correct that it was not required to sue all of the co-conspirators. However, the joint and several liability rule is of no assistance to Brunswick's damage model. Of course, co-conspirators are jointly and severally liable for the entire effect of an unlawful conspiracy. But the rule allowing for joint and several liability in a conspiracy does not abrogate the requirement that Brunswick can only recover for loses **[*29]** actually *caused by* the conspiracy. To illustrate the problem here: assume companies 1-5 reduced their MerCruiser purchases pursuant to a conspiracy; assume companies 6-25 reduced their purchases for other reasons unrelated to the conspiracy; and finally assume companies 6-25 joined the conspiracy later by the filing of this lawsuit. [10] In such an instance, the reductions in MerCruiser purchases by companies 6-25 are not caused by the conspiracy, and thus those reductions are not relevant to damages, even though companies 6-25 clearly are conspirators and are jointly and severally liable for all of the effects of the conspiracy.

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[8] These companies did not join the conspiracy merely by virtue of the fact that they were members of IBBI at the conspiracy's inception. Brunswick was required to demonstrate that these companies individually agreed to participate in the unlawful conspiracy.

[9] Several Plaintiffs joined IBBI after the conspiracy period and several IBBI members during the conspiracy period were never parties in this lawsuit.

[10] This an unlikely proposition because of the *Noerr-Pennington* doctrine. Brunswick maintains an exception applies in this instance, but there merits of that particular position are not relevant to this hypothetical.

The situation in the present case is no different than the above illustration. Even if the Court assumes that the five board member Plaintiffs reduced their **[*30]** MerCruiser purchases *solely* because of the conspiracy (which in itself is an unwarranted assumption), there is absolutely no evidence demonstrating that the twenty remaining members of IBBI reduced their MerCruiser purchases because of the conspiracy. This conclusion renders any damage calculation wholly speculative. [11]

Further compounding the problem, Plaintiffs presented substantial and unchallenged evidence of several legally valid reasons why *all* of the IBBI members may have reduced their MerCruiser purchases during the conspiracy period. Some of these reasons include the following: (1) in 1994 MerCruiser discontinued a popular 3.0 liter engine, an engine that accounted for approximately 25% of IBBI's prior volume up to that time; (2) for **[*31]** six months during the blackout, MerCruiser refused to allow IBBI members to purchase more engines than they had previously forecasted, thus requiring IBBI members to turn to other suppliers for their excess needs; and (3) during the conspiracy period, Yamaha exited the stern drive engine market and had an admitted "fire sale" on its remaining inventory. Thus, in order to find damages under this model, the jury would be required to blatantly speculate that the members of IBBI, as a group, reduced their purchases because of the conspiracy, and not because of the other valid reasons. [12] The jury would be required to do so even though there is not a shred of proof that twenty of the companies even joined the conspiracy. This proof further renders any potential damage award wholly speculative.

[*32] On cross-examination, Plaintiffs' counsel and Dr. Rapp quarreled over Dr. Rapp's decision to base his damage figures on the buying patterns of IBBI as a group. Dr. Rapp's testimony underscores the untenable nature of his theory:

> A. [If] it turned out that there were only one or two members in the conspiracy, just speaking hypothetically, then I would have to say that this damage theory would not be a workable one to use unless you thought . . . that those one or two people lost 254 engines. If, on the other hand, there were a substantial number of IBBI members, perhaps not every one who was listed on the Brunswick counterclaim complaint, if there are a substantial number, then I would like to have the jury consider this damage theory as a reasonable way of estimating damages.

Tr. at 5439. Focusing on this particular passage, the Court finds that there was absolutely no evidence in the record that would allow a juror to reasonably conclude that the five board member Plaintiffs accounted for all 254 of the alleged reduced engine purchases. Notably, Dr. Rapp testified unequivocally that "the analysis requires that a substantial number of the membership of IBBI participated." **[*33]** Tr. at 5440.

Other testimony was revealing as well. Dr. Rapp continually acknowledged the deficiencies in his theory:

> Q. Let me ask you this question, Dr. Rapp. Suppose before you started this analysis Brunswick's attorneys came to you and said IBBI has 30 members, but only five of them, only five of those 30 participated in this alleged conspiracy. Could you have still done your analysis this way?
>
> A. I would not have done my analysis that way if it were clear that the five were distinguishable and there were no -- there were no legal reasons why the others might be included too for some reason.

Tr. at 5444. This portion of Dr. Rapp's testimony, like Brunswick's argument above, appears to reflect a misunderstanding as to the nature of joint and several liability. None of the co-conspirators are liable for reductions

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[11] Both Fulks and Hirdes, the only board members that testified, denied that Mariah or Powerquest even reduced their MerCruiser purchases. Brunswick presented no evidence that they did (other than to point out that they were in IBBI during the conspiracy).

[12] This situation is in marked contrast to the position Brunswick advocated with respect to Dr. Hall, who did not use a "before-and-after" damage model. Dr. Hall testified that all market factors were taken into account before arriving at the hypothetical market division, and it was clear from the evidence that he did in fact take all of the market factors into account. In contrast, Dr. Rapp simply admitted that he did not even consider obvious market factors present in the benchmark and conspiracy periods. Additionally, the evidence reflected that Dr. Rapp was unaware that Plaintiffs Armada and Caravelle purchased over 400 engines from OMC during the benchmark period, a fact that, to use the words of Dr. Rapp, could "mean the damages are too big." Tr. at 5496. Dr. Rapp's eventual explanation for failing to take the OMC purchases into account was not persuasive.

in engine purchases for reasons unrelated to the conspiracy, regardless of whether they ultimately joined the conspiracy later.

Near the end of his testimony, Dr. Rapp conceded that his damage figure would have no application to a conspiracy of only a few IBBI members:

> A. I will certainly concede this, that if the -- if the jury were to decide **[*34]** that only a small group of plaintiffs were responsible, that they would have to make use of this damage theory, but not use it, *but not use the conclusion of $ 397,000 to get at the right answer*. That would have to be reduced. It it is only one or two people rather than 25 or 30.
> Q. Dr. Rapp, how do you know that the reduction in purchases would be attributable to the one or two and not to the many that may have had other business reasons for reducing the purchases of MerCruiser?
> A. The other business reasons get -- whatever business reasons they had in 1993, the assumption is that they would have had in 1992. That's what the benchmark is all about. That's why the damages are what they are because there's a comparison to a historical factual benchmark.
> * * *
> Q. Dr. Rapp, if you had prepared a table that is 2587 and reflected on it the purchases of all boat builders of whom IBBI are only a small fraction, and you had shown a benchmark period and a damage period, would you concede that if you included the entire industry, this wouldn't be a valid analysis. Is that right?
> A. That's correct.
>
> Q. Now, if you included the purchases of all IBBI members, many of **[*35]** whom are not even alleged to be a part of the conspiracy, isn't it equally invalid?
>
> A. I guess I have to go back to the question of who is in and who is out of the conspiracy. I can only answer you, again, abstracting from the law in the extreme. *It is true if it is determined that there are only a very few conspirators, then this analysis may still be useful, but not the full amounts, not the full amounts*. That doesn't mean, in other words, you don't have to lump this and say we have to go individual by individual and ask them because that's not the way to get anywhere, what they would have purchased if they weren't participants in the conspiracy.
> Q. So what you are saying is you think it would be fair for the jury to start with your number of $ 396,792 and the circumstance you described and adjust it based on how many members of IBBI they might think were participants in the conspiracy. Is that right?
>
> A. *I'm not sure how you would go about it*. It wouldn't just be a question of adjusting that number. You would have to go back and think through what the right total is, used shares; but, in general, something like that, yes.
>
> Q. But you haven't done that, **[*36]** have you?
>
> A. *I have not*.
> Q. You have not given the jury any evidence to do that. Is that right?
>
> A. I have given you the table and a description of how it is put together. *But I did not anticipate at all the proposition that there would only be a very few members of the alleged conspiracy. That's right*.
> Q. I think you indicated that if it is only one or two that participated in the conspiracy that this would not be a valid approach?
> A. Right, right.
> Q. But you say if it is 25 or 30 it is a valid approach?
> A. Yes, that's right.
> Q. Where do you draw the line?
>
> A. *I don't know where to draw the line*. You would have to use adjustments in between. You would have to work with it in between. There is no line.

Tr. 5445-49 (emphasis added).

Construing all of the evidence in Brunswick's favor, the Court finds that there is no reasonable basis for a juror to conclude that any IBBI member's actions, aside from the five board members, are solely attributable to the blackout. There is absolutely no evidence in the record suggesting that the remaining companies reduced their MerCruiser purchases *because* of the conspiracy and there **[*37]** is substantial unrebutted evidence in the record that *all* IBBI members may have reduced MerCruiser purchases for reasons that were entirely lawful, reasons that were exclusively present during either the benchmark period or the conspiracy period. Thus, the Court finds that Brunswick's damage study cannot support a damage award in Brunswick's favor, and that the Plaintiffs are entitled to judgment as a matter of law with respect to the issue of damages on Count I of the Counterclaim.

V.

As described above, Brunswick has demonstrated, as a matter of law, a *per se* violation of *Section 1* of the Sherman Act. However, Brunswick presented inadequate evidence of damages, such that no award of damages on the counterclaim would have been sustainable, even if the jury had been instructed to find the existence of the unlawful conspiracy.

The Court has emphasized on numerous occasions that expert reports were conclusive and final, and that parties would not be allowed to offer new opinions not properly disclosed according to firm disclosure deadlines. This principle even worked to deny Plaintiffs the ability to present a damage claim to the jury for attempted monopolization of **[*38]** the outboard engine market. Thus, the Court will not allow Brunswick a new trial on damages. Brunswick had its opportunity to present a damage claim to the jury, and having failed in that regard, there is no just reason to afford Brunswick a second chance. However, Brunswick has demonstrated injury in fact due to a *per se* violation of the Sherman Act. Accordingly, upon entry of judgment, the Court will award Brunswick nominal damages on Count I of the Counterclaim in the amount of one dollar ($ 1.00), trebled to three dollars ($ 3.00).

VI.

In accordance with the above, Defendant Brunswick Corporation's Motion for Judgment as a Matter of Law on Count I of its Counterclaim (Docket # 1176) is hereby GRANTED in part and DENIED in part. Plaintiffs' Motions for Judgment as a Matter of Law on Count I of Brunswick's Counterclaim (Docket #'s 1155, 1157, 1159, 1160, 1163, and 1167) are hereby GRANTED in part and DENIED in part.

IT IS SO ORDERED this 4 day of September, 1998.

James M. Moody

United States District Judge

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Utah Foam Prods. Co. v. Upjohn Co.

United States Court of Appeals for the Tenth Circuit

September 4, 1998, Filed

Nos. 97-4007, 97-4008

Reporter
154 F.3d 1212 *; 1998 U.S. App. LEXIS 21612 **; 1998 Colo. J. C.A.R. 4793

UTAH FOAM PRODUCTS CO., a Utah corporation, Plaintiff-Appellant-Cross-Appellee, v. THE UPJOHN COMPANY, a Delaware corporation, Defendant-Appellee-Cross-Appellant.

Prior History: **[**1]** Appeal from the United States District Court for the District of Utah. (D.C. No. 87-C-955-G). D.C. Judge J. THOMAS GREENE.

Disposition: AFFIRMED.

Core Terms

Foam, district court, remittitur, damages, negligent misrepresentation, price discrimination, negligent misrepresentation claim, cause of action, commerce, prices, compensatory damages, transfers, grade, sales, punitive damages, sales records, competitors, subsidiary, discovery, products, recuse, vacate, summary judgment, award damages, new trial, prejudgment, records

LexisNexis® Headnotes

Civil Procedure > Appeals > Remands

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Rem Actions > True In Rem Actions

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

HN1[] **Appeals, Remands**

A plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted. The policy underlying this rule sounds in contract law. By accepting remittitur of damages in lieu of a new trial, the plaintiff has accepted the benefit of not having to undergo the rigors, risks, and costs of a new trial in exchange for an agreement not to challenge the damages award or otherwise appeal any matter pertaining to the issues covered by the remittitur offer. However, a party who has accepted remittitur of damages on one cause of action may still appeal issues related to other causes of action not subject to the remittitur order.

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review

Civil Procedure > Pretrial Matters > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

Civil Procedure > Remedies > Damages > Punitive Damages

HN2[] **Conferences, Pretrial Orders**

Acceptance of remittitur of damages effectively waives the right to appeal any issue pertaining to the causes of action covered by the remittitur offer. Moreover, acceptance of remittitur of either compensatory or punitive damages bars appeal of issues related to both.

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] **Appellate Review, Appealability**

The court reviews a grant of summary judgment de novo, applying the same standard as the district court.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN4[] **Regulated Practices, Price Discrimination**

Discrimination in pricing is illegal where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. *Utah Code Ann. § 13-5-3(1)(a)*.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Transportation Law > Intrastate Commerce

HN5[] **Regulated Practices, Price Discrimination**

The party alleging illegal pricing discrimination bears the burden of showing that the illegal conduct may have substantially impacted competition.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN6[] **Standards of Review, Abuse of Discretion**

The court reviews the district court's decision to exclude evidence at the summary judgment stage for abuse of discretion.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN7[] **Regulated Practices, Price Discrimination**

Under the Utah price discrimination statute, comparisons of allegedly similar discriminatory sales must be made among sales of products of like grade and quality. *Utah Code Ann. § 13-5-3(1)(a)* (1996). The plaintiff bears the burden of proving that the products in question were of like grade and quality.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN8[] **Regulated Practices, Price Discrimination**

It is well established that a defendant's transfers of product to a wholly owned subsidiary is an intra-corporate transfer and not a sale for purposes of a price discrimination claim. This is because the wholly owned subsidiary and the parent company are seen as a single economic actor.

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Elements

Contracts Law > Contract Formation > Consideration > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Remedies

HN9[] **Consideration, Enforcement of Promises**

Under Utah law, the measure of damages for negligent misrepresentation includes the amount of money necessary to compensate the plaintiff for its detrimental reliance. Such damages include the difference between the value of what plaintiff has received in the transaction and its purchase price or other value given.

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Jonathan A. Dibble, Ray, Quinney & Nebeker, Salt Lake City, Utah, (Stephen B. Nebeker and Rick B. Hoggard, Ray, Quinney & Nebeker, Salt Lake City, Utah, with him on the briefs) for Defendant-Appellee.

Judges: Before TACHA, BRORBY and EBEL, Circuit Judges.

Opinion by: EBEL

Opinion

[*1214] **EBEL**, Circuit Judge.

Plaintiff-Appellant Utah Foam Products Co. ("Utah Foam") appeals from a jury verdict and order of damages in its favor on its fraud and negligent misrepresentation claims against Defendant-Appellee, The Upjohn Company ("Upjohn"). Utah Foam claims that the district court erred in making certain evidentiary rulings, in dismissing Utah Foam's claim under the Utah Unfair Trade Practices Act, and in denying Utah Foam's request for prejudgment interest on damages awarded. Utah Foam also claims that the district court judge erred in refusing **[**2]** to recuse himself from the case. Upjohn brings a cross-appeal, claiming that the district court erred in refusing to grant judgment as a matter of law in favor of Upjohn on Utah Foam's fraud and negligent misrepresentation claims. We affirm the jury's verdict and all of the district court's rulings.

Background

This lengthy litigation grew out of a dispute about the price Upjohn charged Utah Foam for polymeric isocyanate (trade name "PAPI"), a chemical made by Upjohn and used by Utah Foam in making rigid sprayable polyurethane foam, an insulating material. From 1978 until 1986, Upjohn contracted to supply Utah Foam with PAPI 27, one of the types of isocyanate made by Upjohn. According to Utah Foam, Upjohn fraudulently and negligently misrepresented to Utah Foam that Utah Foam would always be the recipient of Upjohn's "best price" for PAPI. See *Utah Foam Products Co. v. The Upjohn Company, 930 F. Supp. 513, 516 (D. Utah 1996)*. Utah Foam discovered this alleged fraud and misrepresentation when circumstances forced Utah Foam to buy PAPI 27 from one of Utah Foam's competitors, and found that the competitor was able to offer the product to Utah Foam at a lower price **[**3]** than that charged by Upjohn.

[*1215] In July, 1987, Utah Foam filed suit against Upjohn, claiming that Upjohn violated Utah's Unfair Practices Act, breached the contract, and committed fraud and negligent misrepresentation. Utah Foam requested compensatory and punitive damages. During a drawn-out period of pretrial litigation, the district court repeatedly ruled that Upjohn's records regarding the sales of PAPI 135 would not be subject to discovery in this case, because PAPI 135 was not of like grade and quality to PAPI 27, the subject of Utah Foam's Unfair Practices claim. [1] The district court also denied Utah Foam's motions to compel production of sales records of CPR, a wholly-owned subsidiary of Upjohn, on the basis that all deliveries of PAPI from Upjohn to CPR qualified as intra-company transfers, and not sales, and thus they were irrelevant to Utah Foam's claims. On January 12, 1994, the district court granted summary judgment to Upjohn on Utah Foam's state price discrimination claim. The district court dismissed Utah Foam's breach of contract claim on October 18, 1994. On December 18, 1995, the district court ruled that Utah Foam's experts' testimony as to the calculation **[**4]** of damages would be limited to proving lost margins, based upon differences in the net price paid for PAPI, and not lost sales. On January 26, 1996, Utah

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[1] Shortly before trial, Utah Foam successfully argued to the district court that Upjohn's PAPI 135 records were relevant to its fraud claim. However, in light of Utah Foam's unjustified tardiness in making this argument for the first time so close to the scheduled start of trial, the court limited discovery of those records to those already prepared by Upjohn (years 1983-1985). The court refused to order production of PAPI 135 records from earlier years, on the grounds that so doing would cause real prejudice to Upjohn.

Foam filed a motion for recusal, on the ground that the district court judge had exhibited bias against Utah Foam and favoritism for one of Upjohn's counsel. After a hearing, the district court denied the motion.

Utah Foam's fraud and negligent misrepresentation claims went to trial before a jury on February 20, 1996. See *Utah Foam, 930 F. Supp. at 515*. **[**5]** The jury found that Upjohn had made fraudulent and negligent misrepresentations to Utah Foam regarding the price of PAPI, and awarded Utah Foam $ 313,593 in compensatory damages plus $ 5.5 million in punitive damages. See *id. at 516*. Upjohn moved under *Federal Rule of Civil Procedure 50(b)* to vacate or adjust the award of compensatory damages on Utah Foam's fraud and negligent misrepresentation claims. See *id. at 518*. The court refused to vacate the award, but reduced the amount of compensatory damages to $ 303,573.11. See *id. at 518-22, 532*. The district court also denied Upjohn's *Rule 50(b)* motion to vacate the award of punitive damages, but granted its motion for remittitur, reducing the punitive damages award to $ 607,142.22. See *id. at 523-32*. In addition, the district court denied Utah Foam's motion for prejudgment interest. See *id. at 522-23*. The district court then issued an order offering Utah Foam the option of accepting remittitur or undergoing a new trial on all issues. See Utah Foam Prods. Co. v. The Upjohn Co., No. 87-C-955G, at 5-6 (D. Utah Nov. 19, 1996) (unpublished order). **[**6]** Utah Foam accepted remittitur.

Utah Foam now appeals the district court's evidentiary rulings restricting the discovery of Upjohn's PAPI 135 sales records, prohibiting discovery of CPR's records, and limiting Utah Foam's experts' testimony as to estimated losses and damages; the district court's denial of prejudgment interest; the district court's dismissal of Utah Foam's Utah Unfair Practices claim; and the district court's denial of Utah Foam's motion to recuse. Upjohn cross-appeals the district court's refusal to grant Upjohn's *Rule 50(b)* motion to vacate the jury's finding of liability for fraud and negligent misrepresentation.

I. Acceptance of remittitur

In *Donovan v. Penn Shipping Co., Inc., 429 U.S. 648, 650, 51 L. Ed. 2d 112, 97 S. Ct. 835 (1977)* (per curiam), the Supreme Court reiterated "the longstanding rule that ***HN1***[] a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." The policy underlying this rule sounds in contract law. By accepting remittitur of damages in lieu of a new trial, the plaintiff has accepted the benefit of not having to undergo the rigors, risks, **[**7]** and costs of a new trial in exchange for an agreement **[*1216]** not to challenge the damages award or otherwise appeal any matter pertaining to the issues covered by the remittitur offer. However, a party who has accepted remittitur of damages on one cause of action may still appeal issues related to other causes of action not subject to the remittitur order. See *Denholm v. Houghton Mifflin Co., 912 F.2d 357, 359 & n.2 (9th Cir. 1990)* (listing cases); *Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 626-27 (4th Cir. 1977)*; Bruce I. McDaniel, Annotation, Plaintiff's Right to Appeal Adverse Judgment on One Cause of Action As Affected by Acceptance of Remittitur on Another Cause of Action, 41 A.L.R. Fed. 856, 857 (1979).

In *Alley v. Gubser Dev. Co., 785 F.2d 849, 856-57 (10th Cir. 1986)*, the district court gave the plaintiffs a choice between remittitur of the jury's punitive damages award or a new trial on all issues. The plaintiffs chose remittitur. When the plaintiffs attempted to appeal the district court's denial of attorney's fees and prejudgment interest on the compensatory damages, we held that they were **[**8]** barred from doing so under Donovan. See id. In short, the well-established rule is that ***HN2***[] acceptance of remittitur of damages effectively waives the right to appeal any issue pertaining to the causes of action covered by the remittitur offer. See *Denholm, 912 F.2d at 360-61* (acceptance of remittitur of compensatory damages bars appeal of pretrial orders excluding evidence relevant to proving those damages). Moreover, acceptance of remittitur of either compensatory or punitive damages bars appeal of issues related to both. See *Alley, 785 F.2d at 857* ('The district court's remittitur embraced all issues considered in the case and . . . the Alleys' acceptance of the remittited judgment waives their right to appeal these issues."); see also *Lanier v. Sallas, 777 F.2d 321, 322 (5th Cir. 1985)* (because punitive damages and compensatory damages based upon same cause of action are "inextricably intertwined," acceptance of remittitur of compensatory damages barred appeal of district court's refusal to submit issue of punitive damages to the jury).

Here, Utah Foam does not dispute that it had the choice of accepting either remittitur **[**9]** of its damages based upon its fraud and negligent misrepresentation claims or face a new trial on those claims. Nor does Utah Foam attack the district court's decision to impose remittitur, but rather seeks to appeal the court's rulings on issues directly related to Utah Foam's claims at trial, namely, the district court's denial of pre-judgment interest, its rulings limiting the scope of discovery of Upjohn's PAPI records, its ruling denying discovery of CPR's PAPI documents, and its limitation of Utah Foam's experts' testimony as to the calculation of damages. Because Utah Foam accepted remittitur of damages on its fraud and negligent misrepresentation claims and thereby avoided a complete retrial of those issues, Alley bars Utah Foam's appeal of all issues which relate to those claims. We find that Utah Foam's acceptance of remittitur waived the right to appeal these issues and decline to consider them now.

II. Utah Unfair Practices Act claim

Because the Utah Unfair Practices Act claim did not go before the jury in this case and the district court did not order a retrial of that claim in the event Utah Foam did not accept the remittitur on the fraud and negligent misrepresentation **[**10]** claims, Utah Foam did not waive the right to appeal the dismissal by summary judgment of the Unfair Practices Act claim. See *Call Carl, 554 F.2d at 626-27* (acceptance of remittitur on fraud and deceit count does not preclude appeal of directed verdict on Sherman Act count). ***HN3***[] We review a grant of summary judgment de novo, applying the same standard as the district court. See *Sports Racing Servs., Inc. v. Sports Car Club of America, Inc., 131 F.3d 874, 882 (10th Cir. 1997)*. After reviewing the record on appeal, we conclude that the district court did not err in granting Upjohn's motion for summary judgment on Utah Foam's price discrimination claim.

HN4[] Discrimination in pricing is illegal "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." *Utah Code Ann. § 13-5-3(1)(a)* (1996); see *Burt v. Woolsulate, Inc., 106 Utah 156, 146 P.2d 203, 205 (Utah 1944)* ("It is not every discrimination in price that is outlawed by the Utah Act, but only those which tend to substantially lessen competition or tend to **[*1217]** create a monopoly."). ***HN5***[] The party alleging **[**11]** illegal pricing discrimination bears the burden of showing that the illegal conduct may have substantially impacted competition. See *Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 796-97 (10th Cir. 1970)*; *Burt, 146 P.2d at 205*. Under Utah law, the term "commerce" means "intrastate commerce in the state of Utah." *Utah Code Ann. § 13-5-5* (1996). It is not clear that the commerce affected here was intrastate commerce. See *Belliston v. Texaco, Inc., 521 P.2d 379, 381-82 (Utah 1974)*. However, even if the affected commerce was intrastate, we agree with the district court that it was not substantially lessened by the defendants' conduct, and accordingly we affirm.

At summary judgment, the district court held that Utah Foam could only prove discriminatory pricing damages totaling $ 18,981 and could not prove injury to competition. Thus, the district court dismissed the claim because Utah Foam had failed to show that Upjohn's price discrimination substantially impacted competition in the Utah insulating foam market, as required by the statute. We have carefully reviewed the district court's order and the record, applying the same **[**12]** standard used by the district court. We agree with the analysis and findings of the district court. Accordingly, we affirm the district court's conclusion that the defendant was entitled to summary judgment because its acts of discriminatory pricing did not have, and were not likely to have, the effect of substantially lessening competition or a tendency to create a monopoly in any line of commerce. [2]

III. Evidentiary issues

Utah Foam asserts that the district court erred in not allowing it to discover Upjohn's PAPI 135 sales records and records of transfers of PAPI from Upjohn to CPR, and claims that if it were allowed to present this evidence, its anticompetitive damages would be shown to have had more than a de minimus effect on commerce in Utah. ***HN6***[

[2] We disagree with Utah Foam's argument that the grant of summary judgment against it on its state discriminatory pricing claim is inconsistent with the jury verdict holding Upjohn liable for fraud and negligent misrepresentation.

] We review the district court's **[**13]** decision to exclude evidence at the summary judgment stage for abuse of discretion. See *Sports Car Racing Servs., 131 F.3d at 894*.

HN7[] Under the Utah price discrimination statute, comparisons of allegedly similar discriminatory sales must be made among sales of products of "like grade and quality." *Utah Code Ann. § 13-5-3(1)(a)* (1996). The plaintiff bears the burden of proving that the products in question were of like grade and quality. See *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 1989-1 Trade Cas. (CCH) P 68,583, at 61,103 (M.D.N.C. 1988)*. [3] "In fashioning a 'like grade and quality' standard, courts have generally emphasized the presence, or absence, [of] significant physical differences between products and the effect of those differences upon consumer preferences." Id. (listing cases). Also relevant to the inquiry is whether there are "differences in the way in which a customer can or must use the product." J.P. Ludington, Annotation, What Are "Commodities" and "Commodities of Like Grade and Quality," within *Provision of Robinson-Patman Act Prohibiting Price Discrimination Between Different Purchasers of Commodities of Like Grade and Quality- Federal Cases, 16 L. Ed. 2d 1097, 1101 (1967)*. **[**14]** Thus, "bona fide physical differences affecting consumer use or marketability should be sufficient to cause products not to be of like grade and quality." ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments 444-45 (4th ed. 1997).

Although Utah Foam asserts that PAPI 27 and PAPI 135 are very similar in structure and may be used interchangeably, it is undisputed that PAPI 27 and PAPI 135 differ, mainly in terms of viscosity and reactivity, particularly in colder situations. **[**15]** As a result, some consumers prefer one over the other; **[*1218]** Utah Foam's own president admitted in his affidavit and during depositions that the company had a clear preference for PAPI 27 over PAPI 135 because of PAPI 27's superior performance qualities at high altitudes. Thus, the district court did not err in holding that, for the purposes of Utah Foam's price discrimination claim, PAPI 135 was not a product of "like grade and quality" to PAPI 27 and in refusing to order discovery of Upjohn's PAPI 135 sales records for the purposes of Utah Foam's price discrimination claim.

Utah Foam also argues that the court erred in not allowing it to discover CPR's PAPI records. According to Utah Foam, CPR, a producer of foam insulation systems, was both a competitor of Utah Foam in the Utah market and an economic entity independent from Upjohn. Because the district court held CPR to be economically indivisible from Upjohn, and because there was no evidence offered that Upjohn used CPR to sell raw PAPI 27 to Utah Foam's competitors at lower prices than those available to Utah Foam, the court held that Upjohn's transfers of PAPI to CPR were not within the purview of the Utah price discrimination **[**16]** statute.

HN8[] It is well established that a defendant's transfers of product to a wholly owned subsidiary is an intra-corporate transfer and not a "sale" for purposes of a price discrimination claim. See *City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc., 838 F.2d 268, 277-79 (8th Cir. 1988)*; *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214, 221 (6th Cir. 1985)*; *Security Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962, 966 (5th Cir. 1979)*. This is because the wholly owned subsidiary and the parent company are seen as a single economic actor. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 770-71, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* (In the context of Section 1 of the Sherman Act, "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal 'agreement,' the subsidiary acts **[**17]** for the benefit of the parent, its sole shareholder.")

Utah Foam claims that CPR was in fact an "independent subsidiary" of Upjohn, and therefore transfers of PAPI 27 from Upjohn to CPR should be treated as "sales" under the price discrimination statute. Utah Foam points to the

[3] Because we find no controlling Utah law construing the phrase "like grade and quality," we look to federal law for guidance. See *Belliston v. Texaco, Inc., 521 P.2d 379, 380 (Utah 1974)* ("Except for the jurisdictional requirements, the language of Section 3(a) of the Unfair Practices Act is substantially similar to the provisions of Section 13(a) of the Robinson-Patman Act."); cf. *Evans v. State, 963 P.2d 177, 1998 Utah LEXIS 37, 1998 WL 327681*, at *3 (Utah 1998) (citing Utah Code Ann. § 76-10-926).

following factors, all based upon the testimony of Upjohn's Keith Edmonson, Vice President and General Manager of Upjohn's Chemical Division, as evidence that CPR was sufficiently independent from Upjohn so as to render the two separate economic entities:

> (1) The title of goods passed to CPR when the product was shipped; (2) CPR recommended prices of the PAPI and systems it sold, which prices were never overruled by Upjohn; (3) Upjohn's divisions, like Polymer and CPR, were allowed to set their own prices; (4) CPR had its own payroll department and personnel department; (5) CPR made decisions as to whom and to where it would sell its products; (6) CPR could reject the product it received from Upjohn based on its quality; and (7) CPR had its own accounting department and separate checking accounts.

(See Aplt. Br. at 26 (record citations omitted).) None of this evidence tends to show that **[**18]** CPR was anything but an individual corporate "horse" pulling together with its sister divisions for the benefit of their common "driver," namely, Upjohn. See *Copperweld, 467 U.S. at 771*. For its part, Upjohn points to evidence that all of CPR's essential activities were overseen by Mr. Edmondson, who wielded final executive decision-making and accounting power over CPR. Simply because Upjohn granted its CPR Division some measure of free reign over its activities does not diminish the fact that the evidence shows that CPR operated solely for the benefit and under the ultimate control of Upjohn. We conclude that the district court did not abuse its discretion in holding that all transfers of PAPI 27 from Upjohn's Chemicals Division to CPR were intra-company transfers and not "sales" under the Utah price discrimination statute.

In the alternative, Utah Foam claims that even if Upjohn and CPR were a **[*1219]** single economic entity, we should still find CPR's sales records to be discoverable in order to determine whether CPR sold PAPI 27 to Utah Foam's competitors, in which case CPR's sales could be attributed to its parent, Upjohn. However, the record shows that **[**19]** CPR sold complete foam spray systems, and not raw PAPI 27. Therefore, the district court did not abuse its discretion in deeming CPR's sales records irrelevant to this lawsuit.

IV. Recusal

Regarding recusal, Utah Foam merely argues that if we remand the case we should send it back to a different judge on the ground that Judge Greene erred in refusing Utah Foam's request that he recuse himself. Because we have identified no reason for remanding this case, we consider this argument moot. [4]

V. Upjohn's Cross-Appeal

Upjohn appeals the district court's refusal to vacate the jury verdict finding it liable to Utah Foam for damages caused by its negligent misrepresentation and fraud. We examine the negligent misrepresentation claim first.

A. Negligent Misrepresentation

Upjohn claims that under the negligent misrepresentation theory of liability Utah Foam can only recover for the difference **[**20]** between the price it paid for the product and the fair market value of the product. Upjohn then asserts that because Utah Foam did not and cannot prove the fair market value of PAPI during the times in question, it must lose on this claim as a matter of law. We disagree.

Here, Upjohn does not dispute that the elements of negligent misrepresentation were proved at trial. Instead, Upjohn argues that the *damages* proved by Utah Foam are inappropriate for this claim, namely, that Utah Foam only proved "benefit of the bargain" loss as opposed to pecuniary loss based on the difference between the price it paid for PAPI and the fair market price.

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[4] Even if we were to treat this claim as an independent argument for reversal, we would find no error.

HN9[] Under Utah law, the measure of damages for negligent misrepresentation includes the amount of money necessary to compensate the plaintiff for its detrimental reliance. See Forsberg v. Burningham & Kimball, 892 P.2d 23, 27 (Utah Ct. App. 1995). Such damages include "'the difference between the value of what [plaintiff] has received in the transaction and its purchase price or other value given.'" Id. (quoting Restatement (Second) of Torts § 552(B)(1)(a) (1976)).

Here, the district court did just that. It held that the **[**21]** "market price" for this case was not the price of PAPI on the open market but rather the price paid by Utah Foam's competitors. See Utah Foam, 930 F. Supp. at 522. This approach to calculating the difference between the value Utah Foam thought it was getting and the actual value of the PAPI comports with the law in Utah. Thus, we affirm the jury verdict against Upjohn for negligent misrepresentation.

B. Fraud

At trial, the jury found Utah Foam's actual damages caused by Upjohn's negligent misrepresentation and fraud to be identical: $ 313,593. Utah Foam was awarded this single amount, minus post-trial reductions by the district court. Because on appeal Upjohn does not challenge the propriety of the negligent misrepresentation verdict in Utah Foam's favor (other than the damages calculation), because the jury found Utah Foam's damages from the two causes of actions to be singular, and because we affirm the negligent misrepresentation damages award, we need not address Upjohn's argument that the district court erred in refusing to grant its motion to vacate the jury verdict as to Utah Foam's fraud claim.

Conclusion

For the reasons stated above, the **[**22]** judgment below is AFFIRMED.

End of Document

Alba v. Marietta Mem'l Hosp.

United States District Court for the Southern District of Ohio, Eastern Division

September 8, 1998, Decided ; September 10, 1998, Filed

Case No. 94CV00524

Reporter

184 F.R.D. 280 *; 1998 U.S. Dist. LEXIS 14349 **

JOSE C. ALBA, M.D., Plaintiff, vs. MARIETTA MEMORIAL HOSPITAL, et al., Defendants.

Disposition: **[**1]** Defendants' motions for summary judgment GRANTED as to the antitrust claim. Court declined to exercise its pendent jurisdiction over the remaining state claims, dismissed those claims, and therefore DISMISSED this matter in its entirety.

Core Terms

privileges, surgical, recommended, restrictions, executive committee, antitrust, medical staff, conspiracy, antitrust claim, summary judgment, conspire, staff, appellate review, due diligence, alleges, cases, surgery, personal stake, peer review, suspected, by-laws, fraudulent concealment, peer review process, general surgeon, Sherman Act, intracorporate, Defendants', wrongdoing, reasons, summary judgment motion

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Summary Judgment, Opposing Materials**

Summary judgment is appropriately entered for the moving party as a matter of law when all the papers before a trial court show that there are no genuine issues of material fact in light of the substantive law governing the case. *Fed. R. Civ. P. 56(c)*. The litigant seeking summary disposition of a case bears the initial burden of demonstrating, through affidavits or otherwise, the absence of genuine factual issues If the moving party meets its burden, the non-moving party then has the obligation to produce probative evidence supporting its view that a dispute exists. On summary judgment, a plaintiff's evidence is to be believed and all reasonable inferences must be drawn in his favor. The party opposing summary judgment, however, must do more than simply show that there is some metaphysical doubt as to the material facts, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] **Summary Judgment, Burdens of Proof**

In the context of antitrust litigation the range of inferences that may be drawn from ambiguous evidence is limited; the non-moving party must set forth facts that tend to preclude an inference of permissible conduct. The court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN3[] **Sherman Act, Claims**

Section 1 of the Sherman Act states: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states is declared to be illegal. *15 U.S.C.S. § 1*.A plaintiff claiming a *§ 1* violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities. Unilateral conduct on the part of a single person or enterprise, even if such conduct unreasonably restrains trade, falls outside the purview of this provision in the ***antitrust law***. An agreement between a parent corporation and its wholly-owned subsidiary or its agents is not a concerted action for purposes of the Act. This requirement is known as the "intracorporate immunity" doctrine, also commonly referred to as the "intracorporate conspiracy" doctrine, because unilateral actions of a single enterprise are immune from liability under *§ 1* of the Act. The traditional rule under this doctrine is that two or more individual officers, directors or agents within a corporation, acting on behalf of that corporation, are considered incapable of conspiring with each other or with their corporation, for *§ 1* purposes.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN4[] **Tolling of Statute of Limitations, Fraud**

Plaintiff must prove three elements to justify his claim that fraudulent concealment tolls the statute of limitations: (1) defendant concealed the conduct that constituted the cause of action; (2) plaintiff failed to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff used due diligence until discovery.

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] **Statute of Limitations, Time Limitations**

Due diligence must be exercised once suspicions of wrongdoing do or reasonably should arise.

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For GREGORY B. KRIVCHENIA, SR., M.D., defendant: George Michael Romanello, Zeiger & Carpenter - 2, Columbus, OH.

Judges: ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE. Magistrate Judge King.

Opinion by: ALGENON L. MARBLEY

Opinion

[*282] OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court on both of Defendants' Motions for Summary Judgment (docs. 90, 91). Plaintiff, Dr. Joseph C. Alba, M.D., alleges that Defendants, Dr. Gregory B. Krivchenia, Sr., M.D., and Marietta Memorial Hospital, violated *Section 1* of the Sherman Act, *15 U.S.C. § 1*, in restricting Plaintiff's surgical privileges through the formal peer review process. In addition, Plaintiff **[**2]** has brought eight state law claims against Defendants which arise out of the same alleged wrongful conduct. Oral argument on the Motions was held on February 20, 1998. The Plaintiff was subsequently granted leave to file surreply and to supplement the record for summary judgment purposes (doc. 146), the Defendants responded (doc. 147), and the Motions are again now ripe. This Court issued an earlier Interim Order on May 7, 1998, and now issues its Final Opinion and Order in this matter.

II. BACKGROUND

A. General Overview

Plaintiff, Dr. Jose C. Alba, M.D., ("Alba"), first began working at Defendant, Marietta Memorial Hospital ("MMH"), in Marietta, Ohio in 1972. He was granted full surgical privileges in 1973. He practiced exclusively at MMH as a general surgeon. Due to a surgical complication in 1976, however, Alba's surgical privileges were temporarily restricted for about one year. Again in 1983, Alba's surgical privileges were temporarily restricted. The temporary nature of this second restriction later became contingent upon Alba becoming Board certified in general surgery.

The Board of Trustees' decision to impose temporary restrictions on Alba's surgical privileges **[**3]** until he became Board certified was the ultimate result of the peer review process at MMH. This process involved several committees of doctors reviewing various complications that Alba had had in his surgical practice. Dr. Gregory B. Krivchenia, Sr., M.D. ("Krivchenia") a Board Certified orthopaedic surgeon and chairman of the medical staff Credential Committee at that time, became aware of these complications and was instrumental in this process. Alba had an initial hearing regarding the restriction of his privileges and an appellate review hearing. In addition, Alba was represented by counsel in preparation for and at the appellate review hearing in 1984.

Nine years later, in 1993, Alba was allegedly told by a doctor at MMH, who had reviewed the available documents from the 1984 peer review process, that there were discrepancies in the record, or that a fraud had been committed against him during the process. Alba suspected an anti-competitive purpose, Plaintiff again retained counsel and filed his Complaint on June 9, 1994. He alleges that the restriction of his surgical privileges at MMH was a part of a greater anticompetitive conspiracy to oust older, generalist physicians like **[**4]** him through the fraudulent subversion of the peer review process, so that younger specialists with greater revenue-generating abilities (such as board-certified orthopedists) could be substituted in their place. He also alleges that the marketplace was injured in that it was suffering from a low supply of orthopedic services, and that Dr. Krivchenia succeeded in monopolizing the market. Finally, Alba alleges that the restrictions imposed upon him by MMH in 1983-84 essentially ruined his practice.

B. Statement of Facts

Dr. Alba first began work as a general surgeon at MMH in 1972. In May 1976, Dr. Alba's privileges at MMH were restricted and he was required to have consultation for all major surgical cases. These restrictions, however, were lifted after less than a year. In March 1983, an Ad Hoc Committee of general surgeons, appointed by the chief of surgery, recommended that Alba's privileges again be restricted. On March 28, 1983, the recommended restrictions were imposed by MMH's Executive Committee. The restrictions required that he be monitored by a qualified general surgeon for every major surgical procedure he performed. The restrictions were to be in place for approximately **[**5]** a year until reappointments to the **[*283]** Hospital's 1984 staff membership were made. Plaintiff did not contest these restrictions.

The Medical Staff Executive Committee, the Credentials Committee, and the Ad Hoc Committee of general surgeons reviewed the restrictions on Dr. Alba's privileges again in September 1983, so that a recommendation could be made with regard to Alba's 1984 surgical staff privileges. On October 4, 1983, the Ad Hoc Committee recommended that the restrictions remain in place. However, the specific restrictions recommended by the Committee at that time amounted to what Plaintiff calls "some loosening" of the restrictions imposed in March 1983. On the same date, the Credentials Committee recommended that the restrictions remain, but again, in Plaintiff's terms, its recommendation resulted in "some loosening" of the restrictions imposed in March 1983.

On November 15, 1983, at a meeting of the Executive Committee, Dr. Krivchenia allegedly falsely reported that the Credentials Committee believed Dr. Alba "lacked surgical judgment" and good surgical technique, and that he should therefore lose his major surgical privileges altogether. In addition, the executive Committee **[**6]** allegedly never told about what Plaintiff calls the more favorable reports from the Ad Hoc Committee or the Credentials Committee.

On November 28, 1983, Alba was notified of the Executive Committee's recommendations, which were largely consistent with both the Ad Hoc and Credentials Committees' recommendations -- a temporary restriction in major surgical privileges with certain exceptions. However, the Executive Committee added to its recommendation to the Board of Trustees that the restrictions not be lifted until Dr. Alba became Board certified in general surgery.

On December 7, 1983, Alba requested an appellate hearing and requested that members of the original Ad Hoc Committee be included on his Hearing Panel. His request was denied, however, and the Panel was made up of seven disinterested physicians, who were not in direct economic competition with Alba, and, therefore, were not general surgeons. Plaintiff did not object any further to the composition of the panel. The denial of Alba's request was based upon an outdated set of by-laws (1979). The by-laws actually in force at the time (adopted in September, 1982) required one member of the original Ad Hoc Committee and one member **[**7]** of the Executive Committee to serve on the appellate Hearing Panel. The 1979 by-laws, however, required that the Panel be composed of disinterested physicians. In all other respects, the procedures outlined in the 1979 version of the bylaws were equivalent to the by-laws adopted in September, 1982.

On January 3, 1984, Alba received a "bill of particulars" from MMH, which included information regarding eight surgical cases that would be in question at the Hearing Panel. On January 12, 1984, Alba's hearing before the Hearing Panel took place. Dr. Krivchenia allegedly informed the Hearing Panel that eight separate cases were reviewed by the Executive Committee, as well as the chief of surgery, and the Credentials Committee, in making their recommendations. Plaintiff alleges that this representation was false, and that only Dr. Krivchenia had reviewed the eight cases.

Dr. Krivchenia also allegedly told the Hearing Panel the Executive Committee had fully considered the recommendations of the Ad Hoc Committee and the Credentials Committee before making its recommendation to the Board of Trustees. Plaintiff alleges that this also was a false statement, since the Executive Committee was **[**8]** never told about the "more favorable" reports from the Ad Hoc Committee or the Credentials Committee.

The Chairman of the Hearing Panel, Dr. Scileppi, initiated the Hearing Panel proceedings by stating that he would express no opinion about Alba's work and would remain neutral unless he was needed to break a tie. During the deliberations by the Hearing Panel, however, Scileppi allegedly did not remain neutral. Instead, he allegedly urged the other Panel members to agree with the restrictions and "exaggerated" about Dr. Alba's deficiencies during the deliberations. In addition, Dr. Scileppi discussed cases other than the eight mentioned during the hearing.

[*284] On January 13, 1984, the Hearing Panel issued its conclusions and recommendations to the Executive Committee which stated that they were in unanimous agreement with the recommendations of the Executive Committee temporarily to limit the privileges of Dr. Alba. Plaintiff alleges that the Hearing Panel was not in unanimous agreement. The transcript of the recordings of the deliberations allegedly reveals that several Hearing Panel members thought that the restrictions recommended by the Executive Committee were too harsh. Plaintiff **[**9]** alleges that a final vote may not ever have been taken since no written record exists. On January 31, 1984, the Executive Committee informed Dr. Alba that the restricts affirmed in November 1983 would remain in place until he became Board certified.

On February 16, 1984, Alba requested an appellate review before the Board of Trustees of MMH. Between February and June 1984, Alba hired counsel to assist him in the appellate review process. In preparation, Alba and his counsel obtained a copy of the transcript of the Hearing Panel proceedings, (but not the deliberations), a copy of the By-laws dated 1979, (but not the applicable By-laws dated 1982) and, finally, a copy of the Ad Hoc Committee's October 4, 1983 recommendation. However, Plaintiff alleges that he was denied access to any minutes of the meetings at which his restrictions were discussed. The hearing before the Board of Trustees was continued at least once at Plaintiff's request so that he and his counsel could fully prepare.

On July 12, 1984, the appellate review hearing before the Appellate Review Committee of the Board of Trustees was held. Plaintiff and his counsel each had an opportunity to be heard and to protest the **[**10]** recommendation of the Executive Committee and to raise any issues of impropriety or unfairness that they believed occurred.

Indeed, it is clear from his statement, that Alba's counsel suspected wrongdoing in the imposition of these restrictions:

> . . . Subsequent to this hearing [before the Hearing Committee], which you have a transcript of, [1] **[**12]** Dr. Alba came to our firm . . . We told Dr. Alba we would take a look at it [the proceedings], because he had some serious reservations about what he contended had been done to him by, I guess, your [Medical] Executive Committee or your Credentials Committee . . .
>
> . . . What we did is we began to look for other reasons [why Dr. Alba's major surgical privileges were being restricted]. . . [2] I am certainly not here to accuse anybody of **ulterior motives** in trying to get Dr. Alba's [major] surgical privileges suspended at this hospital. What I have found, however, is the following: that when he [Alba] began practice here in January of 1973, you had lots of patients and a full hospital. Business was booming. In January of '73 until January of 1983, or maybe a little bit before, business was fine and there was (sic) **[**11]** no problems. What we have found, at least in our brief investigation of this hospital, is that elective surgery dropped drastically . . . **You have a group of doctors, and again, correct me if I am wrong, but that Board [Medical Executive Committee] consists of all doctors whose livelihood depends on this hospital, a group of doctors get together and decide someone is unfit to be a surgeon--after ten years--**and I would just say to you gentlemen tonight if he is unfit to be a surgeon in 1983, what was he in '82, in '81 and every other year when you let him do surgery. [3] Why, all of a sudden in 1983, when you don't have enough patients to fill your beds, you decide all of a sudden he is unfit to be a surgeon? 77 patients, I think were registered in the hospital, I don't know whether that was a month ago or whatever. 90% of his practice is elective surgery. He **[*285]** doesn't do that elective surgery, **someone else divvies up the pot** . . . [4]

Dr. Krivchenia presented the case against Plaintiff, and allegedly made two misrepresentations regarding: (1) the years of practice that had been selected for review by the Committees; and (2) the number of cases that had been presented to and reviewed by the Executive Committee. The Appellate Review Committee of the Board of Trustees ultimately recommended to the Board that it impose those restrictions on Plaintiff's surgical privileges that had been recommended by the other Committees. On July 18, 1984, the Board of Trustees adopted the recommendations of the Appellate Review Committee, affirming the recommended restrictions upon Alba.

After July 1984, Plaintiff felt that he had been treated unfairly and **[**13]** that he had been wronged by the imposed restrictions. He recommended to his counsel that they file a lawsuit to regain his privileges. His counsel declined, and the attorney-client relationship was severed in September 1984. In late 1984, Plaintiff applied for privileges at St. Joseph's Hospital in West Virginia, but was denied. Plaintiff then applied for and was granted primary care privileges at Selby Hospital in Marietta. Only much later, in 1986 and 1989 respectively, did he apply for and was he granted minor and then major surgical privileges at Selby. [5]

In 1985, Plaintiff asked MMH's new President to look into his restrictions and to assist him in regaining them, but he allegedly received no response. From 1989 to 1992, Plaintiff did very little to rebuild his surgical practice at Selby Hospital. In **[**14]** 1992, Plaintiff dropped the coverage to perform major operations from his malpractice insurance.

In March 1993, however, Alba applied for reappointment of his surgical privileges at MMH. Alba had not taken any efforts to date to become Board certified. In August 1993, MMH's Executive Committee appointed a three doctor

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[1] This statement alone indicates the information that was in the possession of Plaintiff's former counsel and reviewed by said counsel in preparation for the hearing before the Appellate Review Committee.

[2] Mr. Leez, before getting to this point, articulates certain reasons, such as lack of competence and concern about malpractice cases, that had been mentioned by various committees.

[3] Plaintiff's privileges were restricted for the first time in 1976.

[4] Transcript of Appellate Hearing before the Board of Trustees, July 12, 1984, pp. 2, 4, Exhibit D. (Emphasis added).

[5] Even though Alba regained major surgical privileges at Selby in 1989, he alleges that by that time, and as a result of Defendants' action, he had very few referral services and his practice suffered.

panel, including one Dr. White to review the 1983/84 file on the restriction of the surgical privileges of Dr. Alba. The three doctors allegedly found a number of "discrepancies" in the peer review process afforded Alba. Specifically and among other things, it was discovered that the October 4, 1983 Ad Hoc Committee Recommendation was allegedly never reported to the Executive Committee.

In October 1993, Dr. White allegedly told Dr. Alba of these discrepancies and that they occurred primarily due to the actions of Dr. Krivchenia. Dr. Alba's 1993 request to have his surgical privileges reinstated at MMH, however, was never acted upon by Dr. White, or the three doctor panel on which Dr. White sits. In January, 1994 Alba submitted to MMH his surgical logs from Selby and letters of recommendation, but he heard nothing from MMH. In June 1994, Plaintiff filed this lawsuit. **[**15]** And in 1995, Plaintiff retired without ever becoming Board certified.

III. ANALYSIS

A. Standard on Summary Judgment

HN1[] Summary judgment is appropriately entered for the moving party as a matter of law when all the papers before a trial court show that there are no genuine issues of material fact in light of the substantive law governing the case. *Fed.R.Civ.P. 56(c)*. The litigant seeking summary disposition of a case bears the initial burden of demonstrating, through affidavits or otherwise, the absence of genuine factual issues *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. If the moving party meets its burden, the non-moving party then has the obligation to produce probative evidence supporting its view that a dispute exists.

On summary judgment, a plaintiffs' evidence is to be believed and all reasonable inferences must be drawn in his favor. *See* *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, **[*286]** 106 S. Ct. 2505 (1986)*. The party opposing summary judgment, however, "must do more than simply show that there is some metaphysical doubt as to the material facts ..., the nonmoving party must **[**16]** come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,, 475 U.S. 574, 586-8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (quoting *Fed.R.Civ.P. 56(e)*). ***HN2***[] In the context of antitrust litigation the range of inferences that may be drawn from ambiguous evidence is limited; the non-moving party must set forth facts that tend to preclude an inference of permissible conduct. *475 U.S. at 587-88*. This Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *See* *Street v. Bradford, 886 F.2d 1472, 1479*, (6th Cir. 1990).

B. Plaintiff's antitrust claim is barred by the "intracorporate immunity" doctrine

Defendants' Motions for Summary Judgment with respect to the antitrust claim are premised upon three separate and independent bases; [6] (1) Plaintiff's claim is barred by the applicable statute of limitations, and he fails to raise an issue of fact on the issue of fraudulent concealment; (2) Plaintiff's claim is barred by the "intracorporate immunity" doctrine; **[**17]** and (3) Plaintiff's claim is barred by the doctrine of "antitrust injury." Each of these bases is an independent basis for summary judgment on Plaintiff's antitrust claim. For the following reasons, this Court grants Defendants' Motions for Summary Judgment on Plaintiff's claim for a violation of *Section 1* of the Sherman Act. [7]

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[6] The parties agree that the protections afforded by the Health Care Quality Improvement Act of 1986, codified at 42 U.S.C, § 11011, *et. seq.*, do not apply to the actions taken against Alba in 1983-84.

[7] Because this Court finds in favor of Defendants on the Motions for Summary Judgment on Plaintiffs' only federal claim -- the antitrust claim -- it need not address the parties' arguments related to Plaintiff's eight state law claims. Pursuant to the favored practice in this Circuit, this Court will decline to exercise its pendent jurisdiction over those state law claims. See *United Mine*

[18]** ***HN3***[] *Section 1* of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States … is declared to be illegal." *15 U.S.C. § 1 (1988)*. According to the statute, a plaintiff claiming a *§ 1* violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities. *See Schwartz v. Aultman Health Services Assn.,* unpublished, *1995 U.S. App. LEXIS 35549*, No. 94-3967 (6th Cir. 1995) 1995 WL 696715 (citing *Capital Imaging v. Mohawk Valley Medical Assn., 996 F.2d 537, 542 (2nd Cir. 1993)*, *cert. denied, 510 U.S. 947, 114 S. Ct. 388, 126 L. Ed. 2d 337 (1993))*. Unilateral conduct on the part of a single person or enterprise, even if such conduct unreasonably restrains trade, falls outside the purview of this provision in the ***antitrust law***. *See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. For that reason, an agreement between a parent corporation and its wholly-owned subsidiary or its agents is not a concerted action for purposes of the Act. *See Copperweld Corp. v. Independence Tube Corp., **[**19]** 467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*.

This requirement has come to be known as the "intracorporate immunity" doctrine, also commonly referred to as the "intracorporate conspiracy" doctrine, because unilateral actions of a single enterprise are immune from liability under *§ 1* of the Act. The traditional rule under this doctrine is that "two or more individual officers, directors or agents within a corporation, acting on behalf of that corporation, are considered incapable of conspiring with each other or with their corporation, for *Section 1* purposes.'" *Smith v. Northern Mich. Hospitals, Inc., 703 F.2d 942, 950 (6th Cir. 1983)* **[*287]** (quoting *Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451, 455 n.7 (9th Cir. 1979))*. *See, Copperweld, 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731*.

In *Smith v. Northern Mich. Hospitals, Inc., 703 F.2d 942, 950 (6th Cir. 1983)*, the Sixth Circuit applied this rule in the context of hospitals and physicians for the first time. Physician staff members at a hospital which merged two hospitals into one sued the hospital and a medical clinic corporation for antitrust conspiracy. Part of the plaintiffs' claim was premised **[**20]** on the theory that some doctors in the medical clinic corporation conspired on behalf of the corporation with other doctors in the corporation to exclude the plaintiffs. The district court dismissed the claim.

The Sixth Circuit affirmed the dismissal under the traditional rule stated above. In addition, the Court rejected the application of the "independent personal stakes" exception to the rule because "to apply this supposed exception for 'independent stake to the present case would be paramount to allowing the exception to subsume the rule." *Id. at 951*. The Court also stated that "There are rather substantial policy reasons for not adopting such an exception." *Id. at 950 n. 15*. While the Court recognized that other Circuits had adopted and applied this exception, it stated that "it is doubtful that we would follow the analysis in" those cases. *Id. at 951 n.17*.

The Sixth Circuit again addressed this doctrine in *Potters Medical Center v. City Hospital Ass'n, 800 F.2d 568 (6th Cir. 1986)*. Plaintiffs, a medical center and 2 clinics, sued a hospital, its attorney/Board member, and a senior member of its medical staff for antitrust conspiracy, alleging that the two individuals/agents **[**21]** conspired with the defendant hospital to, among other things, refuse to grant staff privileges to doctors at Plaintiffs' medical center and the clinics. The district court dismissed the claims.

The Sixth Circuit agreed that "as a matter of law" the two agents of the hospital "lack the capacity to conspire with" the hospital. *Id. at 573*. The rationale is that agents of a single firm share a unity of economic purpose with the firm, so that agreements among them do not impermissibly coalesce economic power that was previously directed toward divergent goals. Plaintiff/appellants argued for the "independent personal stakes" exception, but the Court did not recognize the exception:

> Although several courts have recognized the 'independent personal stakes' exception to the rule that officers and agents lack capacity to conspire with their corporation, . . . this circuit has never endorsed the exception. In fact, this court has noted the 'rather substantial policy reasons for not adopting such an exception.' Even if we were to recognize the exception, appellants argument would still fail.

Workers of America v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966) ("pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."); *See also Gaff v. FDIC, 814 F.2d 311, 319 (6th Cir. 1987)* (recognizing a general rule disfavoring a district court's exercise of pendent jurisdiction when federal issues are dismissed before trial).

Id. at 573. The Court thus affirmed.

The Court again addressed the rule and **[**22]** the exception in *Nurse Midwifery Associates v. Hibbett, 918 F.2d 605 (6th Cir. 1990)*, where two nurse midwives and an obstetrician sued three hospitals, and certain members of the medical staff of two of these hospitals, among others, under the Sherman Act. The plaintiffs alleged that the medical staff had conspired with the hospitals to bar them from obtaining hospital privileges. The district court granted summary judgment, relying on *Potters and Smith*, and declined to adopt the exception to the doctrine.

On appeal, the Sixth Circuit discussed the "intracorporate conspiracy doctrine" in general at length. It discussed how some courts have held that the doctrine does *not* prevent a finding of a conspiracy between a hospital and its medical staff or among the members of the medical staff, because the relationships are different than corporation/agent relationships or agent/agent ones. *See* *Bolt v. Halifax Hosp. Med. Center, 851 F.2d 1273, 1280* (11th Cir.), vacated, *861 F.2d 1233 (11th Cir. 1988)* *(en banc),*reinstated in part, *874 F.2d 755 (11th Cir. 1989)* *(en banc);* *Weiss v. York Hosp., 745 F.2d 786, 813-17 (3d Cir. 1984)*.

However, the *Weiss* court's holding **[**23]** also provided that the doctrine did prevent a finding of conspiracy in the context of peer review proceedings regarding staff hospital privileges. *Id. at 816-17*. The *Weiss* court held that the members of the medical staff were capable of conspiring amongst themselves **[*288]** because they were not really officers of the hospital when practicing medicine in their individual capacities in competition with each other. *Id. at 814-17*. Unlike *Bolt*, however, the *Weiss* court held that the members of the medical staff were acting only as officers of the hospital when they made staff privilege decision for the hospital, and could not conspire with the hospital because the medical staff was not in competition with the hospital. *Id. at 816-17*.

The Sixth Circuit in *Nurse Midwifery* agreed with the *Weiss* court's solomonic decision, and held that the doctrine "prevents a finding of conspiracy between a hospital and its medical staff but, in certain situations, does not preclude a conspiracy among individual members of the medical staff." *918 F.2d at 614*. The Court reasoned:

> there are no strong antitrust concerns that would warrant a departure from traditional concepts **[**24]** of agency since the hospital and the medical staff are not competitors. The fact that the medical staff may have acted with anticompetitive motives is not sufficient to warrant a finding that a hospital's decision to accept the staff recommendation is an antitrust conspiracy.

Id. Thus, the Court affirmed the grant of summary judgment.

While the Sixth Circuit in *Nurse Midwifery* noted that some courts had recognized the "independent personal stakes" exception, it described that "this court, while not specifically rejecting the . . . exception," had noted the substantial policy reasons for not adopting the exception. *Id. at 613*. The Court then rejected the plaintiff's arguments in that case for adopting the exception:

> We are not inclined at this point to follow several other circuits in adopting this exception, in view of substantial policy reasons for not doing so. . . We are not convinced that an agent acting with anticompetitive motives due to some independent personal stakes raises sufficient antitrust concerns to warrant abandoning the traditional rule that a principal cannot conspire with one of its agents See also P. Areeda, ***Antitrust Law*** P1471 (1986).

[25]** *Id. at 615*.

The Sixth Circuit again affirmed this holding in this context in *Muzquiz, Jr. v. W.A. Foote Memorial Hospital, 70 F.3d 422 (6th Cir. 1995)*. The plaintiff's doctor in *Muzquiz* sued his hospital for among other things, an antitrust violation when it, through its Board, denied his request for privileges. The Sixth Circuit affirmed the dismissal of the antitrust claim on the basis that "this court's holding in *Nurse Midwifery* precludes an antitrust claim against the hospital in this case." *Id. at 429-30*.

Plaintiff spent a great deal of effort in his briefs and at oral argument presenting arguments why the intracorporate immunity doctrine does not bar his claim in this case. In addition, Plaintiff, spent similar efforts in explaining why, if the doctrine does apply, the independent personal stakes exception should be adopted by this Court and applied to his antitrust claim. This Court is not persuaded however, that the Sixth Circuit's ruling that a hospital cannot conspire with its medical staff in peer review proceedings can be varied from in this matter. As the Sixth Circuit has stated, "no strong antitrust concerns" in the hospital staff privileges **[**26]** context warrant a departure from the traditional rule, and the independent personal stakes theory fails to raise "sufficient antitrust concerns" to warrant its adoption in this Circuit. *Nurse Midwifery at 614-15*.

Therefore, as in *Muzquiz*, plaintiff's antitrust claim against the hospital and its staff (Dr. Krivchenia) in this context -- hospital staff privilege decisions made through the peer review process -- is precluded, as a matter of law, by the Sixth Circuit's holding in *Nurse Midwifery*. Furthermore, this Court is bound by the Sixth Circuit's determination in these cases not to adopt the independent personal stakes exception to this doctrine in the case *sub judice.* Thus, Plaintiffs' claim under *Section 1* of the Sherman Act must be dismissed.

Since this finding is a sufficient basis to support summary judgment on the antitrust claim, this Court need not address Defendants' two other separate and independent bases for summary judgment. However, because this Court also finds for Defendants on **[*289]** their statute of limitations argument, that basis will be addressed.

C. Plaintiff fails to raise a genuine dispute of material fact with regard to fraudulent concealment,* [**27] *and therefore, his antitrust claim is time-barred.

Defendants also argue that Plaintiff's antitrust claim is time-barred because the statute of limitations on a private antitrust action is four years. *See* *15 U.S.C. § 15*. The restriction of Plaintiff's major surgical privileges at MMH was finalized on July 18, 1984. He did not file suit until June 1994, almost ten years later. Plaintiff argues that the statute was tolled until 1993 due to the acts of fraudulent concealment perpetrated by Defendant. Defendants, however, argue that Plaintiff had sufficient information to alert him to the "possibility of wrongdoing" in 1984, and that he failed to exercise due diligence to discover any alleged wrongdoing after that date.

In this Circuit, ***HN4***[] Plaintiff must prove three elements to justify his claim that fraudulent concealment tolls the statute:

> (1) Defendant concealed the conduct that constituted the cause of action;
>
> (2) Plaintiff failed to discover the operative facts that are the basis of his cause of action within the limitations period;
>
> and (3) Plaintiff used due diligence until discovery.

Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, ***[**28]*** *394 (6th Cir. 1975)*, Plaintiff's failure to raise an issue of fact as to any one of these three elements is fatal to his claim.

The focus is properly weighted on the second two factors of the *Dayco* Test as explained by Judge Speigel in *Ohio v. Louis Trauth Dairy, Inc., 856 F. Supp. 1229, 1238 (S.D. Ohio 1994)*:

> "the bedrock threshold for granting the equitable tolling of the statute of limitations for fraudulent concealment must be whether a Plaintiff knew or through due diligence should have known the existence of his claim."

Whether or not Plaintiff adduced sufficient evidence to raise a genuine dispute of material fact related to the first two factors necessary for a fraudulent concealment analysis need not be addressed because Plaintiff's evidence is insufficient to survive summary judgment on the third factor -- whether he exercised due diligence from the date of the alleged wrongdoing until the date of its alleged discovery.

Plaintiff first argues that his duty of due diligence did not arise until 1993, when he received notice of the alleged wrongdoing. However, ***HN5***[] due diligence must be exercised once suspicions of wrongdoing do or reasonably should arise. **[**29]** *Dayco 523 F.2d at 394* ("any fact that should excite suspicion is the same as actual knowledge of his entire claim.") It is undisputed that Plaintiff suspected wrongdoing in the restriction of his surgical privileges by the date of the hearing before the Appellate Review Committee of the Board of Trustees, July 12, 1984. His counsel's statement to that Committee on that day reveals that he and Plaintiff suspected an economic motive to the restriction. In addition, Plaintiff admits that he thereafter requested that his counsel file suit because he felt as though he had been wronged and treated unfairly. The fact that his attorney declined to file suit did not prevent Plaintiff from seeking to retain other counsel to handle his complaints. Therefore, Plaintiff's duty to exercise due diligence in discovering the alleged wrongdoing arose after July 12, 1984, when it is undisputed that he and his counsel suspected wrongdoing.

Plaintiff next argues that any attempt to uncover the suspected wrongdoing after July 1984 would have been futile since the information necessary to discover what he believed to be the truth was in the complete control of Defendants. Furthermore, Plaintiff argues **[**30]** that had he filed suit in 1984, he would not have been likely to uncover antitrust conspiracy because he would not have been granted access to these secret peer review documents. Plaintiff relies on the fact that no court in this Circuit had addressed the issue of the discoverability of peer review documents until 1991 in the case of *LeMasters v. The Christ Hospital, 791 F. Supp. 188* ***[*290]*** *(S.D. Ohio 1991)* (peer review information sought by physician not privileged).

However, even though the *LeMasters* case was a case of first impression in this Circuit, the *LeMasters* court cited to and relied upon other circuit and district court cases, which predated 1984, and which affirmed the discoverability of peer review documents. The District Court for the Eastern District of Michigan granted a plaintiff's motion to compel production of peer review report, in spite of a Michigan statute purporting to establish absolutely privilege, in *Dorsten v. LaPeer County General Hospital, 88 F.R.D. 583 (E.D. Mich. 1980)*. *See, also Memorial Hospital vs. McHenry County v. Shadur, 664 F.2d 1058 (7th Cir. 1981)* (also cited in *LeMasters* and holding that privilege against discovery did not **[**31]** extend to hospital in federal antitrust action given the public interest in the private enforcement of federal antitrust laws). Thus, had Plaintiff and his counsel sued in 1984 for the alleged wrongdoing in restricting his surgical privileges, it is reasonable to assume that he would have uncovered the evidence which he has today uncovered as a result of suing in 1994. See *Dayco, 523 F.2d at 394* ("the means of knowledge are the same thing as knowledge itself.") (citing *Wood v. Carpenter, 101 U.S. 135, 143, 25 L. Ed. 807 (1979))*.

Plaintiff's only excuse for sitting idly by from 1985 to 1993 is that he was unaware of the existence of a conspiracy or any fraudulent conduct However, he believed that he was wronged and treated unfairly, and his lawyer suspected at least an anticompetitive if not antitrust purpose, all in 1984. Due diligence require more than sitting idly by until the facts are someday revealed to you. *See Campbell v. Upjohn Co., 676 F.2d 1122, 1128 (6th Cir. 1982)*. Whatever it requires, it is clear that due diligence requires something more than what Plaintiff did in this case. Therefore, Plaintiff's claim for an antitrust violation under *Section 1* of the Sherman **[**32]** Act is timebarred.

IV. CONCLUSION

Defendants' Motions for Summary Judgment are hereby **GRANTED** as to the antitrust claim. This Court declines to exercise its pendent jurisdiction over the remaining state law claims, dismisses those claims, and, therefore, **DISMISSES** this matter in its entirety.

IT IS SO ORDERED.

ALGENON L. MARBLEY

UNITED STATES DISTRICT JUDGE

DATED: September 8, 1998

JUDGMENT IN A CIVIL CASE - Date: September 10, 1998

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motions for summary judgment are hereby GRANTED as to the antitrust claim. This Court declines to exercise its pendent jurisdiction over the remaining state claims, dismisses those claims, and therefore DISMISSES this matter in its entirety.

Date: September 10, 1998

Rossi v. Standard Roofing

United States Court of Appeals for the Third Circuit

November 6, 1997, Argued ; September 9, 1998, Filed

NO. 97-5185

Reporter

156 F.3d 452 *; 1998 U.S. App. LEXIS 21911 **; 1998-2 Trade Cas. (CCH) P72,274

JOSEPH ROSSI; ROSSI FLORENCE, CORP.; ROSSI ROOFING, INC., Appellants v. STANDARD ROOFING, INC.; ARZEE ROOFING SUPPLY CORP.; GAF CORPORATION; ALLIED ROOFING, INC.; SERVISTAR CORP.; ROBERT HIGGINSON; HARDWARE WHOLESALERS, INC.; WILLIAM HIGGINSON; CERTAINTEED CORP.; WOLVERINE CORP.; NAILITE CORP.; ESTATE OF ROBERT HIGGINSON; AL ROTH; CARY ROTH; JOSEPH LICCIARDELLO; WOOD FIBRE INDUSTRIES, INC.

Prior History: **[**1]** On Appeal From the United States District Court For the District of New Jersey. (D.C. Civ. No. 92-cv-05377).

Disposition: Affirmed in part, reversed in part and remanded.

Core Terms

Roofing, distributors, conspiracy, manufacturers, competitors, antitrust, boycott, products, northern, prices, concerted action, customers, motive, siding, cooperative, group boycott, summary judgment, supplier, district court, causation, conspire, supplies, sales, circumstantial evidence, defendants', horizontal, adduced, complaints, alleges, damages

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN2[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To determine whether a restraint is unreasonable, courts apply one of two modes of analysis, depending upon the nature of the concerted action at issue. Agreements are either analyzed through a case-by-case application of the so-called rule of reason, whereby the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition or the court applies the per se standard, which dispenses with the need for case-by-case analysis. Under the per se standard, conduct that is manifestly anticompetitive or would always or almost always tend to restrict competition is conclusively presumed to unreasonably restrain competition without elaborate inquiry as to the precise harm it has caused or the business excuse for its use.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN3[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A conspiracy is horizontal in nature when a number of competitor firms agree with each other and at least one of their common suppliers or manufacturers to eliminate their price-cutting competition by cutting his access to supplies.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN4[] **Sherman Act, Claims**

To establish a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, plaintiffs must prove: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Evidence > Burdens of Proof > General Overview

Evidence > Inferences & Presumptions > General Overview

HN5[] **Evidence, Burdens of Proof**

When the nonmoving party will bear the burden of proof at trial, that party must adduce evidence sufficient to establish the existence of every element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN6[] Summary Judgment, Entitlement as Matter of Law

In evaluating the sufficiency of the evidence, facts and inferences must be viewed in the light most favorable to the party opposing summary judgment.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > Statements During Conspiracy

Evidence > ... > Exemptions > Statements by Coconspirators > Statements Furthering Conspiracy

Evidence > ... > Hearsay > Rule Components > Statements

HN7[] Inchoate Crimes, Conspiracy

Under *Fed. R. Evid. 801(d)(2)(E)*, a statement by a coconspirator of a party during the course and in furtherance of the conspiracy is not inadmissible hearsay as to that party. Under our jurisprudence, four requirements must be met before a statement can be admitted under this exception. It must appear: (1) that a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN8[] Conduct Evidence, Prior Acts, Crimes & Wrongs

The prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN9[] Private Actions, Remedies

To recover damages, an antitrust plaintiff must prove causation, described in our jurisprudence as fact of damage or injury. It is not necessary to show with total certainty the amount of damages sustained, just that the antitrust violation caused the antitrust injury suffered by the plaintiff.

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Judges: Before: BECKER, ROTH, Circuit Judges and DIAMOND, District Judge. [*]

Opinion by: BECKER

Opinion

[*455] OPINION OF THE COURT

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1. *Section 1* of the Sherman Antitrust Act --

[*] Honorable Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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[*456] BECKER, Chief Judge. *

[4]** This appeal from the grant of summary judgment in favor of antitrust defendants presents a familiar pattern. A dealer irritates his competitors and their principal supplier through his aggressive price discounting practices. The other dealers complain to the supplier, who, to placate the aggrieved dealers, agrees not to sell any product to the dealer. The "boycotted" dealer then brings a Sherman Act suit, *15 U.S.C. § 1 et seq.*, in federal court. The alleged conspiracy involves a number of the plaintiff's competitors, and the refusal to deal is said to have become a group boycott, which can be a horizontal antitrust violation with per se antitrust implications; the supplier, notwithstanding its vertical relation to the plaintiff, is said to have become a co-conspirator.

The present case arose out of the rough and tumble roofing and siding materials distribution business in northern New Jersey, where several favored roofing and siding distributors were concerned that the entrance of a new price cutting competitor could destabilize the market and substantially cut into their profit margins. The principal players in this drama are plaintiffs Joseph Rossi, **[**5]** and his two successive roofing and siding distribution businesses, Rossi Florence Corp. ("Rossi Florence"), and Rossi Roofing, Inc. ("Rossi Roofing"); defendants Standard Roofing, Inc., ("Standard") and Arzee Supply Corporation ("Arzee"), two of Rossi's chief competitors, and several of their key officers; and defendant GAF Corporation ("GAF"), the manufacturer that supplied the most important product in the market. Minor roles were played by defendants Wood Fiber Industries, Inc. ("Wood Fiber"), another roofing and siding manufacturer, and Servistar Corp. ("Servistar"), a national purchasing cooperative and reseller of roofing and siding products.

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* Honorable Edward R. Becker, United States Circuit Judge for the Third Circuit, assumed Chief Judge status on February 1, 1998.

Following discovery, the district court granted summary judgment for all defendants on the ground that plaintiffs had failed to adduce sufficient evidence to meet the demanding standard of proof in the antitrust context established by the Supreme Court's jurisprudence. The court also relied on plaintiffs' alleged failure to demonstrate causation and damages. While we agree with the district court that Rossi cannot survive summary judgment as to Servistar and Wood Fiber, we believe that the record is sufficient to enable Rossi to survive **[**6]** summary judgment on the antitrust claims as to Standard, Arzee, the individual defendants associated with those firms, and GAF.

The Supreme Court's jurisprudence in the area of concerted refusals to deal teaches that not every situation in which a distributor is cut off at the behest of his competitors constitutes a group boycott entitled to per se treatment. Otherwise, legitimate efforts by manufacturers to impose reasonable rules limiting intra-brand competition would be outlawed and the beneficial effects such actions have on inter-brand competition would be lost. Moreover, the distinction between vertical and horizontal restraints would blur. These concerns, however, are not implicated here, in view of both the price-related orientation of the alleged offending conduct of the key defendants and the sheer scope and draconian modus operandi of the alleged conspiracy.

The jurisprudence also renders it difficult for an antitrust plaintiff to prove that the manufacturer and distributors conspired, typically because it is difficult for the plaintiff to demonstrate that what the manufacturer or supplier did was inconsistent with independent action or that the claimed conspiracy **[**7]** makes economic sense. In this case, however, at least at the summary judgment stage, that burden is surmounted by the presence of certain direct evidence of conspiracy as well as: (1) evidence that GAF acted against its consistent policy (and hence ostensibly against its own interest) in refusing to sell (and seeing to it that others did not sell) GAF products to Rossi; (2) evidence of pretext in connection with GAF 's efforts to explain away the foregoing; (3) evidence that **[*457]** the major suppliers had sufficient leverage over GAF to induce it to so act; and (4) the quite graphic and extensive nature of the statements and actions of various defendants directed towards eliminating Rossi as a price-cutting competitor who passed secret rebates onto his customers and thereby threatened to de-stabilize the market. We also discern genuine issues of material fact on causation and damages, and this too precludes summary judgment on the antitrust claims against the key defendants.

Although the district court's order granting summary judgment on the antitrust claims regarding GAF, Standard, Arzee, and their corporate officers must be reversed, it must be affirmed as to Servistar **[**8]** and Wood Fiber, since Rossi has failed to overcome his burden of showing that either Servistar's or Wood Fiber's actions tended to exclude the possibility of independent action on their part. More specifically, Rossi has failed to put forth any evidence of Servistar's motive to conspire; as we shall explain, Servistar's relationship to GAF was far different from that of the distributor defendants. Rossi has also failed to show that the other defendants had any leverage over Servistar with which they could have coerced it to join the conspiracy. With respect to Wood Fiber, the only evidence Rossi has been able to adduce is that Wood Fiber may, on one or two occasions, have responded to pressure and threats from Standard and Arzee by not selling to Rossi, and hence this record is insufficient to satisfy the standards for proving concerted action as delineated by the Supreme Court.

Rossi also pressed a tortious interference claim under New Jersey state law. The district court granted summary judgment for all defendants on this claim without any discussion. This aspect of the judgment must be set aside because it violates our rule requiring that district courts accompany grants of summary **[**9]** judgment with an explanation sufficient to permit the parties and this court to understand the legal basis for the court's order. See *Vadino v. A. Valey Eng'rs, 903 F.2d 253, 257-60 (3d Cir. 1990)*.

I. FACTS AND PROCEDURAL HISTORY

The following background facts, which describe the basic framework and background within which this case arises, are set forth in the light most favorable to the non-moving party as is required when considering a motion for summary judgment. The remainder of Rossi's evidence, most of which deals specifically with the existence vel non of concerted action by the defendants, will be detailed in § II.B.2, infra, after we have explained the appropriate legal standards.

A. The Parties

The plaintiffs, in addition to Joseph Rossi, are Rossi Florence and Rossi Roofing. [1] Rossi has been in the roofing and siding distribution business in northern New Jersey since 1972. Rossi Florence and Rossi Roofing were roofing and siding distribution companies formed by Rossi at the end of 1988 and the beginning of 1989. Both are now out of business. This suit was brought against a number of Rossi's competitors (as well as several individuals **[**10]** associated with them), several roofing and siding manufacturers, and one national purchasing cooperative. Several of the original defendants, Allied Roofing, Inc. ("Allied"), Nailite Corp. ("Nailite"), Certainteed Corp. ("Certainteed"), and Wolverine Technologies Corp. ("Wolverine") have settled with Rossi and were dismissed from the case. The remaining defendants are: Standard, Arzee, GAF, Wood Fiber, Servistar, the estate of Robert Higginson (hereinafter "Robert Higginson"), William **[*458]** Higginson, Joseph Licciardello, Alvin Roth, and Cary Roth.

[11]** Standard and Arzee are distributors of roofing and siding products in northern New Jersey. Like Rossi Roofing, they purchase products from manufacturers and resell them to contractors and applicators in large volume. Standard is headquartered in Tinton Falls, New Jersey and has seven branch locations, including five in New Jersey, one in Pennsylvania, and one in Connecticut. Robert Higginson was the founder and chairman of Standard. William Higginson, Robert's son, is a shareholder and the current president of Standard. Arzee is a family-owned distributor with one of its branches located adjacent to Standard in Cedar Knolls. Defendant Alvin Roth is a shareholder and the president of Arzee, and defendant Cary Roth is Alvin's son and one of Arzee's branch managers.

GAF and Wood Fiber manufacture and supply roofing products to distributors like Rossi Roofing, Standard, and Arzee. GAF and Wood Fiber are two of the 37 roofing product manufacturers that serve the northern New Jersey market. GAF manufactures and sells its roofing material ("GAF product") to most, but not all, of the distributors located in northern New Jersey. GAF sold to Standard, Arzee, and Allied, but refused to sell **[**12]** to Rossi. Joseph Licciardello was an employee of GAF, who quit his job and replaced Rossi as vice president of Standard after Rossi was fired. [2] Wood Fiber competes with GAF in the northern New Jersey market, manufacturing and selling Structodek FS, a product used principally in commercial roofing applications.

Defendant Servistar is a member-owned, national purchasing cooperative that operates hardware distribution centers nationwide. Servistar has over 4000 members at the retail level and deals primarily in paint, hardware, plumbing and electrical supplies, housewares, lawn and garden equipment, power tools, and lumber. Roofing products account for only 2% of Servistar's total purchases on behalf of its members, which were just under $ 1 billion in 1990. Servistar does not warehouse roofing supplies, but rather operates on a "drop shipment" basis, meaning that members place their orders through Servistar (which affords **[**13]** them a discount based on Servistar's status as a national volume purchaser), and the selected roofing manufacturer then supplies the product directly to the member. Servistar pays the manufacturer and later collects from the member.

B. Rossi at Standard; Rossi Forms His Own Company

From 1972 to 1988, Rossi worked for defendant Standard as the manager of its Cedar Knolls, New Jersey branch, selling roofing and siding materials. In 1980, Rossi was promoted to vice president, rewarded with stock in the company, and told that he would eventually become a co-owner of the business. Eight years later, however, in September 1988, Standard fired Rossi. The parties dispute the reasons for Rossi's discharge. Rossi alleges that Standard fired him because he refused to participate in a conspiracy with defendant Arzee to fix prices, discussed

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[1] Defendants contend that Joseph Rossi lacks standing as an individual to pursue this matter against them because his personal claims of injury are derivative of the claims of Rossi Florence and Rossi Roofing. The district court did not reach that issue because it found that no antitrust violation existed at all. See *Rossi v. Standard Roofing, Inc., 958 F. Supp. 976, 991 n.11 (D.N.J. 1997)*. Since we are reversing the district court's grant of summary judgment in favor of several of the defendants and remanding this case for further proceedings, we will also remand the standing issue so that the district court can consider it in the first instance. Because we are not then differentiating between plaintiffs for the purposes of this appeal, we will assume that all three plaintiffs have standing, and will generally use the term "Rossi" to refer to them all.

[2] Section I.B, infra, provides further information about Rossi's career at Standard.

infra at § II.B.2.a. Standard claims that it fired Rossi for a combination of reasons including his deteriorating work performance, his failure to control expenses, the Cedar Knolls branch's excessively high payroll expenses under his management, his large personal expense account, his failure to arrive at work until late morning, his concentration **[**14]** on outside business ventures to the detriment of Standard, and, ultimately, his failure to achieve branch profits commensurate with branch sales.

At all events, by the time he was fired, Rossi had developed a reputation within the industry for extremely competitive pricing, excellent service, and reliability. While at Standard, Rossi had refined an aggressive marketing strategy that stressed high volume sales at low prices. This strategy, as one might imagine, angered Rossi's competitors and even concerned some of his suppliers, which were sensitive to their distributors concerns about pricing.

After his termination, Rossi decided to use his connections within the industry to open his own roofing and siding distributorship **[*459]** that would serve northern New Jersey in direct competition with Standard and Arzee. Rossi's first attempt, in late 1988, was Rossi Florence, a joint venture with Richard Droesch ("Droesch"), president of Florence Corp. ("Florence"), a roofing, siding, and window distributor in Long Island, New York. Rossi and Droesch planned to operate their new business out of a warehouse Rossi owned at 8 Frederick Place, located immediately adjacent to Standard's **[**15]** Cedar Knolls/Morristown branch and just down the street from Arzee's Morristown branch. Rossi and Droesch made substantial preparations for their venture during the fall of 1988. Droesch (together with one of his employees) invested $ 100,000 in Rossi Florence, and Rossi Florence obtained a $ 900,000 bank line of credit secured by the principals' personal guarantees. By mid-January 1989, however, Droesch decided to pull out of Rossi Florence, and Rossi refunded his investment. Droesch felt that because of pressure from Standard, Arzee, and others, the new company would be unable to get the products it needed to successfully compete in the market. In addition, Alvin Roth, president of Arzee, threatened Droesch that if he continued in business with Rossi in New Jersey, Arzee would open up a branch in Long Island to compete directly with Droesch's Florence distributorship.

Thereafter, in February 1989, Rossi incorporated Rossi Roofing, continuing his efforts to break into the roofing and siding distribution business in northern New Jersey. Rossi Roofing obtained another $ 900,000 bank line of credit, personally guaranteed by Rossi and his wife. The company, which opened for business **[**16]** on March 20, 1989, closed in less than a year, after experiencing great difficulty in obtaining product lines and weathering the brunt of a major downturn in the New Jersey housing industry. In January 1990, unable to run Rossi Roofing profitably, Rossi sold the company's assets to American Builders and Contractors, Inc. ("ABC"), a national roofing and siding distributor.

C. The Roofing and Siding Industry in Northern New Jersey; Price Discounting and Market Shares

During the relevant time period, the northern New Jersey market included thirty-nine roofing distributors with more than fifty-seven locations. Eleven residential roofing manufacturers, nine commercial roofing manufacturers, and seventeen vinyl siding manufacturers operated in the region. It is undisputed that this roofing and siding marketplace was highly competitive, and that roofing and siding contractors constantly price-shopped, pitting distributor against distributor in order to obtain the best possible deal.

GAF, which served this region, offered certain favored distributors secret off-invoice, volume and non-volume discounts or "rebates" in the form of periodic credits against purchases. Standard, Arzee, **[**17]** and former defendant Allied purportedly all received such discounts from GAF. The amount of these discounts was kept highly confidential because the favored distributors feared that if other distributors found out, they might complain to GAF and ultimately destabilize prices in the market. As GAF district sales manager Elmer "Bud" Krusa put it, "the less people that know about it, the less chance you have of getting it -- dropping the entire market price." Rossi contends that while he was employed at Standard, he would pass these discounts on to his customers in an effort to increase his market share, whereas his competitors typically pocketed the rebate.

GAF and Wood Fiber are the only two manufacturers remaining as litigants in this case. According to GAF 's own estimates, it supplied a large percentage of the New Jersey shingle market (38% for all shingles and 71% for laminate shingles). GAF was Standard's primary supplier of roofing products in the 1980's, and Standard was GAF 's biggest customer in New Jersey and one of its top five customers in the entire country. Standard bought $ 7.7 million of GAF product in 1989 (or 32% of GAF 's total sales in New Jersey that year), substantially **[**18]** more than any other GAF customer in New Jersey.

Arzee and former defendant Allied also purchased GAF product, but in markedly smaller quantities. Arzee, for example, featured Tamko and Owens Corning Roofing, **[*460]** rather than GAF product, and only purchased $ 919,747 of GAF product in 1989 (or 4% of GAF's total sales in New Jersey in 1989). Together, however, Standard, Arzee, and Allied (which bought $ 2.1 million of GAF product in 1989) purchased $ 10.7 million of the $ 24.1 million of GAF product sold in New Jersey (or 44% of GAF 's total sales in New Jersey in 1989). [3] Rossi contends that, notwithstanding the large number of other manufacturers offering product in the area, GAF product was critical for a distributor to successfully compete in Northern New Jersey, as evidenced by GAF's large market share and also the fact that it was the most desirable and popular roofing material available. This in turn stems in part from several facts: GAF product was well-known by both homeowners and contractors; GAF guaranteed its product; and importantly, GAF product had already been selected for many of the existing townhouse projects in northern New Jersey in 1989 and 1990, making **[**19]** it impossible for the builders to switch brands mid-stream.

The evidence in the record regarding Wood Fiber's market position in 1989-90 is not as clearly defined as that of GAF. Wood Fiber manufactures Structodek FS, a commercial roofing product used primarily in commercial applications for certain modified bitumen roofs. Commercial work comprised no more than a third of Rossi Roofing's

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[3] 1989 sales of GAF product in the northern New Jersey market (rounded to the nearest $ 100,000) were:

Company	Amount	% of Total Sales
Standard	$ 7,700,000	32.0%
Allied	$ 2,100,000	8.7%
Arzee	$ 900,000	3.8%
Total	*$ 10,700,000*	*44.5%*

business; the remaining two-thirds consisted of residential roofing. We do not know from the record how much product Wood Fiber sold in the northern New Jersey market; nor do we know what percentage of Wood Fiber's sales was purchased by Standard or Arzee (or Allied); nor is there any evidence that Wood Fiber had an off-invoice rebate **[**20]** program favoring certain distributors similar to GAF's. This is not surprising because Wood Fiber's involvement in this case stems largely from two isolated episodes, one in which a Wood Fiber representative complained of "pressure" not to sell to Rossi Roofing, and another in which Wood Fiber refused to supply product to Rossi after having accepted an order. See infra § II.B.2.d.

D. Rossi's Damage Claims

Rossi submits that because of his inability to purchase "GAF and other essential products, Rossi Roofing could not succeed." Unable to sustain the business any longer, on January 8, 1990, Rossi entered into an asset purchase agreement with ABC, which leased Rossi's 8 East Frederick Place property and opened a branch where Rossi Roofing once stood. Most employees, including Rossi as the branch manager, continued to work for ABC. According to Rossi, ABC (which was able to get GAF and other products) did very well. In 1990, it achieved over $ 5.5 million in sales, and by 1993, sales had increased to $ 11 million. [4] In 1993, ABC fired Rossi, closed the Morristown branch, and transferred operations to Randolph, New Jersey. Rossi then entered into a similar agreement with **[**21]** Allied, which opened up a location on Rossi's property and hired him to manage it.

Rossi contends that he suffered substantial damages when Rossi Florence and Rossi Roofing, unable to get GAF and other important products, failed. In support, Rossi offers the testimony of several of his former customers during his tenure at Standard, who stated that they would have done business with Rossi Roofing if it had had the necessary product lines. Thus, in Rossi's submission, if the manufacturers had sold to him the same products that they ultimately sold to ABC (and later **[**22]** Allied), Rossi Roofing would have succeeded, and "over time, Rossi would have had his company open up new branches, as Standard, Arzee and Allied have done. The lost profits to Rossi Florence, and to Rossi Roofing, have been over $ 7 million **[*461]** at a minimum." In addition, Rossi claims to have suffered additional, non-duplicative damages of over $ 1 million from payments he made on behalf of Rossi Florence and Rossi Roofing, including payments made on his personal guarantees of Rossi Roofing's debts.

E. Procedural History

Rossi's action in the district court alleged, inter alia, a group boycott in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, and *Section 3* of the New Jersey Antitrust Act, as well as tortious interference with plaintiffs' contractual and prospective contractual relations. [5] After extensive discovery and submissions in support of and opposition to the motions, the district court granted defendants' motions for summary judgment, finding insufficient evidence of concerted action, causation, and damages. Rossi has appealed not only that judgment but also a discovery ruling -- the district court's order denying a motion **[**23]** to compel defendant GAF to provide additional factual detail about the subject matter of GAF's counsel's handwritten notes of three telephone conversations with GAF employees.

The district court had subject matter jurisdiction pursuant to *28 U.S.C. §§ 1337* and *1367*, as well as *15 U.S.C. § 15*. We have appellate jurisdiction pursuant to *28 U.S.C. § 1291*.

II. *SECTION 1* OF THE SHERMAN ANTITRUST ACT

Under the literal dictates of *§ 1* of the Sherman Act "***HN1***[] every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." *15 U.S.C. 1* (emphasis

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[4] There is little evidence as to what the net profits (or losses) of the ABC branch were. Arzee contends, based upon some nebulous testimony in the record, that the ABC branch run by Rossi suffered losses in each of its four years of operation, app. at 4253-56, and that the Morristown branch of ABC was a failure, generating only $ 5 million in revenues in 1990, $ 1.7 million less than Rossi's own break-even figure for Rossi Roofing. App. at 4309-10.

[5] State law claims for breach of contract, conversion, fraud, and negligent misrepresentation, arising out of Rossi's contractual relationships with Standard, were dismissed without prejudice and are not under review here.

supplied). The Supreme Court has interpreted this provision to prohibit only unreasonable **[**24]** restraints. See *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. ***HN2***[] To determine whether a restraint is unreasonable, courts apply one of two modes of analysis, depending upon the nature of the concerted action at issue. Agreements are either analyzed through "a case-by-case application of the so-called rule of reason," whereby the fact finder "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition," id. (internal quotations omitted), or the court applies the per se standard, which dispenses with the need for case-by-case analysis. [6] See id. Under the per se standard, conduct that is "manifestly anticompetitive" or "would always or almost always tend to restrict competition," id. (internal citations omitted), is conclusively presumed to unreasonably restrain competition "without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." *Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. This **[**25]** is because "of [its] pernicious effect on competition and lack of any redeeming virtue." *Northern Pac. Ry., 356 U.S. at 5*. Thus, the first issue we must consider is whether the conduct alleged here warrants per se or the more lenient rule of reason treatment, because that determination will dramatically affect the quantum of proof Rossi must offer to sustain his claim.

[26]** A. Characterizing a Group Boycott; Per se Versus the Rule of Reason

Rossi, relying on such cases as *United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*, *Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1376 (3d Cir. 1992)*, *Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 473 (3d Cir. 1985)*; *Malley-Duff v. Crown Life Ins. Co, 734 F.2d 133 at 140*, **[*462]** and *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 114 (3d Cir. 1980)*, alleges that the defendants engaged in a classic horizontal group boycott that qualifies as a per se violation. Rossi submits that several of his fellow distributor-competitors (i.e. Standard, Arzee, and Allied), as well as their principal manufacturer/supplier(s), agreed to boycott Rossi Florence and Rossi Roofing and frustrate Rossi's attempts to obtain the products he needed to successfully compete against them.

Defendants respond that Rossi's theory does not comprise a per se antitrust claim because it is a vertical conspiracy in which there has been no allegation of resale price **[**27]** fixing. We agree with defendants that if this were simply a vertical conspiracy, between one horizontal competitor and one supplier or manufacturer, we would analyze it under the rule of reason unless there were some evidence of price fixing. See *Business Elecs., 485 U.S. at 735-36* (analyzing an alleged agreement between one supplier and one horizontal distributor as a vertical non-price-fixing conspiracy under the rule of reason); *Tunis Brothers Co. v. Ford Motor Company, 763 F.2d 1482 at 1497, 1502* (same); cf. *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 37, 59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)* (concluding that franchise agreements that bar retailers from selling franchised products from locations other than those specified are analyzed under the rule of reason). [7] Unlike the cases cited above, however, here there are a number of horizontal competitors involved. Thus, this case more closely resembles the horizontal nature of *United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*, a case that the Supreme Court treated as a group boycott with per se **[**28]** implications.

In General Motors, the Supreme Court found a group boycott where a group of automobile dealers had joined together to force their manufacturer, General Motors, to assist them in ending the practice of some dealers that were reselling their automobiles to discounters. See *384 U.S. at 143-44, 147*. Other cases fit this mold as well. See,

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[6] We have also recently discussed a third standard that falls somewhere between the rule of reason and per se standards. In our jurisprudence, we refer to this middle ground as an abbreviated or "quick look" rule of reason analysis. See *Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 n.9 (3d Cir. 1996)* (citing *United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)*). This "quick look" analysis applies "where per se condemnation is inappropriate, but where a full-blown industry analysis is not required to demonstrate the anticompetitive character of an inherently suspect restraint." Id.

[7] In Business Elecs., the Supreme Court indicated that the rationale behind applying the rule of reason to vertical non-price restraints is that such restraints have the potential to promote inter-brand competition, the "primary concern of the antitrust laws," over intra-brand competition. See *485 U.S. at 724-25* (citations omitted).

e.g., Big Apple BMW, 974 F.2d at 1376 (analyzing an alleged agreement among supplier BMW North America and several of its dealers to prevent a potential price-cutting competitor from receiving a franchise as a horizontal group boycott); Sweeney, 637 F.2d at 114 **[**29]** (holding that when a manufacturer terminates a distributor's supply pursuant to an agreement with several distributors, these actions make out a horizontal § 1 claim); cf. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959) (applying a similar horizontal analysis under § 2 of the Sherman Act where manufacturers and distributors had conspired among themselves and with a major retailer to deprive another retailer access to product lines).

The common principle we glean from these cases is that ***HN3***[] a conspiracy is horizontal in nature when a number of competitor firms agree with each other and at least one of their common suppliers or manufacturers to eliminate their price-cutting competition by cutting his access to supplies. From this perspective, Rossi's asserted conspiracy is indistinguishable from those put forth in General Motors, Klor's, Big Apple BMW and Sweeney -- namely, "joint action to eliminate [a] discounter[] from participation in the market," General Motors, 384 U.S. at 144 -- and thus, the defendants' characterization of the conspiracy Rossi alleges as vertical, **[**30]** and not horizontal, cannot withstand scrutiny.

This conclusion, however, leaves us with the second (and ultimately more difficult) question whether this horizontal agreement, which Rossi labels a "group boycott," qualifies as a per se violation. Traditionally, such agreements have received such per se treatment. See Malley-Duff & Assocs. v. Crown Life Insur. Co., 734 F.2d 133, 140 (3d Cir. 1984). Indeed, in all of the horizontal "group boycott" cases listed above, the court adopted the per se approach. See, e.g., General Motors Corp., 384 U.S. at 143-44, 147; **[*463]** Klor's, 359 U.S. at 212-13; Big Apple BMW, 974 F.2d at 1376; Sweeney, 637 F.2d at 114. More recently, however, the Supreme Court has reminded us that it is not a simple exercise to determine what conduct falls within the "forbidden category" of a per se group boycott. See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 294, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985) (" 'There is more confusion about the scope and operation of the per se rule against **[**31]** group boycotts than in reference to any other aspect of the per se doctrine.' ") (quoting L. Sullivan, Law of Antitrust 229-30 (1977)); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986). Under the more recent jurisprudence, it is clear that assigning the label "group boycott" to a concerted refusal to deal with a distributor does not have a talismanic effect, automatically bringing the case under the per se rubric. Instead, the Supreme Court has directed us to carefully scrutinize the nature of the asserted refusals to deal to determine whether it fits within the per se " 'boycott' pigeonhole." Indiana Fed'n of Dentists, 476 U.S. at 458.

In Northwest Wholesale Stationers, the Supreme Court attempted to explain what kinds of boycotts qualify for the per se approach and what kinds do not. The Court emphasized that the per se approach was appropriate when the allegations were of "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive **[**32]** struggle." 472 U.S. at 294 (internal quotes omitted). The Court also noted that per se boycott cases usually contain three elements: "denial of something a competitor needs to compete effectively, defendants with a dominant position in the relevant market, and the absence of any plausible contention that the challenged behavior would 'enhance overall efficiency and make markets more competitive.' " P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 1510 (Supp. 1997) (quoting and interpreting Northwest Wholesale Stationers, 472 U.S. at 294-95). Finally, the Court instructed that although "a concerted refusal to deal need not necessarily possess all of these traits to merit per setreatment . . . [a] plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive." [8] Northwest Wholesale Stationers, 472 U.S. at 295, 298.

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[8] The Courts of Appeals have differed in their application of this language. The Seventh Circuit has held that "once control over an important resource appears, no justification for a refusal to deal can be considered." Areeda & Hovenkamp, ***Antitrust Law*** P 1510 (interpreting Fishman v. Wirtz, 807 F.2d 520, 541 (7th Cir. 1986) (holding that a concerted refusal to deal is illegal per se if the "defendants have either market power or exclusive access to an element essential to effective competition.") (internal quotes

[33]** Applying these precepts to the "boycott" at issue in Northwest Wholesale Stationers, the Court determined that it was "not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects." *472 U.S. at 295*. In that **[*464]** case, a retail office supply store had sued a nonprofit cooperative buying association claiming that its expulsion from the cooperative was per se illegal. The expulsion -- without explanation, notice, or hearing -- hurt the plaintiff by effectively raising the wholesale price of supplies and eliminating certain favorable warehousing options made available to members of the defendant. Examining this type of restraint, the Court held that "the act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect." *Id. at 296* (citations omitted). Rather, the Court noted that cooperatives must "establish and enforce reasonable [membership] rules in order to function effectively." Id. Therefore, the rules that the plaintiff allegedly violated (it allegedly failed to disclose to the cooperative **[**34]** membership of a change in its ownership) might have been necessary for the cooperative to monitor its members' creditworthiness. Without a showing that "the cooperative possessed market power or exclusive access to an element essential to effective competition," the Court held that expulsion based upon violation of the disclosure rules was not "likely to result in predominantly anticompetitive effects." Id.

Similarly, in Indiana Fed'n of Dentists, the Court refused to extend per se group boycott status to a situation in which a professional association collectively refused to cooperate with insurers' requests for x-rays. The Court refused to expand the category of cases classified as per se group boycotts to situations involving professional associations or situations where "the economic impact of certain practices is not immediately obvious." *476 U.S. at 459*. While the collective refusal to cooperate with insurers "resembled practices that have been labeled 'group boycotts,' " the Court refused to hold that the economic impact of this agreement was immediately obvious. *Id. at 458*.

Here, in contrast to Indiana Fed'n of Dentists **[**35]** and Northwest Wholesale Stationers, the defendants are not members of a professional association, and the economic impact of their actions -- driving a price-cutting competitor out of business -- is clear. Applying the precepts laid out in Northwest Wholesale Stationers, we believe that the Rossi boycott falls within the description of "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *472 U.S. at 294* (internal quotes omitted). As will be discussed more fully below, see infra § II.B.2.b(1), Rossi has adduced evidence that GAF product was, if not unique, then at least necessary for him to compete in the marketplace. Further, the gravamen of his complaint fits snugly within the Court's Northwest Wholesale Stationers description of per se concerted refusals to deal -- namely, Standard and Arzee (and perhaps other horizontal competitors like Allied) conspired with manufacturers like GAF and suppliers like Servistar to deny Rossi access to GAF product as well as to coerce other suppliers not to **[**36]** sell any products to him. Importantly, all of this activity was done against the backdrop of Standard's and Arzee's dissatisfaction with Rossi's price-cutting proclivities, and thus an inference can be drawn that the conspiracy was at least partially conceived as a price restraint.

For these reasons, we find it implausible that the alleged behavior by the defendants would "enhance overall efficiency and make markets more competitive," Northwest Wholesale *Stationers, 472 U.S. at 294*, and therefore,

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omitted)). The Eighth and Ninth Circuits have focused on the number of horizontal players in the alleged conspiracy and have found no per se rule against boycotts in situations where the conspirators included only a single supplier and a single retailer in competition with the plaintiff. See id. (discussing *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 591 (8th Cir. 1987)* ("there must be some collusion between competitors on the same market level," for otherwise the "net economic impact of refusals to deal" is not "immediately obvious") and *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734 (9th Cir. 1987))*. The implication of these holdings would seem to be that the result differs as the number of parties to the conspiracy grows. This Court has tended to follow the Eighth and Ninth Circuits and has seemingly been more willing than some others, see, e.g., *K.M.B. Warehouse Dists., Inc. v. Walker Manuf. Co., 61 F.3d 123, 127 (2d Cir. 1995)* (viewing an alleged agreement among a vertical manufacturer and three horizontal distributors as a vertical non-price-fixing conspiracy subject to the rule of reason, not per se, analysis), to find an horizontal per se violation when a small number of dealers have prevailed upon a manufacturer or supplier to cut off a price discounter. See, e.g., *Big Apple BMW, 974 F.2d at 1376*; *Malley-Duff, 734 F.2d at 140*, and *Sweeney, 637 F.2d at 114*.

taking into account the Court's most recent guidance, we conclude that Rossi's allegations should be analyzed using the per se framework.

Our conclusion that Rossi's allegations constitute a per se violation of § 1 simplifies our analysis here. In the usual rule of reason case, **HN4**[] to establish a violation of § 1, plaintiffs must prove:

> (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that **[**37]** the plaintiffs **[*465]** were injured as a proximate result of that conspiracy.

Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482, 1489 (3d Cir. 1985) (citations omitted), vacated on other grounds, *Ford Motor Co. v. Tunis Brothers Co. Inc., 475 U.S. 1105, 89 L. Ed. 2d 909, 106 S. Ct. 1509 (1986)*. Here, because per se analysis applies, prongs two and three are conclusively presumed satisfied and need not be addressed. Accordingly, to prevail on summary judgment, Rossi need only show the existence of a genuine issue of material fact regarding concerted action and proximate causation. We will address these in turn.

B. Concerted Action

1. *Section 1* of the Sherman Antitrust Act -- Proving the Conspiracy

The presence of concerted action or an agreement is an essential element of a *§ 1* claim. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* ("Unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement" must exist to trigger *section 1* liability.) (internal quotes omitted); *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999-1000 (1994)* **[**38]** (noting that the existence of concerted action is one of the important distinguishing features between a *§ 1* claim of conspiracy and a § 2 claim of monopolization). Unilateral activity, no matter what its motivation, cannot give rise to a *§ 1* violation, see *Sweeney, 637 F.2d at 110-11*, because a manufacturer "has the right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. A plaintiff may utilize either direct or circumstantial evidence in order to make out the element of concerted action. While direct evidence, the proverbial "smoking-gun," is generally the most compelling means by which a plaintiff can make out his or her claim, it is also frequently difficult for antitrust plaintiffs to come by. Thus, plaintiffs have been permitted to rely solely on circumstantial evidence (and the reasonable inferences that may be drawn therefrom) to prove a conspiracy. See *Alvord-Polk, 37 F.3d at 1000* (citing *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 98 L. Ed. 273, 74 S. Ct. 257 (1954)*; **[**39]** *Sweeney, 637 F.2d at 111*).

While the traditional summary judgment standard applies with equal force in antitrust cases, [9] when the plaintiff relies solely on circumstantial evidence to prove concerted action, this analysis is modified in accordance with the

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[9] A district court's grant of summary judgment is subject to plenary review. See *Knabe v. Boury Corp., 114 F.3d 407, 410 n.4 (3d Cir. 1997)*; *Public Interest Research of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 71 (3d Cir. 1990)*. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. An issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

As in this case, **HN5**[] when the nonmoving party will bear the burden of proof at trial, that party must adduce evidence "sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. **HN6**[] In evaluating the sufficiency of the evidence, facts and inferences must be viewed in the light most favorable to the party opposing summary judgment. See *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

leading antitrust cases dealing with this subject, Monsanto and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, and their progeny. In Matsushita, the Supreme Court explained the limitation courts must apply to permissible inferences when deciding a summary **[*466]** judgment motion in an antitrust conspiracy case: "Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588* (citing *Monsanto, 465 U.S. at 764*). Rather, to survive a motion for summary judgment, "a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently," id., "direct or circumstantial evidence **[**40]** that reasonably tends to prove that [the alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Monsanto, 465 U.S. at 764* (quoting *Sweeney, 637 F.2d at 111*).

[41]** The Supreme Court's concerns about permitting the inference of a conspiracy from ambiguous circumstantial evidence in the antitrust context stem from its conclusion that mistakes by an overzealous judiciary would be "especially costly . . . chilling the very conduct the antitrust laws are designed to protect." *Matsushita, 475 U.S. at 594*; *Monsanto, 465 U.S. at 763*; *Big Apple BMW, 974 F.2d at 1363* ("Care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon defendant's freedom, so long as it acts independently, to refuse to deal.") (citing *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919))*. For this reason, the plausibility of an antitrust plaintiff's claim is important. "If the factual context renders [the plaintiff's] claim implausible -- if the claim is one that simply makes no economic sense -- [a plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Matsushita, 475 U.S. at 587* (citations omitted). Relatedly, in evaluating whether **[**42]** a genuine issue for trial exists, the antitrust defendants' economic motive is highly relevant. "If[the defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id. at 596*. Moreover, even with a plausible motive to conspire, ambiguous conduct will not create a triable issue of fact with respect to the existence of a conspiracy. See *id. at 597 n.21*.

Under our jurisprudence, the Matsushita standard only applies when the plaintiff has failed to put forth direct evidence of conspiracy. See *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1233 (3d Cir. 1993)*. Thus, in direct evidence cases, the plaintiff need not adduce circumstantial evidence " 'that tends to exclude the possibility' that the alleged conspirators acted independently," *Matsushita, 475 U.S. at 588*, and there need not be an inquiry into the plausibility of the defendants' claim or the rationality of defendants' economic motives. See *id. at 596-97*. This is **[**43]** because when the plaintiff has put forth direct evidence of conspiracy, the fact finder is not required to make inferences to establish facts, and therefore the Supreme Court's concerns over the reasonableness of inferences in antitrust cases evaporate. See *Petruzzi's, 998 F.2d at 1233*.

Additionally, our jurisprudence does not require the summary judgment opponent to " 'match, item for item, each piece of evidence proffered by the movant,' " but rather he or she must only exceed the " 'mere scintilla' " standard. See *Petruzzi's, 998 F.2d at 1230* (quoting *Big Apple BMW, 974 F.2d at 1363*). Accordingly, when examining the sufficiency of what the plaintiff has adduced, we are not to "tightly compartmentalize the evidence," but rather we must evaluate it as a whole to see if it supports an inference of concerted action. See *id. at 1230*.

In sum, Matsushita does not introduce a special burden on antitrust plaintiffs opposing summary judgment; it "demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiffs **[**44]** theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Eastman Kodak, 504 U.S. at 468-69* **[*467]** (footnote omitted). Conversely, Matsushita does not mean that antitrust defendants are entitled to summary judgment merely by showing that there is a plausible explanation for their conduct; rather "the focus must remain on the evidence proffered by the plaintiff and whether that evidence 'tends to exclude the possibility that [the

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That being said, however, when the moving party has pointed to material facts tending to show there is no genuine issue for trial, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita, 475 U.S. at 586-87* (citations omitted).

defendants] were acting independently.' " *Petruzzi's, 998 F.2d at 1232* (quoting *Monsanto, 465 U.S. at 764*). Thus, where the nonmoving party has put forth evidence that provides an inference of concerted action, the moving party "bears the burden of proving that drawing the inference of unlawful behavior is unreasonable." *Id. at 1230*.

Finally, while ambiguous conduct cannot create a triable issue of fact, when "the alleged conduct is 'facially anticompetitive and exactly the harm the antitrust laws aim to prevent,' no special care need be taken in assigning inferences to circumstantial evidence." *Alvord-Polk, 37 F.3d at 1001* **[**45]** (quoting *Eastman Kodak, 504 U.S. at 478*).

With these standards in mind, we will address the evidence adduced by Rossi in support of his theory of conspiracy. Cognizant of our obligation to view the evidence as a whole and to resist the temptation to compartmentalize it, see *Petruzzi's, 998 F.2d at 1230*, we will nonetheless consider Rossi's allegations, defendant by defendant, to provide a logical structure to our analysis. We note in this regard that this court has been relatively hospitable to the efforts of plaintiffs to prove concerted action. See *Alvord-Polk, 37 F.3d at 1010, 1013*; *Petruzzi's, 998 F.2d at 1247*; *Big Apple BMW, 974 F.2d at 1380, 1383*; *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335, 1338-39 (3d Cir. 1987)*; *Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 572-75 (3d Cir. 1986)*; *Tunis Bros., 763 F.2d at 1489, 1502*.

2. Rossi's Evidence of Concerted Action

a. Standard (Robert Higginson, William Higginson, Joseph Licciardello) and Arzee (Al Roth and Cary Roth) [10]

[46]** We begin with Rossi's horizontal competitors, Standard and Arzee, against whom Rossi has the strongest evidence of motive to keep a price-cutting competitor with close ties to many customers from entering the market. Standard's and Arzee's (as well as the other defendants') first line of defense to Rossi's charges is that the conspiracy he alleges is implausible, and therefore under Matsushita, permitting an inference of antitrust conspiracy would have the effect of "chilling the very conduct the antitrust laws are designed to protect." *475 U.S. at 594*. According to the defendants, there was no rational economic reason for them to conspire, and thus they had no plausible motive to conspire to boycott Rossi.

They base their implausibility claim on the fact that the market was extremely price competitive and consisted of upwards of three dozen competing distributors. Under these conditions, defendants argue that they could not have charged above-market prices and stayed in business, and thus that they had nothing to fear from a price-cutter like Rossi. Moreover, they submit that there would be little to gain by excluding one more distributor from the market when **[**47]** there were at least three dozen firms in the market already. In defendants' view, any conspiracy to stabilize the market and reap enhanced profits would be doomed to failure (and is therefore presumably implausible) because, to succeed, it would have required an enormously complex and far-reaching undertaking, involving upwards of sixty participants (each selling different quantities of comparable, competing products) to stabilize prices at supra-competitive levels. Defendants maintain that, because there was virtually no likelihood that three (Standard, Arzee, and Allied) out of the almost forty competing distributors, and one or two **[*468]** (GAF and possibly Wood Fiber) out of thirty manufacturers could have sustained such a conspiracy, they had no rational motive to conspire, and the conspiracy is thus implausible.

The defendants compare this to the situation in Matsushita. There, the defendants were alleged to have entered into a twenty-plus-year conspiracy to fix prices in the electronics market below the market level in the hopes of establishing a monopoly and extracting monopoly profits in the undetermined future. See *Matsushita, 475 U.S. at 588-90*. **[**48]** The Court viewed this predatory pricing scheme as implausible because it would have required multiple defendants to endure tremendous up-front losses for the foreseeable future in the hopes that they could, at some point, recover these losses and make even greater profits once they had driven their competitors from the

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[10] In our discussion of Standard, Robert Higginson, William Higginson, Joseph Licciardello, and also Arzee, Alvin Roth, and Cary Roth, we find no basis to separate the individual defendants from their respective corporate employers. Thus, for shorthand purposes, when we make future reference to "Standard" or "Arzee," (or the "Standard defendants" and the "Arzee defendants"), we refer to the individuals as well as the corporate entities with which they are related.

market and established a monopoly. See id. at 589-90. The Court, examining the electronics market as well as the length and ongoing failure of the alleged conspiracy, concluded that there was no evidence that the defendants could ever recoup such losses, see id. at 594-95, and therefore, that the defendants had no motive to engage in the conspiracy. See id. at 595.

Standard's and Arzee's reliance on Matsushita in this case is misplaced for several reasons. As a threshold matter, Matsushita does not apply when there is direct evidence of conspiracy. See Petruzzi's, 998 F.2d at 1233. Here, Rossi has adduced direct evidence of concerted action between defendants Standard and Arzee in the form of a threat Rossi received in December of 1988. Joseph Licciardello, who had by that time left his **[**49]** job at GAF and was working in Rossi's old job as manager of the Standard branch at Cedar Knolls, told Rossi that Standard and Arzee would do whatever it took to put him out of business if he persisted with his plans to found Rossi Florence. In his deposition, Rossi testified:

> Q: Mr. Rossi, tell me specifically what anyone from Standard did to prevent Rossi Florence from going into business.
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> * * *
>
> A: I guess it started when Joe Licciardello came over and threatened me that if I went into business that he and Arzee Supply would do anything they could, stop supplies, cut the prices, whatever they had to do they were going to do to keep me out of business. That's the way he put it. [11]

[50]** Licciardello's threat, viewed in a light most favorable to Rossi, indicates that two of his competitors had discussed and agreed to act jointly to prevent Rossi from competing with them in the roofing and siding business in northern New Jersey. Moreover, Licciardello's statement even details how the two companies planned to do it; they agreed to "stop supplies" anyway they could. Thus, we conclude that the Matsushita implausible conspiracy argument is not relevant to the allegations of conspiracy with respect to Standard and Arzee. However, even if, as in **[*469]** the case of GAF, there was no direct evidence of concerted action, the conspiracy Rossi alleges is not implausible. Indeed, as we will discuss below, with respect to Standard, Arzee, and GAF, the conspiracy makes perfect sense. See infra § II.B.2.b(1).

The direct evidence discussed above is enough to take the case against Standard and Arzee beyond the constraints of Matsushita (and thus permits us to avoid the questions whether the circumstantial evidence tends to exclude the possibility of independent action, whether the plaintiff 's claim is plausible, and whether the defendants' economic motives were **[**51]** rational). See supra at § II.B.1. However, it is not enough by itself to satisfy Rossi's burden in opposing summary judgment. On the other hand, Rossi has adduced a significant collection of other evidence, circumstantial in nature, in support of his position. We turn to that evidence now.

First, Rossi has adduced evidence of two meetings between Standard and Arzee employees which, when taken together, support the inference of a joint motive by the two defendants to unlawfully stabilize roofing prices in northern New Jersey. This motive is consistent with the motive behind the defendants' alleged boycott of Rossi

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[11] Arzee argues that this statement is not admissible against it under Bourjaily v. United States, 483 U.S. 171, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987). We conclude that it is. ***HN7***[] Under Fed. R. Evid. 801(d)(2)(E), "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not inadmissible hearsay as to that party. Under our jurisprudence, four requirements must be met before a statement can be admitted under this exception. "It must appear: (1) that a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy." United States v. McGlory, 968 F.2d 309, 333 (3d Cir. 1992). The district court must find these requirements by a preponderance of the evidence. See Bourjaily, 483 U.S. at 175; McGlory, 968 F.2d at 333. The district court made no such finding here. It did not even address the issue, concluding, as a matter of law, that no conspiracy existed. Thus, the question whether there is sufficient evidence to permit such a finding is subject to plenary review. See McGlory 968 F.2d at 334.

As will be made clear in the discussion that follows, the record is replete with circumstantial evidence that Licciardello, Standard, and Arzee were members of a conspiracy to boycott Rossi and drive him out of business. See infra § II.B.2.a. As the record also shows, Licciardello's threat was made during the conspiracy and in furtherance of it. We conclude therefore that Rossi has satisfied the preponderance standard with respect to all four requirements.

Florence and Rossi Roofing -- that Standard and Arzee wanted to eliminate an uncooperative competitor who threatened to undercut their prices and destabilize the market. Rossi testified that sometime in 1986 or 1987, while he was still working for Standard (he was fired in September 1989), his boss at that time and chairman of Standard, Robert Higginson, directed him to attend a lunch with Al and Cary Roth of Arzee. According to Rossi, Robert Higginson told him that this lunch had been set up so that the two competitors could "cooperate" and share price information. **[**52]** Robert Higginson also told Rossi that Standard's other competitors had pricing agreements and that they were the only ones who were not participating. At the lunch, Al Roth proposed to Rossi a price-fixing scheme whereby Arzee and Standard would fix prices and divide up their large customers and jobs. Al Roth further explained to Rossi that he had maintained a similar arrangement with Allied concerning Certainteed products. Rossi rejected Al Roth's overtures, and Standard and Arzee did not, at that time, enter into an agreement to set prices.

The second Standard-Arzee meeting at which prices were discussed took place over the telephone in February of 1990. It involved a conversation between Licciardello, the manager at that time of Standard's Cedar Knolls branch, and Cary Roth, the manager of one of Arzee's local branches, regarding the price of GAF vinyl siding. Patrick Mulcahy, a former employee of Standard who overheard the conversation, recalled that Licciardello said to Cary Roth: "We really got to run this like a business and we all have to make a profit here. And we've got to keep certain price levels in order to do this." [12] This statement is remarkably similar to other **[**53]** statements that we have found probative of an agreement between competitors. See, e.g., *Petruzzi's, 998 F.2d at 1236* ("Why don't you put your prices in line and make money on what you have?").

Neither of these discussions took place during the period of the alleged conspiracy to boycott and exclude Rossi from the market; one took place before, and one after. Yet we reject Standard's and Arzee's contention that they are irrelevant to our decision. The two pieces of evidence, especially taken together, **[**54]** are probative of Standard's and Arzee's motive. Evidence that Standard's and Arzee's principals had actively considered fixing prices and allocating customers in 1986-87, and again in 1990, is sufficient to permit the inference that Standard and Arzee may have had a long-standing intent to stabilize prices in the roofing distribution business in northern New Jersey. See *Big Apple BMW, 974 F.2d at 1360-61* (reviewing evidence outside of the statute of limitations and thus not part **[*470]** of the alleged conspiracy which nevertheless "demonstrated a pattern of conduct"); see also *Andresen v. Maryland, 427 U.S. 463, 483-84, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976)* (proof of similar acts is admissible to show intent or the absence of mistake); *Keyes v. School District No. 1, 413 U.S. 189, 207-08, 37 L. Ed. 2d 548, 93 S. Ct. 2686 (1973)* (citing the well-settled evidentiary principle that " ***HN8***[] 'the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.' ") (quoting 2 J. Wigmore, Evidence 200 (3d ed. 1940)). Because Rossi **[**55]** was known to the defendants as a price-cutter and potent competitor who had refused to collude on prices in the past, this circumstantial evidence tends to link Standard's and Arzee's motives with their other actions in support of the boycott, which are detailed below.

The record is also replete with examples of high pressure recruitment, monitoring, and enforcement tactics undertaken by Standard and Arzee in furtherance of their efforts to prevent Rossi from purchasing roofing materials, particularly GAF product. There is evidence that Standard and Arzee put pressure on virtually everyone, including manufacturers, distributors, and even Rossi's prospective business partner, Droesch, to convince them not to do business with Rossi. In December 1988, for example, Al Roth called Droesch, who had agreed to establish Rossi Florence and go into business with Rossi, and told him that he was not happy about Rossi competing against Arzee and that if Droesch proceeded with his plans to establish Rossi Florence with Rossi, Roth would open up an Arzee location on Long Island near Droesch's Florence business which was located there. Also in late 1988 and early 1989, representatives of several **[**56]** manufacturers told Rossi that they were being pressured not to deal with him or sell to Rossi Florence. Specifically, Rossi testified that representatives from Gold Bond, Wood Fiber, Bird Corporation, Homosote, Hi-Finn, Genstar, Vipco, and Hastings Aluminum, told him that they had been threatened

[12] Standard and Arzee both raise questions about whether this conversation actually took place. In addition to denying it, they point out that Mulcahy did not hear the voice of the person on the phone, and only heard Licciardello talking to someone named "Cary." Mulcahy assumed the person on the other end of the line was Cary Roth. As this is before us on a motion for summary judgment, we conclude that, in a light most favorable to Rossi, a jury could infer that "Cary" was Cary Roth of Arzee.

by representatives of Standard. Similarly, representatives of Nailite and Certainteed claimed that they had been threatened by Arzee. [13]

There was evidence that after Rossi incorporated Rossi Roofing in early 1989, Standard's and Arzee's pressure on manufacturers and distributors continued. Joe Mullenhour of Bird Corporation told Rossi that Licciardello of Standard had threatened to drop Bird's vinyl siding if Bird Corporation sold to Rossi Roofing. **[**57]** Bill Higginson of Standard also spoke to Raymond Six of Gold Bond and told him that he was "disappointed" that Gold Bond had agreed to sell to Rossi Roofing. Six cut off the conversation because he was concerned by the antitrust implications of Bill Higginson's overtures. More specifically, Six told Higginson that he would not let the conversation go further because:

> Gold Bond had been in an anti-trust suit back in the 70's on gypsum. Every Gold Bond manager - well, I'll say every Gold Bond employee had been schooled, I'll say, from 1975 on, anyway, on what Robinson-Patman is, what Sherman anti-trust was. So the conversation wasn't going to go any further than what my statement to him was.

When Rossi asked Jim Hines of Hi-Finn to supply Rossi Roofing with the "Atlas" insulation line, he arranged for Rossi to buy the product indirectly through a middleman at a higher price. When Hines later visited Standard on a sales call, Licciardello told him, "You know why I can't do business with you." Hines replied that "if it has anything to do with the truck of Atlas insulation that Joe Rossi has in stock, that was purchased through another distributor, not directly through Atlas. **[**58]** " Licciardello referred Hines to Bob Schaab, Standard's Controller, who told Hines to "do what you want to." Based upon his experience with Schaab and his dealings with Standard, Hines testified that he concluded that conversation with "the feeling that his implication may have been that, if I sold to Joe [Rossi], he definitely **[*471]** wouldn't buy from me." Finally, Hines testified that his business with Standard fell off right around the time that Rossi purchased the Atlas insulation from the middleman recommended by Hines. On this evidence, a fact finder could reasonably draw the inference that Licciardello had threatened Hines to ensure Hi-Finn's cooperation in the boycott of Rossi, and that, when Hines rebuffed him, Standard punished Hines and Atlas by cutting off future purchases.

Similarly, Rick Fiore, an employee of roofing manufacturer Certainteed, told Rossi that Cary Roth of Arzee had pressured him and threatened to sue Certainteed if it sold to Rossi Roofing. Robert Qualik of Nailite informed Rossi that Arzee had told Nailite not to sell to Rossi Roofing and that "[Arzee] had blocked [Rossi Roofing] from getting product on a particular job right around the corner **[**59]** from us." Also, Karl Loser of Wood Fiber told Rossi that he was receiving a lot of pressure from Standard not to sell Structodek FS, a Wood Fiber product, to Rossi Roofing.

In an effort to circumvent these supply problems arising from his efforts to buy directly from manufacturers, Rossi attempted to purchase product through other distributors, even though this would cost more. For example, Rossi was able to convince Passaic Metals, a roofing and siding distributor in northern New Jersey, to sell him some GAF product. In response, Bill Higginson of Standard called his competitor, Frank Gurtman, the president of Passaic Metals, and threatened to open a branch near Passaic Metals and take away all of his customers if Gurtman continued to sell to Rossi.

There is also evidence that Standard and Arzee went to great lengths to monitor Rossi Roofing. The record indicates that Licciardello ordered Keith Cogley and Jorge Esteves to report to him the comings and goings of all roofing materials at Rossi Roofing. All three closely watched Rossi's premises on a daily basis to determine what kinds of products Rossi was able to purchase and from where they might be coming. Cary Roth and Ed Jacobitz **[**60]** of Arzee also frequently monitored Rossi Roofing by sitting in their cars in a cul-de-sac adjacent to Rossi's premises.

In addition, there is evidence that Standard even reported back to GAF when its employees saw GAF product on Rossi's premises to assist GAF in enforcing the boycott. Former GAF district manager Licciardello, then working for

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[13] While offered in hearsay form, we will consider these statements because they are capable of being admissible at trial, see *Petruzzi's, 998 F.2d at 1234 n.9* (citations omitted), for Rossi has simply to produce the declarants to give the testimony. Id.

Standard, admitted that after seeing GAF product on Rossi's premises, he called Bob Gessner of GAF to confirm that GAF was still not selling to Rossi. On another occasion, when a load of GAF was sitting out in front of Rossi Roofing, Gessner said to Licciardello, "I thought we weren't selling him," to which Licciardello responded "we're not."

When Standard's Cogley saw a load of GAF product at Rossi Roofing, Licciardello called GAF to find out how Rossi had procured the product. Someone at GAF told Licciardello that the load was not for Rossi Roofing, but that it was being transported on a Jentar truck, and was simply stopping overnight at 8 East Frederick Place, where both Jentar Trucking and Rossi Roofing had offices. Later, after Licciardello learned that Rossi Roofing had purchased GAF product from Servistar through his Far Hills account, **[**61]** see infra § II.B.2.c, Licciardello told Standard employee Esteves that " 'That's the last time we're going to be seeing any GAF across the street.' They got the -- they were getting the loads through [Far Hills], which is [Servistar]. That's how Joe Rossi was getting GAF and he's [Licciardello's] going to put an end to that. 'Never going to see another GAF load across the street.' "

While this monitoring and reporting activity would not in isolation be probative of a conspiracy, in the context of the pressure and enforcement tactics described above, the direct evidence that Standard and Arzee had talked about and agreed to boycott Rossi Florence and Rossi Roofing, and the circumstantial evidence of motive, certain inferences can be drawn from this evidence. To enforce a boycott, Standard and Arzee would need to monitor carefully the supplies Rossi was able to procure, communicate to cooperating manufacturers any evidence that Rossi had been able to circumvent the boycott, and bring pressure on any non-cooperating manufacturers **[*472]** or distributors that refused to participate in the conspiracy. Here, Rossi has adduced evidence of exclusive monitoring by both Standard **[**62]** and Arzee, and evidence that Licciardello could "put an end" to Rossi receiving GAF product. Viewed in conjunction with the evidence that Standard and Arzee pressured many manufacturers and distributors, this monitoring and reporting activity also supports an inference that Rossi's two primary competitors were jointly attempting to establish a market-wide boycott of Rossi Roofing.

We emphasize that we would not consider the evidence that Standard and Arzee aggressively monitored Rossi Roofing (and even reported the substance of those observations to GAF), without more, sufficient to satisfy Rossi's burden in opposing summary judgment. However, in conjunction with all of the other pieces of circumstantial evidence Rossi has adduced, we believe that this monitoring and reporting activity represents an important thread to be considered in the complicated tapestry of conspiracy that Rossi weaves.

Looking at all of the evidence Rossi has assembled against Standard and Arzee, we conclude that he has satisfied his burden in opposing summary judgment on the concerted action prong. First, Rossi has developed direct evidence that Standard and Arzee had, both before and after Rossi Roofing **[**63]** existed, attempted to conspire to fix prices, allocate customers, and otherwise stabilize the roofing and siding distribution market in northern New Jersey. He has also shown that both defendants knew him to be a price-cutting competitor who had frustrated their unlawful purposes by refusing to cooperate with them. These two facts provide strong evidence of the defendants' motive to conspire against Rossi. Desiring to raise prices above their competitive levels in a highly competitive market, an inference is supported that Standard and Arzee were concerned that they could not succeed without Rossi's cooperation, and that they therefore decided to prevent him from competing against them.

Next, Rossi points us to direct evidence of the boycott, namely Licciardello's threat on behalf of Standard and Arzee to cut off his supplies and put him out of business. Finally, Rossi has developed considerable evidence of Standard's and Arzee's elaborate efforts to enforce the boycott. Rossi has produced testimony that many manufacturers and distributors were pressured and/or threatened not to do business with Rossi Florence and Rossi Roofing. He has also adduced testimony that Standard and Arzee **[**64]** had an elaborate monitoring system in place, one which even included reporting back to GAF to help enforce the boycott.

To be sure, this evidence is far from conclusive. It could be found at trial that Standard, Arzee, and GAF were all acting independently of one another in parallel efforts to do Rossi in. However, given the comprehensive nature of the evidence covering all elements of the group boycott Rossi alleges, we must reverse the district court's order granting summary judgment in favor of Standard, Arzee, Robert Higginson, William Higginson, the Roths, and Licciardello.

b. GAF

We also believe that Rossi has adduced sufficient evidence that GAF acted in concert with Standard and Arzee to survive its motion for summary judgment and will reverse the district court with respect to GAF as well.

(1) Matsushita Implausibility

GAF's first defense, like Standard's and Arzee's, is that the conspiracy alleged by Rossi is implausible under Matsushita. Because Licciardello's statement that Standard and Arzee intended to establish a boycott of Rossi Roofing is insufficient by itself to hold in GAF, and we can find no (other) direct evidence of GAF 's participation in **[**65]** the alleged conspiracy in the record, we must analyze, under the Matsushita standard, the plausibility of the conspiracy that Rossi alleges. See supra § II.B.2.a. In contrast with that case, we find that the theory Rossi advances with respect to GAF 's motivations and participation in the conspiracy is not economically implausible.

[*473] First, Rossi's claim does not, as defendants allege, require the cooperation of dozens of distributors and manufacturers (each selling different quantities of comparable competing products) in the northern New Jersey marketplace to succeed (i.e. for distributors Standard, Arzee, and Allied to be able to charge supra-competitive prices). Rather, it is primarily focused on the actions of three distributors, Standard, Arzee, and Allied, and one manufacturer, GAF. Despite the fact that this case arises against the backdrop of the highly competitive, price-sensitive roofing and siding industry in northern New Jersey in 1989 and 1990, Rossi advances a plausible theory of how these defendants could have unlawfully conspired to fix prices and therefore why they would want to boycott Rossi. Moreover, even if Standard and Arzee were not conspiring **[**66]** to keep prices artificially inflated by pocketing the secret rebates that their competitors were not receiving, both still had a plausible motive to keep Rossi, an avowed and experienced price-cutter and acknowledged potent competitor with a reputation among their customers for excellent service, from opening up a competing distributorship next door.

In order to comprehend the plausibility of the conspiracy Rossi alleges, it is necessary to understand GAF's position in the market and the importance of GAF product. In 1990, GAF was indisputably one of the largest and most important manufacturers of roofing supplies in the northern New Jersey market, with an estimated 38% share of the entire residential roofing shingle market in New Jersey and an estimated 71% share of the residential roofing laminate shingle market in New Jersey. GAF not only supplied a large percentage of the overall market, but it also was Standard's single largest supplier during the time that Rossi was a manager there. As such, Rossi was extremely familiar with GAF, and a large percentage of his customers, many of whom followed him from Standard to Rossi Roofing, had a strong preference for GAF product. Indeed, **[**67]** there is substantial testimony in the record from many sources supporting Rossi's contention that GAF product was critical to both Rossi Florence's and Rossi Roofing's success in the market.

For example, Sean Coffey, one of the five largest residential roofers in northern New Jersey, testified that he used GAF product in 1989 and 1990 almost exclusively and would not buy from any roofing distributor that did not have access to it. Similarly, Francis Doherty, proprietor of another large roofing business in northern New Jersey, testified that "99 percent" of his strip shingle purchases had been GAF product. John Feher, another roofer who attempted to purchase GAF product from Rossi Roofing, testified that GAF was very popular with everyone, including contractors and homeowners, because "it's easy to get and guarantees [sic] and everything is good on it." Thomas Harnett, an executive at Bird Corporation, testified that GAF "dominated all levels of roofing in New Jersey," and that it was a "highly desirable product."

Likewise, Albert Logan, a former Celotex employee, stated that GAF had "dominated the market for years," representing at least fifty percent of every distributor's inventory. **[**68]** John Mulcahy, a former Standard employee, also testified that GAF was "dominant and had . . . [its] products so well-established in the area." Because of this, Mulcahy stated that any distributor denied access to GAF product would have difficulty competing in the residential shingle market. Id. When asked to describe the magnitude of the adverse impact of trying to compete without GAF product, Mulcahy stated, "It would be like a beer distributor not having Budweiser."

Finally, another former employee at Standard, Michael Hydro, testified that GAF comprised eighty percent of his sales while he worked there and at least five of Standard's customers purchased exclusively GAF product. He also explained that in 1989 and 1990, a large number of townhouse projects were already "spec'd" with GAF product, which made it impossible for the roofers to switch product lines mid-stream. Thus, anyone who could not supply GAF product was effectively barred from bidding for these jobs. On the basis of all of this evidence, we believe that Rossi has demonstrated that a genuine issue of material fact exists as to **[*474]** whether GAF product was special, and necessary for a distributor like **[**69]** Rossi to successfully compete in northern New Jersey.

Against this background on the roofing market in general and GAF 's place in the market in particular, we move to the evidence Rossi adduced that GAF used secret rebates with several of its biggest distributors in northern New Jersey, including Standard, Arzee, and Allied, for that is critical to understanding the motivations of Rossi's horizontal competitors. Pursuant to this scheme, GAF provided these distributors off-invoice, non-volume discounts on their purchases. These "rebates," assuming they were only offered to a few favored distributors as Rossi contends, allowed those distributors to sell GAF product at or below the prevailing market price (as set by the distributors who did not receive the discounts) while secretly conspiring to pocket the difference. In GAF district sales manager Bud Krusa's words, "the less [sic] people [who] knew about it [the discounts], the less chance you [the smaller distributors] have of getting it and dropping the entire market price." The most favorable inference we can draw for Rossi from Krusa's statement is that if these highly secret rebates became widely known, the smaller distributors **[**70]** who were not receiving rebates would have put pressure on GAF to receive equal treatment, and that this shake up of the market could ultimately destabilize prices, lead to a price war, and "drop[] the entire market price" for GAF product.

By adducing evidence of the GAF rebate scheme and the importance of GAF and GAF product, Rossi transforms what might otherwise have been a very difficult (and implausible) conspiracy into a realistic opportunity for a few cooperating competitors to fix prices and earn substantial profits while still operating within what appears to be a competitive marketplace. Cf. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 239, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* (holding that a conspiracy to fix supra-competitive prices in a market with many variables was implausible because of the complexity required to monitor and enforce it) (citations omitted).

We find this case, as it relates to GAF, Standard, and Arzee, fundamentally unlike Matsushita. There, the critical problem with the conspiracy as alleged was that the conspirators had been losing large sums of money over a period of twenty plus years by undercutting **[**71]** the market in the hope of building market share and eventually establishing a monopoly. Not only did the Court find it difficult to distinguish the allegedly predatory pricing strategy from actual price competition, but given the extremely low chance that the scheme would succeed, the Court concluded that the defendants, if they operated in a rational manner, had no motive to engage in the conduct with which they were charged. In contrast, it is not difficult to divine the likely motive of the three distributors, Standard, Arzee, and Allied, in boycotting Rossi. As Rossi's horizontal competitors, they wanted to rid the market of a price-cutting competitor with a reputation for excellent service and reliability who had refused to cooperate in their price-fixing schemes in the past. Moreover, Rossi is aided in asking us to permit the fact finder to draw this inference by the strong likelihood that the boycott would actually succeed (as evidenced by the results).

Even if all of this is true, submits GAF, it still does not explain why it would make sense for GAF to join the conspiracy. We agree that GAF 's motive, as the manufacturer-supplier, is less obvious than Standard's or Arzee's, **[**72]** but ultimately we find it no less compelling. This is because Rossi has adduced evidence that Standard, Arzee, and Allied possessed substantial economic leverage over GAF. Together, they purchased $ 10.7 million of the $ 24.1 million of GAF product sold in New Jersey in 1989, or 44.5% of GAF 's total northern New Jersey sales. These distributors were not happy about the prospects of Rossi entering the market and competing with them, and they made their views known to GAF. Complaints and threats from three of GAF's largest customers in New Jersey are sufficient to establish a rational motive for GAF to engage in the concerted conduct that Rossi alleges. For these reasons, we do not accept GAF's submission that Rossi's conspiracy theory, and the economic **[*475]** motivations behind it, are inherently implausible.

(2) Circumstantial Evidence Against GAF

We turn next to the circumstantial evidence that supports Rossi's allegations that GAF joined with Standard and Arzee (and potentially others) to enforce a market-wide boycott of first Rossi Florence and later Rossi Roofing, The evidence comes in several forms. First, as we will detail, Rossi has adduced evidence that GAF received **[**73]** numerous complaints about Rossi's pricing practices while he was at Standard and responded to them by asking Rossi to raise his resale prices on GAF product. While these complaints antedate Rossi entering the marketplace, they are useful background information to establish motive and practice. See *Big Apple BMW, 974 F.2d at 1360-61*.

Second, GAF participated in the group boycott against Rossi through monitoring and enforcement activities and the implementation of an unprecedented anti-trans-shipment policy. Third, there is evidence that GAF singled out Rossi and acted contrary to its own corporate policy in refusing to deal with him (an important factor under Monsanto and Matsushita), in that GAF employees testified that the company had an "open distribution" policy under which they sold to all comers, yet GAF refused to sell to Rossi and went to considerable lengths to see that he was not able to secure GAF product from other sources. Finally, Rossi has also adduced evidence that two of GAF 's explanations why it refused to deal with him -- that it had adequate distribution in New Jersey and product shortage -- were pretextual.

(a) Distributors' Complaints **[**74]** and GAF's Response

While Rossi worked at Standard, the company received, as did Arzee and Allied, the off-invoice, non-volume rebates discussed supra. Rossi used these rebates to reduce the prices he charged to his customers in an effort to increase sales volume; he did not, as his competitors did, retain the rebates to increase gross profits. This aggressive price-cutting strategy understandably angered Standard's competitors, and several of them complained to GAF about Rossi's behavior. Krusa and Licciardello, both then working as GAF district sales managers in the New Jersey region, frequently called Rossi at Standard and passed along the complaints of Arzee, Allied, Passaic Metals and others about Rossi's pricing. Krusa and Licciardello also called Bob Schaab, the Controller of Standard, to complain that Rossi was passing on the discounts given by GAF to Standard to his customers.

Although GAF did not have suggested resale prices, Krusa and Licciardello told Rossi to raise his resale prices for GAF product. Schaab, relaying GAF's messages, also asked Rossi to refrain from passing the GAF rebates to Standard's customers. Rossi refused, and vowed to price as he saw fit. **[**75]** This evidence suggests several things. First, it reaffirms the motives of Rossi's horizontal competitors, Arzee and to a lesser extent Standard. Second, it shows that a group of distributors (even a group that did not include Standard) could wield economic leverage over GAF and influence its interactions with recalcitrant distributors. Third, it suggests that GAF's course of conduct was to curry favor with its larger distributors by doing what it could to assist them in stabilizing the market and keeping price levels up.

We agree with GAF that evidence that it succumbed to pressure from distributors is not sufficient, by itself, to survive summary judgment, since the evidence of complaints and threats GAF received from Standard and Arzee is not enough in isolation to prove concerted action. See *Monsanto, 465 U.S. at 763-64* ("permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct."); *Sweeney, 637 F.2d at 111*. However, we do not rely solely on these complaints. Rather, there is a substantial **[**76]** amount of additional evidence to support a finding of an unlawful conspiracy. In this circumstance, we are permitted to consider the evidence of distributor complaints. See *Monsanto, 465 U.S. at 764 n.8* ("We do not suggest that evidence of complaints has no probative value at all, but **[*476]** only that the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy.").

(b) Actions in Contravention of GAF Corporate Policy

GAF's boycott against Rossi appears to be contrary to its own corporate policy, particularly in light of the evidence adduced of GAF's draconian enforcement and anti-trans-shipment activities. There is testimony in the record that GAF had an open distribution system. Peter Bacchione, GAF 's director of marketing and sales and Krusa's superior in 1989, testified that GAF never had a closed distribution network and never rejected a potential distributor because the local market was saturated. Bacchione testified:

Q: Do you recall in 1989 whether GAF, with respect to the roofing products that you had responsibility for, had any **[**77]** particular objectives with respect to increasing, decreasing, or otherwise, its distribution channel.
A: . . . We always looked to increase our share of business with any distributor.
Q: Did GAF have any exclusive distributors for roofing products while you were national sales director?
A: No.
* * *
Q: Wasn't GAF's philosophy to have an open distribution network?
* * *
A: Maybe it was -- maybe it was a philosophy. A practice. Whether it was a philosophy that was up on a wall some place, I don't recall that.
Q: Was it the practice?
A: Generally, we sold on an open basis. There were no exclusivities. [14]

[78]** This testimony directly contradicts GAF's litigation position as stated by Krusa, who has maintained since 1989 that GAF refused to supply Rossi because it had "adequate distribution." [15] Krusa is also contradicted by Lorraine Campbell, Ruth Rogers, Mary Lou Sperr and Bob Tafaro, all of whom worked for Krusa, and all of whom testified that Krusa never told them that GAF had adequate distribution in New Jersey. Finally, Rossi submits that Krusa is contradicted by the fact that GAF supplied 34 out of the 39 distributors in northern New Jersey, and only refused to sell to three distributors including Rossi Roofing. On summary judgment, of course, we need not resolve this dispute, but rather grant Rossi all favorable inferences.

[79]** (c) Monitoring and Enforcement Activities

GAF, through Krusa and Licciardello, took still more steps to ensure that Rossi did not get any GAF product. In January 1989, when Droesch told Krusa that he planned to buy GAF product through his Florence Corporation in Long Island and resell it to Rossi Florence, Krusa told Droesch that "he would not allow that and he would not sell me [sic] in Long Island if I did that." GAF also warned other distributors not to resell its products to Rossi, and there is evidence that, on at least one occasion, GAF took steps to enforce its boycott. GAF salesmen Sal Granfort and Doug Collins warned DiNaso & Sons, a roofing and siding distributor located in Staten Island, New York, not to resell its product to Rossi. After DiNaso & Sons ignored their warnings, GAF raised DiNaso's prices by $ 1.00/unit, arguably in retaliation. **[*477]** Similarly, when Rossi contacted Stroeber Supply, another northern New Jersey distributor, to see if it would sell GAF product to him, Larry Hammershock of Stroeber told a Rossi Roofing employee that Stroeber had already been told by GAF not to sell GAF product to Rossi Roofing. Hammershock defied GAF and sold to **[**80]** Rossi Roofing anyway, but at a higher price.

There is also evidence that GAF extended the boycott to buying groups like HWI and Servistar which Rossi began to use, in addition to distributors like Stroeber and DiNaso, to try to circumvent the GAF boycott. [16] To this end,

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[14] Bacchione appears to contradict himself during his deposition. For example, in reference to the decision whether to open up ABC as a distributor after Rossi Roofing had gone out of business, Bacchione also said: "The concern was not whether or not to open up another distributor. The concern was whether or not we had adequate distribution, I think was the subject at hand. I think we felt there was adequate distribution. . . . There was not a valid reason to open up another distributor [next door to Standard]." This contradictory testimony leads to two possible conclusions, and on summary judgment, we must accept the one most favorable to Rossi.

[15] For example, Krusa allegedly told Droesch in January 1989 that GAF would not sell to Rossi Florence in New Jersey because it had adequate distribution. In July 1989, when Krusa prevented Rossi from picking up an order of GAF product from HWI, Rossi spoke with Krusa who told him, "The distribution is filled. GAF requires no other distributors."

[16] Rossi contests the district court's affirmance of an order by the magistrate judge, denying his motion to compel GAF to disclose the names of the entity or entities that were the subject matter of certain conversations between GAF 's in-house counsel Robert Poyourow and Krusa on July 27, 1989, August 10, 1989, and January 6, 1990. Rossi hypothesizes that several of these discussions centered around HWI and Servistar, and he submits that the district court abused its discretion when it accepted GAF's description of the "subject matter" of these conversations on its privilege log as "absence of a legal obligation to sell product." We conclude, however, that the district court did not abuse its discretion by denying Rossi's motion to compel the

Rossi joined HWI in July 1989 and placed an order for GAF product. Membership in HWI ordinarily should have allowed Rossi to purchase products from all of HWI's suppliers, including GAF. Likewise, GAF normally supplied its products to all HWI members, regardless of whether they appeared on GAF's own customer list. Notwithstanding this, when a Rossi Roofing driver went to GAF's facility on July 27, 1989, to pick up the GAF product ordered through HWI, GAF would not release it. After several hours of wrangling over the order, Rossi eventually spoke with Krusa, who had given the order not to release the GAF product. Krusa told Rossi "I am not selling to you. The distribution is filled. GAF requires no other distributors." Rossi replied that GAF was not really selling to Rossi Roofing, but rather to HWI, to which Krusa responded, "We are not selling to you." After this dramatic exchange, Dave Heine of HWI remarked that **[**81]** he had never seen anything like this in his ten years working at the buying group. App. at 2596, 3513.

[82]** In yet another effort to obtain GAF product and circumvent the boycott, Rossi used Far Hills Lumber and Hardware ("Far Hills"), a start-up hardware store of which he was a principal, to place orders through the buying group Servistar. See supra § II.B.2.a and infra § II.B.2.c. Rossi was able to purchase one order of $ 30,000 worth of GAF product on August 2 and 3, 1989. However, after GAF and Standard found out that Rossi had used Far Hills and Servistar to get GAF product, see infra § II.B.2.c, GAF refused to fill Far Hills' second order for $ 456 of GAF product.

Rossi has also adduced evidence that GAF and Standard coordinated to ensure that Rossi was not getting any GAF product. See supra § II.B.2.a. Rossi developed evidence that Licciardello of Standard confirmed with Gessner of GAF that GAF was not selling to Rossi, and there is evidence that, after seeing GAF product in front of Rossi Roofing, Licciardello called and was reassured by GAF that the load was not for Rossi but bound for Walmart on a Jentar truck. See id. In addition, there is the statement made by Licciardello after he learned that Rossi Roofing had been getting GAF product through Far **[**83]** Hills and Servistar that" 'that's the last time we're going to be seeing any GAF across the street.' They got the -- they were getting the loads through [Far Hills], which is [Servistar]. That's how Joe Rossi was getting GAF and he's [Licciardello] going to put an end to that. 'Never going to see another GAF load across the street.' " See supra § II.B.2.a.

[*478] (d) Pretextual Excuses

Finally, Rossi argues that GAF used pretextual excuses to explain why it refused to supply Rossi, and that this use of pretext is further circumstantial evidence of the conspiracy he alleges. See *Fragale, 760 F.2d at 474* (pretextual excuses are circumstantial evidence that can disprove the likelihood of independent action). The first excuse is that Rossi was not needed because GAF had adequate distribution. Rossi notes that, despite Krusa's contention that everyone in his office knew that he had "adequate distribution" in New Jersey, neither his boss, Peter Bacchione, nor his employees, Lorraine Campbell, Ruth Rogers, Mary Lou Sperr, and Bob Tafaro had ever heard of this policy. Even Krusa admits that GAF had never refused to fill an order through a buying group **[**84]** like Servistar because its distribution was allegedly full.

This "adequate distribution" excuse is just the "flip side" of Rossi's contention that GAF was acting in contravention of its open distribution policy, and for the same reasons that there is a genuine issue whether GAF 's policy was to supply all distributors who wished to purchase its products, there is also a genuine issue of material fact whether the "adequate distribution" justification Krusa gave to Rossi was legitimate or simply pretextual. We note again that GAF supplied its roofing product to at least 34 of the 39 distributors in the northern New Jersey marketplace, but not to Rossi.

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name of the entity discussed or any other additional information concerning the "subject matter" of the conversation catalogued in GAF's privilege log. See *Rabushka v. United States, 122 F.3d 559, 565 (8th Cir. 1997)* (standard of review), cert. denied, ***Rabushka ex rel. United States v. Crane Co., 140 L. Ed. 2d 498, 118 S. Ct. 1336 (1998)***. ***Rule 26(b)(5)*** only requires that a party claiming a privilege "describe the nature of the documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection." ***Fed. R. Civ. Pro. 26(b)(5)***. These matters are generally best left to the district and magistrate courts' discretion. In the circumstances that exist here, we will not second guess the courts' conclusion that the description provided was adequate to support the privilege claim.

GAF's second excuse, which Rossi submits was also pretextual, was that GAF had a product shortage and therefore could not supply any new distributors. Rossi contends that there is a genuine issue of material fact as to the validity of this excuse because Bacchione, GAF's national sales manager, testified that he could recall no problems in filling customer orders for GAF product in 1989, despite the fact that this would have been a matter within his job responsibilities. In addition, Rossi argues that the only document GAF has been **[**85]** able to produce to corroborate Krusa's claim that GAF product was in short supply in 1988 and 1989 was a memorandum dated August 11, 1989. Rossi submits that this memorandum should not be considered conclusive for the purposes of summary judgment because it was written almost nine months after GAF had decided not to supply Rossi Florence. GAF counters that the memorandum refers to the product shortage as a "continuing" issue, and therefore that summary judgment is appropriate.

The critical language in the memorandum is:

> We continue to have an im-balance of inventory between Baltimore and So. Bound Brook. The lack of warehousing has been a very critical issue, causing the im-balance in inventory.
>
> We are receiving more calls, on a daily basis, from customers in the southern half of the district complaining of our lack of product and the congestion of trucks and also the length of time it takes to get loaded at the Baltimore Plant.

Our reading of the document is that it is ambiguous and therefore insufficient to command summary judgment. For example, it is unclear whether the memorandum refers to an overall GAF product shortage or just a warehousing "im-balance" **[**86]** that was temporarily interfering with delivery to the southern half of Krusa's territory. Also, while the memorandum refers to the problem as a "continuing" one, there is no indication what that means. On summary judgment, viewing the evidence in a light most favorable to Rossi, he has established a genuine issue of fact whether both the "adequate distribution" and the "product shortage" excuses were pretextual.

(e) <u>Conclusion</u>

To summarize, we find that Rossi has adduced competent evidence that GAF: (1) responded to distributor complaints in the past; (2) singled out Rossi as one of the few distributors out of a large number in northern New Jersey not to receive GAF product; (3) acted in contravention of its own established open distribution policy in dealing with Rossi; (4) threatened and punished distributors who resold to Rossi; (5) refused to supply Rossi through buying groups; (6) implemented an unprecedented policy prohibiting trans-shipment of GAF product to Rossi; (7) cooperated with Standard in monitoring and enforcing **[*479]** the boycott; and (8) offered pretextual excuses to explain its behavior. Examining the totality of this evidence, it is sufficient to support **[**87]** a reasonable inference that GAF was acting in concert with Standard and Arzee to boycott Rossi.

Particularly forceful is the evidence that GAF prohibited distributors from trans-shipping GAF product to Rossi and that GAF prevented Rossi from purchasing its products from buying groups. These actions simply do not make sense in light of GAF's asserted justifications for its behavior vis a vis Rossi. For example, if there were truly a product shortage in northern New Jersey, presumably GAF would then have cut off supply to all Servistar and HWI members who were not on GAF's approved customer list to ensure that its larger distributors like Standard and Arzee would not suffer from the short supply. Yet, GAF supplied Far Hills, also an entity that was not on GAF's customer list, until it discovered that Far Hills was under Rossi's control. Moreover, the product shortage excuse is not consistent with GAF's claim that it unilaterally implemented a policy precluding trans-shipment of product at the distributor level. Assuming that GAF product was scarce, GAF would understandably want to ensure that its favored distributors received it ahead of all others. However, once GAF decided how it **[**88]** would allocate among its approved distributors whatever amount of GAF product existed, it is difficult to conceive of a legitimate reason why GAF would care whether that distributor used the product or resold it to Rossi Roofing at a profit.

Additionally, the product shortage justification does not explain why GAF would sell Droesch as much GAF product as he wanted in Long Island but would not allow him to trans-ship that product to New Jersey. Similarly, it is hard to comprehend why GAF would continue to fill $ 30,000 orders, obviously commercial-sized purchases, to buying group members in northern New Jersey, if it was truly believed that it had adequate distribution in that market. One explanation of this behavior is that GAF was acting in concert with Standard, Arzee, and Allied to boycott Rossi and force him out of business.

For the reasons described above, Rossi has met his burden of adducing evidence that tends to exclude the possibility of independent action, and hence we will reverse the district court's order granting summary judgment in favor of GAF.

c. Servistar

In contrast to the defendants discussed above, we will affirm the district court's grant of summary **[**89]** judgment in favor of Servistar because Rossi has failed to introduce either direct or circumstantial evidence that tends to exclude the possibility that Servistar acted independently rather than joining the conspiracy against Rossi.

Servistar's involvement in this case stems from its refusal to honor Rossi's second purchase request for $ 456 of GAF product on August 11, 1989. Rossi had already obtained a little over $ 30,000 of GAF product on August 8 and 9, 1989, via his Far Hills account with Servistar, which was resold to Rossi Roofing. Two days later, when Rossi attempted to order a second batch, Servistar did not fill it, claiming that GAF had cut Far Hills off from obtaining GAF product. Rossi contends that after he received the first order of GAF product, Standard and Arzee discovered how he had circumvented the blockade, notified GAF, and that GAF then enlisted Servistar to join the group boycott and cut off this new avenue of supply. Rossi offers three pieces of evidence to support this allegation: (1) a discussion he had with Jim Cherbonneau of Servistar in which Cherbonneau told him that GAF did not want Servistar to ship its product to Rossi and that GAF would not supply **[**90]** Rossi through his Servistar account; [17] (2) Servistar's curious and sudden change of mind, selling Rossi $ 30,000 of GAF product one day and refusing a minuscule $ 456 order two days later; and (3) Servistar's use of the allegedly pretextual excuse that Far Hills had credit problems to justify its refusal to deal.

[*480] Rossi's only direct evidence, the phone conversation with Cherbonneau, is not evidence of Servistar's conspiratorial involvement. Cherbonneau said that "GAF would not sell product to Servistar to go to -- through [Far Hills] to me." Cherbonneau's statement, while not precluding concerted action, is evidence only of a unilateral decision by GAF to not supply Rossi through any means (or a multilateral conspiracy that did not include Servistar). Additionally, it is undisputed that Servistar could not force GAF to supply **[**91]** it or its members with GAF product. Unlike other products Servistar supplied, Servistar neither stored GAF product in its warehouses nor had the contractual right to compel GAF to supply the product. The Servistar-GAF purchasing agreement did not obligate GAF to accept all of Servistar's members' orders.

Because Servistar provided GAF product to its members on what is known in the industry as a "drop shipment" basis, it had no control over whether its suppliers would actually deliver their products to its members. The "drop shipment" relationship between Servistar and GAF meant that when a Servistar member placed an order with Servistar for GAF product, Servistar would forward that order to GAF. The member would then go to the GAF warehouse to pick up the GAF product directly from GAF, not Servistar. GAF then would invoice Servistar for the purchase, and Servistar would pay GAF. Subsequently, Servistar would collect the amount due from its member. Using this "drop shipment" purchasing method, Servistar assists its members by: (1) negotiating group discounts from manufacturers, and (2) acting as the guarantor of its members' credit to those manufacturers. Thus, Servistar's role did **[**92]** not include pre-purchasing and warehousing of GAF product, and it had virtually no say over which of its members GAF chose to supply.

Under these circumstances, Rossi's claim that "at the request of GAF, Servistar refused to fill Far Hills' next order for $ 450 because Far Hills had resold it to Rossi Roofing," is not supported by Rossi's own testimony. As described above, according to the undisputed evidence, GAF did not have to conspire with Servistar to boycott Rossi Roofing because GAF did not need Servistar's acquiescence to prohibit Far Hills or Rossi Roofing from buying its product through Servistar. Since there is no evidence that Servistar could overrule a unilateral GAF decision to refuse to

[17] Cherbonneau told Rossi, "GAF called, they knew where the product was going. They had filled their needs in that area, and [] they do not want us to ship to you."

supply a Servistar member, we cannot reasonably infer on the basis of such ambiguous evidence that Servistar and GAF agreed to refuse to sell to Far Hills. See *International Logistics Group Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989)* (no credible conspiracy is alleged where a manufacturer imposing distribution restraints does not need agreement or acquiescence from its distributors in formulating marketing conditions for its product); 6 Phillip E. Areeda, **[**93]** ***Antitrust Law*** P 1402b4 (1986) ("discussions, suggestions, recommendations, and the giving of information do not indicate any conspiracy where the actor imposing the alleged restraint does not wish or need the acquiescence of the other party or any quid pro quo from him").

Similarly, Rossi's allegation that Servistar made no effort to require GAF to fill the order of its member Far Hills does not support his theory of conspiracy. Without direct evidence (or other strong circumstantial evidence) of concerted action by Servistar and GAF, we cannot draw an inference of an unlawful conspiracy from the equivocal nature of Servistar's decision not to make what would most likely have been a futile effort to encourage GAF to sell to Rossi. Servistar's refusal to disrupt its relationship with GAF because GAF unilaterally (from Servistar's perspective) refused to deal with Rossi is clearly "as consistent with permissible competition as with illegal conspiracy," *Matsushita, 475 U.S. at 588* (citations omitted), and is not evidence of a "conscious commitment to a common scheme." *Monsanto, 465 U.S. at 764*. We note in this regard that there is no evidence **[**94]** that Servistar was on notice that GAF was part of a conspiracy to boycott Rossi Roofing. Thus, from Servistar's point of view, this was simply a unilateral refusal to deal. Indeed, even if Servistar did know that GAF was involved in an unlawful group boycott, its decision to continue **[*481]** relations with GAF would still not rise to the level of concerted action.

Without direct evidence with respect to Servistar, we must also consider whether Rossi's conspiracy theory is plausible, and whether inferring concerted action under these circumstances would have the effect of deterring significant procompetitive conduct. See *Petruzzi's, 998 F.2d at 1233*. Both of these considerations militate against inferring concerted action with respect to Servistar. Apart from the evidence discussed above that it would be unreasonable to infer that Servistar would conspire with GAF to do what GAF could do unilaterally (i.e. refuse to release GAF product to Rossi from GAF warehouses), it is similarly implausible that GAF, an extremely minor Servistar supplier, could "pressure" Servistar, a billion plus dollar buying cooperative, into joining the group boycott of Rossi Roofing, **[**95]** a small start-up roofing and siding distributor. Similarly, Rossi has adduced no evidence of a motive for Servistar to join the conspiracy. See *Matsushita, 475 U.S. at 596-97*. Nothing in the record indicates that Servistar had any reason to support a conspiracy to increase or stabilize wholesale roofing prices in New Jersey, and, to repeat, there is simply no evidence of GAF leverage over Servistar. [18]

Perhaps most importantly, inferring a conspiracy from the slim circumstantial evidence would have the effect of deterring Servistar's significant procompetitive conduct in this as well as many other markets. As a wholesale purchasing cooperative, Servistar bolsters competition and increases economic efficiency by aggregating small purchasers thereby **[**96]** permitting them "to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensuring ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers." *Northwest Wholesale Stationers, 472 U.S. at 295*. If we were to permit an antitrust violation to be inferred under the facts of this case, it would significantly impact the ability of Servistar to continue its procompetitive actions in the market.

Because Servistar could not compel GAF to sell to Far Hills, Servistar's only option in response to GAF's decision not to supply Far Hills would have been to somehow bring pressure to bear on the roofing manufacturer. Such action would undoubtedly adversely affect all Servistar members nationwide who were receiving improved pricing for GAF product through Servistar, especially if it led to the restriction or cessation of Servistar's purchasing agreement with GAF. Indeed, inferring concerted action in these circumstances could encourage Servistar **[**97]** to terminate relationships with every supplier that refused to sell to a particular Servistar member. This would deter Servistar's procompetitive activities and deny Servistar's members the significant benefits of cooperative membership.

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[18] Sales of GAF product through Servistar, estimated at about $ 2.5 million, comprised only 12 of Servistar's total roofing purchases on behalf of its members and an insignificant fraction of Servistar's one billion plus national purchases in 1989.

Finally, Rossi submits that Servistar offered a pretextual excuse to explain its decision not to supply Far Hills with GAF product. Pretextual excuses, as noted, can disprove the likelihood of independent action. See *Fragale, 760 F.2d at 474*. Rossi challenges Servistar's explanation that it refused to supply the second order of GAF product to Far Hills because of Far Hills' credit problems. Although it appears that there are genuine issues of fact concerning Far Hills' credit-worthiness and its impact on Servistar's decision to refuse Rossi's second order of GAF product, [19] considering **[*482]** Servistar's lack of motive to conspire, GAF's lack of any leverage over Servistar, and the fact that GAF did not need to enlist Servistar's help to boycott Rossi, this slim reed of pretext is simply not enough. In view of the procompetitive role Servistar plays in the market generally and concerned that we do not "chill the very conduct **[**98]** the antitrust laws are designed to protect," *Matsushita, 475 U.S. at 594*, we conclude that Rossi has not met his burden here in opposing summary judgment, and therefore we will affirm the district court's order granting summary judgment in favor of Servistar.

d. Wood Fiber

Like GAF, Wood Fiber manufactures roofing products, including Structodek FS, which is widely used in certain commercial roofing applications. Unlike GAF, however, **[**99]** Wood Fiber is only tangentially involved in the alleged conspiracy with its activity centering around a single incident in which Rossi was frustrated in his attempt to purchase approximately $ 5,000 worth of Structodek FS. We will affirm the district court's grant of summary judgment in favor of Wood Fiber because, as with Servistar, Rossi has failed to introduce evidence that tends to exclude the possibility that Wood Fiber acted independently rather than joining the conspiracy against Rossi.

On June 6, 1989, Rossi Roofing ordered Structodek FS from Wood Fiber for its customer, Star Roofing. Wood Fiber quoted a price and a shipping date of July 5th to Rossi Roofing. On June 27, 1989, Karl Loser, Wood Fiber's sales representative in New Jersey, called and told Rossi Roofing's Mike Issler that Wood Fiber would not fill the order. As a result, Rossi Roofing lost the order for Structodek FS from Star Roofing. Rossi claims that Loser told him that Wood Fiber was being pressured by Standard and Arzee not to sell to him and that there was a "problem" with his pricing. Loser also told Issler that Wood Fiber had previously sold product to a small distributor on Long Island and suffered when **[**100]** Allied canceled orders in retaliation. Loser testified that he wanted to supply Rossi Roofing, but that his concerns that Rossi Roofing's competitors would retaliate "influenced" his decision not to supply Rossi Roofing.

Based upon these facts, Rossi asks us to infer that Wood Fiber participated in a conspiracy to boycott Rossi Roofing because it gave in to pressure and fear of retaliation by several of its distributors. It is well established that this kind of evidence, by itself, is legally insufficient to prove a conspiracy. See *Monsanto, 465 U.S. at 763-64*; *Sweeney, 637 F.2d at 111*. In Sweeney, the plaintiffs contended that "the retailers' acts of complaining and [the defendant's] reaction to the complaints constituted concerted action in restraint of trade." *Sweeney, 637 F.2d at 110*. We rejected that argument and noted that "even if the appellants had demonstrated that [the defendant's] actions were in response to these complaints, such evidence alone would not show the necessary concerted action." Id. Similarly, in Monsanto, the Supreme Court opined that "permitting an agreement to be inferred merely from **[**101]** the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *465 U.S. at 763*. Thus, the Court held that " 'to permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute.' " *Id. at 764* (quoting *Sweeney, 637 F.2d at 111 n.2*).

We have explained at length supra why the claims against Standard, Arzee, and GAF survive, notwithstanding these precedents. However, because Rossi has not adduced evidence of anything other than the fact that Wood

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[19] On the one hand, the record indicates that Servistar refused Far Hills credit on August 15, 1989, even though Far Hills had only used $ 30,755 of its outstanding $ 75,000 credit limit and no payments were yet due. On the other hand, Servistar contends that it extended the $ 75,000 credit limit to Far Hills for the purpose of funding hardware purchases, not roofing supplies. According to Servistar's forceful rejoinder, the initial order of $ 30,755 was an error, and after it was discovered, Servistar unilaterally determined not to permit it to happen again.

Fiber may have responded to pressure and threats from Standard and Arzee, we cannot infer the existence of concerted action involving Wood Fiber. The evidence adduced against Wood Fiber stands in stark contrast to the evidence against GAF. For example, Rossi has not adduced any evidence that Wood Fiber offered pretextual excuses, or prohibited trans-shipment of its product, or **[*483]** engaged in monitoring **[**102]** and enforcement of the alleged boycott. Without some additional evidence, a fact finder may not infer that Wood Fiber entered into an agreement to boycott Rossi Florence or Rossi Roofing, and therefore we will affirm the district court's order granting summary judgment in favor of Wood Fiber.

III. PROXIMATE CAUSE AND ANTITRUST INJURY

Having determined that Rossi has adduced sufficient evidence of a conspiracy to satisfy the first prong of the prima facie case with respect to the Standard defendants, the Arzee defendants, and GAF, we now consider whether Rossi has adduced sufficient evidence to satisfy the fourth prong, "that the plaintiffs were injured as a proximate result of that conspiracy." *Tunis Bros., 763 F.2d at 1489*. [20]

The district court concluded that even if Rossi had established **[**103]** the existence of an agreement, his claim still would fail because he had not established that the business losses he suffered were in any way related to that conspiracy. See *Rossi v. Standard Roofing, Inc., 958 F. Supp. 976, 991 (D.N.J. 1997)*. The court determined that Rossi's allegations -- that the defendants prevented him from obtaining GAF and other roofing products he needed to compete and thereby stopped him from opening Rossi Florence and ultimately forced Rossi Roofing out of business -- are unsupported in the record. The district court also concluded that Rossi's damages expert, Regan R. Rockhill, CPA, based his report upon unfounded assumptions that would force a trier of fact to use "guesswork and speculation" in determining what, if any, injury Rossi suffered as a result of the defendants' actions. See id. The court criticized the Rockhill Report for being nothing more than an impermissible "but for" damage model that erroneously ignored several important factors, including failing: (1) to consider that Rossi had no experience running his own business; (2) to analyze specifically what products were needed to assure a successful distributorship; and **[**104]** (3) to engage in any analysis of what harm, if any, was caused by the alleged antitrust violations as opposed to other factors, such as Rossi's management style or general business conditions. See id.

The district court accordingly held that Rossi had not presented sufficient evidence of damages such that a reasonable inference could be made connecting the injury with the defendants' conduct. For the reasons we will explain, we disagree with the court's conclusion that Rossi has not identified a genuine issue of material fact with regard to the proximate cause and damages element of his prima facie case.

HN9[] To recover damages, an antitrust plaintiff must prove causation, described in our jurisprudence as "fact of damage or injury." See *Danny Kresky Enters. Corp. v. Magid, 716 F.2d 206, 209 (3d Cir. 1983)*. It is not necessary to show with total certainty the amount of damages sustained, just that the antitrust violation caused the antitrust injury suffered by the plaintiff. See *Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1493 (8th Cir. 1992)*; *Danny Kresky, 716 F.2d at 211* ("the standard of causation requires only that **[**105]** plaintiff prove that defendant's illegal conduct was a material cause of its injury"). As the Supreme Court explained in *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1968)* (citations omitted) (emphasis in original):

> [Plaintiff's] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damages. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.

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[20] As explained above, because Rossi's allegations qualify for per se treatment, the second and third prongs of the four-part antitrust prima facie case are conclusively presumed. See supra § II.A.

[*484] Once causation is established, the jury is permitted to calculate the actual damages suffered using a " 'reasonable estimate, as long as the jury verdict is not the product of speculation or guess work.' " *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1176 (3d Cir. 1993)* (citing *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983))* **[**106]** (other citations omitted). Thus, in antitrust cases, there are ultimately two related, but distinct, inquiries to establish antitrust injury. First, the plaintiff must prove the fact of antitrust injury, as part of his prima facie case; then, he must make a showing regarding the amount of damages, in order to justify an award by the trier of fact. Concerning the former, courts apply the ordinary standard of proof, but with respect to the latter, the standard is somewhat relaxed. See *In re Lower Lake Erie Iron Ore, 998 F.2d at 1176* ("the relaxed measure of proof is afforded to the amount, not the causation of loss -- the nexus between the defendant's illegal activity and the injuries suffered must be reasonably proven.") (citations omitted); see also *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65, 90 L. Ed. 652, 66 S. Ct. 574 (1946)* (holding that when the plaintiff cannot prove his damages by precise computation, the jury "may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly").

Under these standards, Rossi's antitrust claim does not suffer from the infirmities claimed by **[**107]** the district court. At the threshold, it is important to note that we need only concern ourselves with the first element of antitrust injury, causation. At this procedural juncture, reviewing the district court's grant of the defendants' motions for summary judgment, we are not, as we would be upon reviewing a jury verdict, determining whether a plaintiff has brought forth sufficient evidence to justify the actual damages awarded. Rather, here, all we are concerned with is whether Rossi has established that the defendants' "illegal conduct was a material cause of [his] injury." *Danny Kresky, 716 F.2d at 211*; see also *Zenith Radio, 395 U.S. at 114 n.9*.

We find two sources of evidence sufficient for Rossi to demonstrate fact of injury or causation: (1) evidence of specific lost transactions based upon Rossi's inability to purchase product; and (2) the Rockhill Damage Report. We discuss these in turn.

We have already explained that there is ample evidence in the record that Standard, Arzee, and GAF conspired to deny Rossi access to GAF product and prevent him from competing in the roofing and siding business in northern New Jersey. See supra **[**108]** § II.B.2.a & b. Also, there is evidence that, with a few exceptions, the defendants successfully prevented Rossi from obtaining GAF product. See id. Moreover, there is evidence that GAF product was highly desirable, if not critical, to Rossi's target customers. See supra § II.B.2.b(1). Finally, several of Rossi's former customers from his Standard days, including Sean Coffey, Francis Doherty, John Feher, Albert Logan, and Melvin Stanley, have testified that they would have done business with Rossi Roofing if he had had access to the necessary products, primarily GAF product.

This evidence is enough by itself to satisfy Rossi's burden on causation for the purposes of summary judgment. Rossi has put forth evidence that the defendants' alleged conspiracy unlawfully prevented him from obtaining GAF product, and that he lost multiple sales as a result. Thus, if Rossi can successfully prove the existence of the conspiracy, he will have proved fact of injury. The case before us is not analogous to *Van Dyk Research Corp. v. Xerox Corp., 478 F. Supp. 1268 (D.N.J. 1979)*, a case upon which the district court relied, where the plaintiff failed to prove fact **[**109]** of injury primarily because it could not show that it lost even a single contract based upon the alleged unlawful practices of the defendant. See *478 F. Supp. at 1327*.

In the same vein, Amerinet is not availing to the defendants either. In Amerinet, the Eighth Circuit concluded that the plaintiff had not shown antitrust injury or causation in large part because statements and assertions by its own damage expert "strongly suggested . . . that [plaintiff's] decline was caused at least partly by, if not substantially **[*485]** or mainly by, other factors than [defendant's] alleged antitrust violations." *Amerinet, 972 F.2d at 1495* (noting that the plaintiff's damage expert admitted that the plaintiff was in a period of decline prior to the defendant's alleged antitrust violations). In addition, the plaintiff in Amerinet was only able to show that, at most, the allegedly illegal activity was "one factor among many, and not a controlling or major factor" in specific potential clients' decisions not to purchase from the plaintiff. *Id. at 1497*. Therefore, the Eighth Circuit held that the plaintiff had not adduced sufficient **[**110]** evidence of element of causation to enable it to withstand summary judgment.

Here, Rossi's evidence is more substantial than in either Van Dyk Research or Amerinet. Rossi has proffered evidence from five specific customers that they would have purchased GAF product from Rossi if he had been able to sell it to them, and Rossi's inability to consummate those sales (leading to a loss of business and therefore injury) is a direct result of the alleged antitrust violation--the group boycott. In addition, Richard Droesch, Rossi's partner in the failed Rossi Florence venture, backed out of that venture at least in part based upon his understanding that the company would not be able to get the products it needed, particularly GAF product, to compete successfully in the market. For all these reasons, we believe that the record supports Rossi's allegations that he suffered antitrust injury, and that it was caused by the defendant's allegedly unlawful actions.

The district court also utterly rejected Rossi's damage expert, holding that his report was nothing more than a "but for" damage model that failed as a matter of law to support Rossi's damage allegations. We believe, however, **[**111]** that the Rockhill Report, when combined with the testimony concerning the five lost sales, is indicative of a larger pattern of loss and helps Rossi demonstrate causation. Thus, while the other damage evidence is enough alone to satisfy Rossi's summary judgment burden, for the guidance of the district court on remand, we nonetheless consider the Rockhill Report.

A typical "but for" damage model, like the one in *Southern Pacific Com. Co. v. American Tel. & Tel. Co., 556 F. Supp. 825 (D.D.C. 1983)*, aggregates the defendant's alleged violations and creates a hypothetical calculation projecting the plaintiff's profits and losses "but for" the defendant's antitrust violations. In Van Dyk Research, for example, this estimate was based upon an internal "task force" report created by the plaintiff projecting its own future performance. See *478 F. Supp. at 1327*. The plaintiff then compares this hypothetical figure with its actual performance to calculate its damages. Courts usually highlight two problems with models created using this methodology.

First, they do not attempt to measure the particularized effects of any specific alleged illegal practices, **[**112]** but rather rely on an aggregation of injury from all factors. See Southern Pacific, 556 F. Supp. at 1092. Second, their hypothetical "but for" calculations usually rely upon unrealistic ex ante assumptions about the business environment, such as assumptions of perfect knowledge of future demand, future prices, and future costs that tend to overstate the plaintiff's damage claim. See *id. at 1092-93* (pointing out many difficulties not caused by the defendants that negatively impacted plaintiff's profitability yet were not accounted for in the "but for" damage model). Thus, using a "but for" damage model arguably makes it impossible for the trier of fact to determine what, if any, injury derived from the defendant's antitrust violations as opposed to other factors, and courts sometimes reject such models as the basis of either causation or amount of injury. See Southern Pacific, 556 F. Supp. at 1090, 1098; *Van Dyk Research, 478 F. Supp. at 1327*.

The Rockhill Report is in many respects a "but for" damage model because it does not deal with the particularized effects of specific injuries, but rather aggregates **[**113]** all of Rossi's damages into one figure. Relying on Van Dyk Research and Southern Pacific, defendants argue that all "but for" models should be precluded as a matter of law from serving as a basis for antitrust causation and damage calculation. We do not agree with the defendants' reading of these cases (and, at all events, are not bound by them), which we conclude only stand for the proposition that some, not all, "but for" models are too speculative and must be precluded as a matter of law. The Rockhill Report, as we shall **[*486]** see, is much less speculative and does not suffer from many of the flaws in the damage models discussed in Van Dyk Research and Southern Pacific, and thus it is not comparable with them.

Rockhill made two major assumptions in calculating the damages Rossi suffered because of his inability to procure products. First, he estimated that Rossi Florence and/or Rossi Roofing would have achieved the same pattern of sales revenues (and revenue growth) beginning in 1989 and extending to 2008 that ABC's Morristown sales branch actually achieved from 1990-1993, operating out of the same location, with Rossi as branch manager. Rossi makes a strong **[**114]** argument that this estimate took into account the poor general business conditions that existed at the time, as well as any other extrinsic factors not related to the defendants' alleged boycott, because Rockhill based his estimate upon actual sales figures Rossi was able to achieve competing against the same firms, selling the same products at the same location to the same customers under the actual business conditions that existed at the time. [21] **[**115]** The second major assumption in the Rockhill Report is that Rossi would have been able to manage Rossi Florence and Rossi Roofing in the manner that he had run Standard's Morristown branch from 1974-1987. Rockhill used Standard's Morristown branch financial statements to develop 14-year averages for cost of sales, payroll expenses, equipment expenses, and administrative expenses (as a percentage of total sales) and applied them to the sales estimate. This kind of estimate, while perhaps not one upon which we would base our own personal investment decisions, nevertheless is sufficient to establish causation (especially when considered in conjunction with the five lost transactions). [22]

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[21] Defendants also complain that it is inappropriate to use sales figures Rossi achieved working for ABC, a major national chain, to estimate the revenues that Rossi Florence or Rossi Roofing would have achieved without the boycott. This position has some force and is certainly an appropriate argument to advance before the trier of fact; however, it is not uncontroverted. There is ample evidence in the record that wholesale roofing and siding sales has a strong local accent, and that after price, service and reliability are the next most critical factors in customers' purchasing decisions. Rossi had a long track record in northern New Jersey, and several witnesses testified that they would patronize Rossi regardless of whom he worked for, as long as he carried the product they needed at a competitive price, because he provided the best service. Thus, it is not clearly evident that Rossi's sales figures with ABC (or Standard) would necessarily be higher than with Rossi Roofing.

[22] For the guidance of the district court on remand, we note that the Rockhill Report satisfies the relaxed Bigelow standard of proof for estimating the amount of damages under which:

> the jury [may] conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. . . . [When] [] tortious acts . . . preclude[] ascertainment of the amount of damages more precisely, by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions . . . we [have] held that the jury could return a verdict for the plaintiffs, even though damages could not be measured with the exactness which would otherwise have been possible.
>
> In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as [upon] direct and positive proof.' Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.

Bigelow, 327 U.S. at 264 (internal citations omitted).

In Bigelow, the Supreme Court upheld a jury's damage award based upon a comparison of the plaintiff's actual profits with the contemporaneous profits of a competing theater with access to first-run films, which were illegally denied to plaintiff theater by a group of conspiring film distributors. See *J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 566, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)* (explaining Bigelow). The Bigelow plaintiff had also adduced evidence comparing his actual profits during the conspiracy with his profits when he had been able to obtain first-run films. See id. This was enough to uphold the jury's verdict. Similarly, in Zenith Radio, the Supreme Court permitted the plaintiff, who had been the victim of an illegal campaign against importers attempting to bring new products into Canada, to estimate its damages by comparing its market share in the United States (where it competed freely) with its market share in Canada (where it was the target of unlawful distribution-disrupting tactics). See *395 U.S. at 116 n.11* & 124-25. Finally, we have held that "plaintiffs must be free to select their own damage theories as long as they are supported by a reasonable foundation." *Danny Kresky, 716 F.2d at 213* (upholding a market share damage calculation approach in which the plaintiff argued that had it not been for the defendants' antitrust violations, it would have been able to achieve a percentage of the excluded market segment equal to the percentage of the market it enjoyed in the rest of the market generally).

Compared with these cases, Rossi's damage estimation is far less speculative. The sales revenues (at least for the first few years of the ten year estimate) were exactly those that Rossi actually achieved while working as ABC's branch manager at the same location. Thus, the jury here need not even speculate whether the comparison market (or location) is similar enough to serve as a basis for its damage estimate, as the jury had to in Bigelow and Zenith Radio. Similarly, both the sales and expenses are based on real world numbers, not pure conjecture by an optimistic new competitor. These numbers may or may not

[116]** On the subject of the Rockhill Report, we add that the defendants' criticism that the report is flawed as a matter of law because it improperly mixes data using "a variety of sources including the historic operations of **[*487]** Standard; ABC actual data; input from Mr. Rossi; and judgment" is unavailing. Rockhill used actual data to support his estimates, and thus they are based upon a "reasonable foundation." See *Danny Kresky, 716 F.2d at 213*. We do not suggest that Standard's problems with the report are baseless, only that they constitute genuine issues of material fact and should also be argued before the trier of fact.

Finally, the defendants attack the evidence supporting Rossi's assertion of damages on several other bases. Defendants submit that Rossi Florence and Rossi Roofing failed because: (1) they were start-up operations, (2) they were founded during one of the worst recessions ever to hit the New Jersey housing market, (3) Rossi, as a manager, failed to control his costs, and/or (4) Rossi worked on other ventures to the detriment and ultimate failure of both companies. One or more of these reasons, particularly the theory that it was the recession, **[**117]** not a conspiracy, which mortally wounded Rossi's business efforts, might explain Rossi's failure in the roofing and siding business in northern New Jersey, and could conceivably result in a verdict for the defendants at trial. They are, however, unavailing to the defendants at this stage of the case because they all involve factual disputes that need to be resolved by the trier of fact, not by this court on a motion for summary judgment.

Standard also argues that Rossi failed to establish causation because an essential element in causation involves proving that there are no comparable substitutes for the desired product -- here, GAF product. See *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 148 (6th Cir. 1972)*. This is another factual issue that Standard may argue to the jury. As we have explained above, we are satisfied that Rossi's own testimony and that of several of his witnesses are sufficient to establish that GAF product was, for practical purposes, unique and highly desired in this market. See supra § II.B.2.b(1).

In sum, Rossi has established a prima facie case of antitrust injury with respect to Standard, Arzee, and **[**118]** GAF. He has adduced evidence of specific lost transactions showing causation or fact of injury, which is bolstered by an expert damage report that is not overly speculative as a matter of law. The combination of this evidence, while not conclusive, provides enough of a foundation that an eventual finder of fact would be justified in making a "just and reasonable inference" of the damages Rossi may have suffered as a result of the defendants' allegedly unlawful activities.

IV. STATE LAW TORTIOUS INTERFERENCE WITH CONTRACTUAL AND PROSPECTIVE CONTRACTUAL RELATIONS

The district court dismissed Rossi's state law tortious interference claims against **[*488]** defendants with no discussion. It very well may be, as some of the defendants suggest, that the district court concluded when it dismissed Rossi's state law claims that Rossi had not shown any wrongful or intentional conduct designed to interfere with alleged contractual or prospective contractual relationships. If that is the case, then based upon our disposition here, the state law claims will likely have to be reinstated with respect to the Standard defendants, the Arzee defendants, and GAF since we have found that there is **[**119]** sufficient evidence of their participation in an unlawful conspiracy to boycott Rossi. However, the district court may have had some other reason for dismissing these claims of which neither we nor the parties before us is aware. Our jurisprudence requires district courts in this circuit to accompany grants of summary judgment with an explanation sufficient to permit the parties and this court to understand the legal premise for the court's order. See *Vadino v. A. Valey Eng'rs, 903 F.2d 253, 257-60 (3d Cir. 1990)*. We will therefore reverse the district court's order dismissing the state tortious interference claims against all defendants and remand them to the district court for further consideration and explanation consistent with this opinion.

V. CONCLUSION

For the foregoing reasons, we will affirm the district court's judgment on the federal antitrust issues with respect to Servistar and Wood Fiber, but reverse on those issues with respect to the Standard defendants, the Arzee

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accurately represent what Rossi Florence or Rossi Roofing would have done had it stayed in business, but they are clearly not mere speculation or wishful thinking, as was the case in Van Dyk Research and Southern Pacific.

defendants, and GAF. We will also reverse the district court's judgment dismissing the state claims with respect to all defendants. The case will be remanded for further proceedings consistent **[**120]** with this opinion.

American Int'l Sec. Specialists v. Roberts

United States Court of Appeals for the Fourth Circuit

May 7, 1998, Argued ; September 10, 1998, Decided

No. 97-2089, No. 97-2090, No. 97-2091, No. 97-2092, No. 97-2093, No. 97-2098, No. 97-2105

Reporter

1998 U.S. App. LEXIS 22128 *; 1998-2 Trade Cas. (CCH) P72,262

AMERICAN INTERNATIONAL SECURITY SPECIALISTS, INCORPORATED, Plaintiff-Appellant, v. B. J. ROBERTS, Sheriff, City of Hampton; P. G. MINETTI, Chief of Police, City of Hampton, Defendants-Appellees, and THE CITY OF HAMPTON, VIRGINIA, Defendant. AMERICAN INTERNATIONAL SECURITY SPECIALISTS, INCORPORATED, Plaintiff-Appellant, v. TOBY A. MATHEWS, Sheriff, County of Henrico; HENRY STANLEY, Chief of Police, County of Henrico, Defendants-Appellees, and COUNTY OF HENRICO, VIRGINIA, Defendant. AMERICAN INTERNATIONAL SECURITY SPECIALISTS, INCORPORATED, Plaintiff-Appellant, v. R. J. MCCABE, Sheriff, City of Norfolk; MELVIN HIGH, Chief of Police, City of Norfolk, Defendants-Appellees, and CITY OF NORFOLK, VIRGINIA, Defendant. AMERICAN INTERNATIONAL SECURITY SPECIALISTS, INCORPORATED, Plaintiff-Appellant, v. GARY WATERS, Sheriff, City of Portsmouth; DENNIS MOOK, Chief of Police, City of Portsmouth, Defendants-Appellees, and THE CITY OF PORTSMOUTH, VIRGINIA, Defendant. AMERICAN INTERNATIONAL SECURITY SPECIALISTS, INCORPORATED, Plaintiff-Appellant, v. MICHELLE MITCHELL, Sheriff, City of Richmond; JERRY A. OLIVER, Chief of Police, City of Richmond, Defendants-Appellees, and THE CITY OF RICHMOND, VIRGINIA, Defendant. AMERICAN INTERNATIONAL SECURITY SPECIALISTS, INCORPORATED, Plaintiff-Appellant, v. FRANK DREW, Sheriff, City of Virginia Beach; CHARLES WALL, Chief of Police, City of Virginia Beach, Defendants-Appellees, and THE CITY OF VIRGINIA BEACH, VIRGINIA, Defendant. AMERICAN INTERNATIONAL SECURITY SPECIALISTS, INCORPORATED, Plaintiff-Appellant, v. JOHN R. NEWHART, Sheriff, City of Chesapeake; RICHARD A. JUSTICE, Chief of Police, City of Chesapeake, Defendants-Appellees, and THE CITY OF CHESAPEAKE, VIRGINIA; COMMONWEALTH OF VIRGINIA, Defendants.

Notice: **[*1]** RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: *1998 U.S. App. LEXIS 33444*.

Prior History: Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, Senior District Judge. (CA-97-82-2, CA-97-83-2, CA-97-85-2, CA-97-86-2, CA-97-87-2, CA-97-88-2, CA-96-921-2).

Disposition: AFFIRMED.

Core Terms

municipalities, Antitrust, state action doctrine, state law, articulated, off-duty, district court, private security, state policy, authorizes, regulation, immunity, entitled to immunity, local government, police officer, state immunity, present case, anticompetitive, law-enforcement, allegations, foreseeable, Construing, exemption, ordinance, displace, sheriffs, supplied, uniforms

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] Standards of Review, De Novo Review

The court reviews de novo the district court's decision to dismiss plaintiff's claims pursuant to *Fed. R. Civ. P. 12(b)(6)*. In conducting our review, the court is required to accept as true the factual allegations in plaintiff's complaint and to construe those facts in the light most favorable to plaintiff. The district court's dismissal of the claim must be affirmed if it appears beyond doubt that no set of facts could be proved which would entitle plaintiff to relief.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Employees & Officials

Governments > Local Governments > Finance

Governments > Public Improvements > General Overview

HN2[] Antitrust & Trade Law, Exemptions & Immunities

The state action doctrine provides states with immunity from federal antitrust suits seeking monetary or injunctive relief. The doctrine has been extended to provide immunity to local governments that engage in anticompetitive conduct pursuant to a state policy to displace competition with regulation or monopoly public service. Other courts have held, and this court agrees, that the state action doctrine applies not only to municipalities, but to the official acts of their officers. To demonstrate the existence of a clearly articulated state policy to displace competition, a municipality need not be able to point to a specific, detailed legislative authorization. Nor must its actions be actively supervised by the state. Instead, it is sufficient if the municipality acted pursuant to a clearly articulated and affirmatively expressed state policy, the foreseeable or logical result of which is anticompetitive.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

HN3[] Exemptions & Immunities, Parker State Action Doctrine

Va. Code Ann. § 15.2-1712 authorizes municipalities to adopt an ordinance which permits law-enforcement officers and deputy sheriffs to engage in off-duty employment which may occasionally require the use of their police powers and to provide for reasonable rules to apply to such off-duty employment.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Federal Government > Claims By & Against

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

For purposes of the state action doctrine, a municipality's authority to act is broader than what is applied to determine the legality of the municipality's action under state law. As the Supreme Court explained, a broader conception of authority is necessary to prevent the state action doctrine from undermining the very interests of federalism it is designed to protect. To be sure, state law "authorizes" only agency decisions that are substantively and procedurally correct. However if the antitrust court demands unqualified "authority" in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN5[] **Exemptions & Immunities, Parker State Action Doctrine**

Va. Code Ann. § 59.1-9.4(b)(1) exempts from scrutiny under the Virginia Antitrust Act any conduct that is authorized, regulated, or approved by a statute of this Commonwealth.

Counsel: ARGUED: John Warren Hart, BEATON & HART, P.C., Virginia Beach, Virginia, for Appellants.

ARGUED: William Gray Broaddus, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellees.

ON BRIEF: Scott Andrew Simmons, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellees.

Judges: Before MURNAGHAN and WILKINS, Circuit Judges, and BEEZER, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Opinion

OPINION

PER CURIAM:

Appellant, American International Security Specialists, Inc. (American), appeals the district court's dismissal of its state and federal antitrust claims **[*2]** against various law enforcement officers (Appellees) operating in Virginia. Finding no error in the district court's judgment, we affirm.

I.

American is a private security provider doing business in Virginia. It brought suit against the Appellees, numerous Virginia-based sheriffs and chiefs of police, alleging that they had violated the Sherman Act, *15 U.S.C. § 1*, and analogous provisions of the Virginia Antitrust Act, *Va. Code §§ 59.1-9.5*, 9.6, by permitting and encouraging subordinate officers to engage in off-duty employment as private security personnel, using state and locally supplied uniforms, badges, weapons, radios, and other equipment.

The Appellees filed motions to dismiss American's claims, pursuant to *Fed. R. Civ. P. 12(b)(6)*. Construing American's complaint to state allegations against the Appellees in their official capacities only, the district court concluded that they were entitled to federal immunity under the state action doctrine and the Local Government Antitrust Act, *15 U.S.C. §§ 35-36*, and state immunity under the state action doctrine and an exemption to the Virginia Antitrust Act. When American declined to amend **[*3]** its complaint to state a claim against the Appellees in their individual capacitates, the district court granted the Appellees' motions to dismiss. On appeal, American maintains that such dismissal was erroneous.

II.

HN1[] We review de novo the district court's decision to dismiss American's claims pursuant to *Rule 12(b)(6)*. *See* *Brooks v. City of Winston-Salem, 85 F.3d 178, 181 (4th Cir. 1996)*. In conducting our review, we are required to accept as true the factual allegations in American's complaint and to construe those facts in the light most favorable to American. *See* *Estate Constr. Co. v. Miller & Smith Holding Co., Inc., 14 F.3d 213, 217-18 (4th Cir. 1994)*. The district court's dismissal of the claim must be affirmed if it appears beyond doubt that no set of facts could be proved which would entitle American to relief. *See* *id. at 218*.

The state action doctrine was first articulated by the Supreme Court in *Parker v. Brown, 317 U.S. 341, 350-51, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. ***HN2***[] It provides states with immunity from federal antitrust suits seeking monetary or injunctive relief. *See* *Cohn v. Bond, 953 F.2d 154, 158 (4th Cir. 1991)* **[*4]** (citation omitted). In more recent times, the doctrine has been extended to provide immunity to local governments that engage in anticompetitive conduct "pursuant to [a] state policy to displace competition with regulation or monopoly public service." *See* *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*. Other courts have held, and we agree, that the state action doctrine applies not only to municipalities, but to the official acts of their officers. *See* *Fisichelli v. City Known as Town of Methuen, 956 F.2d 12, 15-16 (1st Cir. 1992)* ("We do not believe that a plaintiff can avoid the [state action doctrine] simply by substituting, for the name of the town, the names of the town officials who approved the challenged municipal action.").

To demonstrate the existence of a clearly articulated state policy to displace competition, a municipality "need not be able to point to a specific, detailed legislative authorization . . . .'" *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)* (quoting *Lafayette, 435 U.S. at 415*). **[*5]** Nor must its actions be actively supervised by the state. *See* *id. at 46*. Instead, it is sufficient if the municipality acted pursuant to "a clearly articulated and affirmatively expressed . . . state policy," *see* *Lafayette, 435 U.S. at 410*, the "foreseeable" or "logical" result of which is anticompetitive, *see* *Hallie, 471 U.S. at 42*.

In the present case, the district court concluded, and we agree, that the Appellees are entitled to immunity under the state action doctrine. The Commonwealth of Virginia has clearly articulated a policy of allowing municipalities and their law-enforcement officers to engage in the conduct complained of by American. ***HN3***[] *Section 15.2-1712 of the Virginia Code* authorizes municipalities to "adopt an ordinance which permits law-enforcement officers and deputy sheriffs. . . to engage in off-duty employment which may occasionally require the use of their police powers . . . [and to provide for] reasonable rules to apply to such off-duty employment . . . ." In light of that provision, it is certainly foreseeable that a municipality might allow its police officers to engage in off-duty work in the private security field, **[*6]** and that a municipality could, as part of the "regulation" thereof, allow its officers to use publicly supplied uniforms and other equipment during the course of such employment.

American argues that the Appellees' activities are outside the scope of the state's clearly articulated policy since some of the municipalities have failed to pass the ordinance authorized by *§ 15.2-1712*. We find that argument unpersuasive. In *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*, the Supreme Court held that ***HN4***[] for purposes of the state action doctrine, a municipality's "authority" to act is "broader than what is applied to determine the legality of the municipality's action under state law," *id. at 372*. As the Court explained, a broader conception of authority is necessary "to prevent [the state action doctrine] from undermining the very interests of federalism it is designed to protect." *Id. at 372*.

> To be sure, state law "authorizes" only agency decisions that are substantively and procedurally correct. . . .[However,] if the antitrust court demands unqualified "authority" in **[*7]** this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, *though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law*.

Id. at 371-72 (emphasis added) (quoting P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 212.3b (Supp. 1989)); *see also* *Allright Colorado, Inc. v. City and County of Denver, 937 F.2d 1502, 1511 (10th Cir. 1991)* ("We reject the argument that alleged errors or abuses in the implementation of state law should expose the City to antitrust liability."); *Boone v. Redevelopment Agency of San Jose, 841 F.2d 886, 892 (9th Cir. 1988)* ("Concerns over federalism and state sovereignty . . . dictate that the [plaintiffs] not be allowed to use federal anti-trust law to remedy their claim that the city and the agency exceeded their authority under state law."). In the present case, it is clear that, pursuant to *§ 15.2-1712*, municipalities have the "authority," in the broad sense intended by *Columbia* , to regulate the **[*8]** off-duty employment of their police officers. We therefore affirm dismissal of American's federal claims. [1]

We reach the same conclusion with respect to state immunity. ***HN5***[] *Section 59.1-9.4(b)(1) of the Virginia Code* exempts from scrutiny under the Virginia Antitrust Act any "conduct that is authorized, regulated, or approved . . . by a statute of this Commonwealth." Here, as discussed above, the Appellees are so authorized. We, therefore, have no difficulty concluding that they are entitled to immunity. [2]

[*9] The judgment of the district court is, therefore,

AFFIRMED.

End of Document

[1] Our conclusion that the Appellees are entitled to immunity under the state action doctrine renders it unnecessary to consider whether they might also be entitled to immunity under the Local Government Antitrust Act.

[2] This conclusion makes it unnecessary to address the district court's alternative holding, about which we have considerable doubt, that the Appellees are entitled to state immunity under the *Parker* state action doctrine.

Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.

United States District Court for the Northern District of Ohio, Eastern Division

September 10, 1998, Decided ; September 10, 1998, Filed

CASE NO. 1:97-CV-1422

Reporter

23 F. Supp. 2d 771 *; 1998 U.S. Dist. LEXIS 14340 **; 1998-2 Trade Cas. (CCH) P72,367

IRON WORKERS LOCAL UNION NO. 17 INSURANCE FUND AND ITS TRUSTEES, et al., Plaintiffs, v. PHILIP MORRIS INCORPORATED, et al., Defendants.

Subsequent History: As Amended September 21, 1998.

Disposition: **[**1]** Defendants' motions to dismiss plaintiffs' claims for breach of voluntary undertaken duty averred in Counts VI and VII of the Amended Complaint granted. Defendants' motions to dismiss plaintiffs' remaining claims under federal RICO (Counts I, II, III), under the Ohio Corrupt Activity Act (Counts XIV, XV, and XVI), for antitrust (Counts IV and X), and for civil conspiracy (Count XI) denied.

Core Terms

damages, defendants', plaintiffs', antitrust, remoteness, cause of action, proximate cause, proximate, Counts, antitrust claim, injuries, defendant's conduct, motion to dismiss, conspiracy, anti trust law, Activity Act, courts, standing to bring, double recovery, tobacco, flowed, Funds, patients, grounds, antitrust violation, medical expenses, personal injury, Clayton Act, undertaken, products

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

A court properly grants a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle her to relief. The court accepts as true and construes all factual allegations in the complaint in the light most favorable to the plaintiff.

Torts > Negligence > General Overview

HN2[] **Torts, Negligence**

A plaintiff has a right of action in negligence only if a defendant's conduct was negligent relative to her, and if the plaintiff's injury was not reasonably foreseeable, then the defendant's act was not negligent relative to her.

Torts > ... > Elements > Duty > General Overview

Torts > Strict Liability > Abnormally Dangerous Activities > General Overview

HN3[] Elements, Duty

If acts are imminently dangerous to anyone who may come within contact, the law will find a duty of prevision not far from that of an insurer. Willfully dangerous acts or intentional acts support a broader scope of duty.

Torts > ... > Causation > Proximate Cause > General Overview

HN4[] Causation, Proximate Cause

Proximate cause is the limitation that courts place upon an actor's responsibility for the consequences of his conduct.

Torts > ... > Elements > Causation > Concurrent Causation

Torts > ... > Elements > Causation > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN5[] Causation, Concurrent Causation

The proximate cause of a result is that which in a natural and continued sequence contributes to produce the result, without which it would not have happened. The fact that some other cause concurred with the negligence of a defendant in producing an injury does not relieve him from liability, unless it is shown such other cause would have produced the injury independently of defendant's negligence.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN6[] Private Actions, Racketeer Influenced & Corrupt Organizations

In deciding whether a plaintiff shows proximate injury under the federal Racketeer Influenced and Corrupt Organizations (RICO) law, a party is generally required to show a direct injury to have standing. It is generally insufficient under RICO to complain of harm flowing from the misfortunes visited upon another person by the defendant's acts.

Torts > Remedies > Damages > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN7[] Remedies, Damages

In cases of willful or malicious injury, and injury from reckless or illegal acts, or from positive fraud, the damages are not so strictly confined to proximate consequences as when these elements do not exist. Where there is fraud or other intentional wrong, there is not the same strictness to exclude remote or uncertain damages, even where punitive damages are not involved.

Torts > ... > Elements > Causation > Causation in Fact

Torts > Intentional Torts > General Overview

HN8[] Causation, Causation in Fact

An act is intentional when the actor desires to cause consequences of his act, or he believes that the consequences are substantially certain to result from it.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN9[] Private Actions, Standing

In determining whether a party has standing to bring a Racketeer Influenced and Corrupt Organization Act (RICO) action, a court should consider: (1) the difficulty the plaintiff has in showing that damages flowed from the defendant's conduct; (2) the risk of double recovery; and (3) whether the defendant's conduct is sufficiently injurious to warrant deterrence.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN10[] Private Actions, Remedies

Ohio Rev. Code Ann. § 2923.34(F) provides that in a civil proceeding under division (B) of this section, any person directly or indirectly injured by conduct in violation of *§ 2923.32* or a conspiracy to violate that section, shall have a cause of action for triple the actual damages he sustained. Ohio Rev. Code Ann § 2823.34(F).

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN11[] Private Actions, Standing

Persons indirectly injured should have standing to bring an action under the Ohio Pattern of Corrupt Activity Act.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN12[] Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1964(c) gives a cause of action to any person injured in his business or property by reason of a violation of § 1962. *18 U.S.C. § 1964(c)*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN13[] Private Actions, Standing

To decide whether the plaintiff has standing to make claim under the Racketeer Influenced and Corrupt Organizations Act, a court must examine whether others are positioned to make the same claims, whether the plaintiff will have difficulty showing its damages flowed from the defendant's conduct, whether there is a risk of double recovery, and, importantly, whether the defendant's conduct is sufficiently harmful to warrant deterrence.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Torts > Business Torts > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN14[] Private Actions, Standing

Only a person injured in his business or property may recover damages underthe Racketeer Influenced and Corrupt Organizations Act (RICO). *18 U.S.C.S. § 1964(c)*. RICO excludes from its ambit damages for personal injury. Claims for personal property injuries are also not cognizable under RICO. A plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN15[] Private Actions, Remedies

To assert a claim for damages under the antitrust statutes, one must be injured in his business or property. *15 U.S.C.S § 15(a)*. A plaintiff must allege specific antitrust injury. An injury, although causally related to an antitrust violation, nevertheless will not qualify as an antitrust injury unless it is attributable to an anti-competitive aspect of the practice under scrutiny.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN16[] **Remedies, Damages**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15* allows civil recovery of treble damages by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15(a)*.To make a claim under § 4 of the Clayton Act, a plaintiff need not prove that the antitrust violation was the sole or but for cause of his injury. It is enough that the challenged conduct is a material cause of that injury. A plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN17[] **Private Actions, Standing**

A court determining antitrust standing must evaluate: (1) the nature of the damages sought; (2) whether the injury is of the type that the antitrust laws were intended to remedy; (3) the risk of duplicative recoveries of complex damages apportionment; and (4) the presence of more direct victims of the antitrust violation who can bring claim.

Torts > ... > Standards of Care > Reasonable Care > General Overview

Torts > ... > Elements > Duty > General Overview

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN18[] **Standards of Care, Reasonable Care**

Under Ohio law, one who gratuitously undertakes a voluntary act assumes the duty to be careful under the circumstances.

Torts > Remedies > Damages > General Overview

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN19[] **Remedies, Damages**

Under Ohio law, a claim for breach of a voluntarily undertaken duty must allege physical injury.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN20[] **Conspiracy, Elements**

In Ohio, civil conspiracy is a malicious combination of two of more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages. An actionable conspiracy must be based upon an actionable underlying tort.

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Judges: Judge James S. Gwin, United States District Judge.

Opinion by: James S. Gwin

Opinion

[*776] OPINION AND ORDER

On January 8, 1998, defendants [1] **[**7]** moved this Court to dismiss plaintiffs' First Amended Complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* [Doc. 27]. [2] In ruling on defendants' motion to dismiss for failure to state a claim upon which relief can be granted, the Court first examines defendants' general defense that plaintiffs' claims are too remote to allow recovery. To decide this, the Court reviews the principles underlying the remoteness **[*777]** doctrine and the proximate cause doctrine. After having made this review, the Court concludes that plaintiffs' claims are not generally stopped as too remote.

The Court then decides whether plaintiffs state claims for violations of the Racketeer Influenced Corrupt Organizations Act ("RICO") and the Ohio Pattern of Corrupt Activity Act ("Ohio Corrupt Activity Act"), *Ohio Rev. Code §§ 2923.31, et seq.* In deciding this, the Court examines the federal and Ohio statutory schemes and determines whether the Ohio Corrupt Activity Act is broader than RICO. After considering the federal and Ohio schemes, the Court determines whether plaintiffs state causes under either or both. After making this review, the Court finds that plaintiffs state causes of action under both RICO and the Ohio Corrupt Activity Act.

After **[**8]** determining whether plaintiffs state RICO claims under federal or state law, the Court addresses plaintiffs' antitrust claims under federal and state law. Again, the Court decides whether plaintiffs' claims are too remote and whether the damages claimed by plaintiffs have proximately resulted from defendants' conduct. The Court also looks to whether plaintiffs have standing to make antitrust claims. After making this review the Court finds that plaintiffs have sufficiently stated causes of action under federal and state ***antitrust law***.

The Court then looks to whether the plaintiffs sufficiently state claims for breach of a voluntarily undertaken duty and for conspiracy. After reviewing these questions, the Court finds plaintiffs do state a cause of action for civil conspiracy upon which relief can be granted. However, the Court finds plaintiffs do not state causes of action for breach of a voluntarily undertaken duties. Accordingly, the Court grants defendants motions to dismiss Counts VI and VII of the Amended Complaint.

I. Introduction

Plaintiffs are certain trusts organized to provide health-related benefits to workers and their families. [3] The plaintiffs are nonprofit, union-sponsored **[**9]** tax-exempt trusts organized under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1100.01, *et seq.* The trusts provide medical or hospital care benefits to participants and their beneficiaries as an employee retirement income security program. Trustees govern the trusts. Of the trustees,

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[1] The defendants are leading cigarette and tobacco manufacturers in control of the tobacco market in the United States, their research councils, and a public relations firm.

Defendants are Philip Morris Incorporated; RJR Nabisco, Inc.; RJR Nabisco Holdings Corp.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; Lorillard Tobacco Company; The American Tobacco Company; Liggett Group, Inc.; United States Tobacco Sales and Marketing Company Inc.; The Council for Tobacco Research - U.S.A., Inc.; The Tobacco Institute, Inc.; Hill & Knowlton, Inc.; B.A.T Industries p.l.c.; and British-American Tobacco Company Limited ("BATCo.").

[2] On January 8, 1998, defendants filed a motion to dismiss for failure to join necessary parties pursuant to *Fed. R. Civ. P. 12(b)(7)* [Doc. 28]. In March 1998, Defendants Tobacco Institute, BAT Industries, PLC, Smokeless Tobacco Council, Inc., RJR Nabisco, Inc. and RJR Nabisco Holdings, Inc. filed motions to dismiss for lack of personal jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(2)*. The Court deals with these motions in separate orders.

[3] Plaintiffs are Iron Workers Local Union No. 17 Insurance Fund. IBEW Local No. 38 Health & Welfare Fund, Ohio Laborers' District Council-Ohio Contractors' Association Insurance Fund, Dealers-Unions Insurance Fund, Local 47 Welfare Fund No. 1, Toledo Electrical Welfare Fund and their trustees.

Plaintiffs have moved this Court to certify this case as a class action. Consideration of class certification shall be addressed in a subsequent opinion and order of the Court.

employers contributing to the trusts typically choose half of the trustees and union member beneficiaries of the trusts choose half of the trustees.

On May 20, 1997, Plaintiffs Funds brought this action against tobacco-related entities. [4] **[**10]** Plaintiffs allege that, since about 1953, the defendants have shifted the large health care costs of smoking onto plaintiffs, proposed class members, and other health care payers. Plaintiffs say defendants expected, foresaw, and planned this shift of expenses. The plaintiffs say that as the direct result of the defendants' wrongdoing, plaintiffs and all similar trust funds had to make substantial expenditures to pay for treatment of smoking-related illnesses and addiction.

Because of this alleged shift of expenses onto the funds, and other medical expense payers, plaintiffs say the defendants have depleted their Trusts of monies otherwise available. Because of this purportedly unlawful conduct, **[**11]** Plaintiffs Funds say they bore the cost of damages caused by the defendants. Plaintiffs allege standing to sue defendants for damage to the business or property of the trust funds. Plaintiffs say they bring this action in fulfillment of their fiduciary duty to replenish the trust funds and to maximize health care benefits for all trust beneficiaries. Plaintiff Funds seek damages and injunctive relief.

[*778] In Counts I, II, and III, plaintiffs make claim under the federal RICO provisions of the Organized Crime Control Act of 1979. *18 U.S.C. § 1961, et seq.* In Counts XIV, XV, and XVI, plaintiffs make claim under the Ohio equivalent of RICO, the Ohio Pattern of Corrupt Activity Act, *Ohio Rev. Code §§ 2923.31, et seq.* In Counts IV and X of the Amended Complaint, the plaintiffs make two antitrust claims. In Counts VI and VII, plaintiffs make claim for intentional and negligent breach of a special duty. Finally, plaintiffs make claim for civil conspiracy in Count XI of their Amended Complaint. [5]

[12]** Defendants now seek dismissal of all plaintiffs' claims. In seeking dismissal, defendants say certain reasons stop all claims made by plaintiffs. Separately, defendants say certain defenses stop individual claims. In ruling upon defendants' motion to dismiss, the Court first examines defendants' more generalized defenses. Chief among these defenses is the argument that plaintiffs' claims are too remote to allow recovery. After reviewing defendants' more generalized arguments, the Court moves to defendants' more specific arguments for dismissal.

II. Standard of review

HN1[] A court properly grants a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle her to relief. *See McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)*. We accept as true and construe all factual allegations in the complaint in the light most favorable to the plaintiff. *U.S. ex rel. McKenzie v. BellSouth Telecommunications, Inc., 123 F.3d 935 (6th Cir. 1997)*, *cert. denied*, *__ U.S. __, 139 L. Ed. 2d 755, 118 S. Ct. 855 (1998)*. [6] Applying this standard, **[**13]** the Court considers the instant motions.

III. Discussion

A. General discussion of remoteness

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[4] The Funds can sue or be sued in their own name. *See* ERISA, *29 U.S.C. § 1132(d)(1)* ("An employee benefit plan [like the Funds] may sue or be sued under this subchapter as an entity."); *Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund, 794 F.2d 221, 224 n.2 (6th Cir. 1986)*.

[5] On September 8, 1998, Plaintiffs dismissed without prejudice claims for fraud (Count V), for unjust enrichment (Count IX), and for violation of the Deceptive Trade Practices Act (Count XII). Plaintiffs earlier withdrew claims for breach of warranty (Count VIII), for violation of ERISA (Count XIII), for strict product liability (Count XVII), and for negligence (Count XVIII). Therefore, Counts V, VIII, IX, XII, XIII, XVII, and XVIII of the Amended Complaint are dismissed.

[6] Because all factual allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff, the court describes this case as plaintiffs allege in their pleadings. Of course, proof of plaintiffs' allegations await later determination.

Defendants argue generally that plaintiffs' claims are too remote to allow relief and, for this reason, the Court should dismiss all of plaintiffs' claims. Because the Court finds the defense of remoteness differs depending on the claim involved, the Court denies defendants' generalized request for dismissal on this ground. Instead, the Court finds that a more claim-specific examination is needed. Nonetheless, a discussion of defendants' general remoteness argument lends assistance to the Court's examination of particular claims.

In seeking dismissal on grounds of remoteness, defendants say that plaintiffs' action is one simply to recover medical **[**14]** expenses incurred by another. Claiming that plaintiffs' claim is only to recover medical expenses incurred by another, defendants say these claims are too remote to give a common law right to reimbursement through "direct" or "independent" claims. If the claims are too remote, then plaintiffs are limited to bringing an action as an assignee or subrogee. [7] However, if the claims are found direct, Plaintiffs Funds would avoid some or all of the defenses that would potentially stop surrogated claims.

[15]** To support their view that plaintiffs' claims are too remote to allow recovery, the defendants claim support from a plethora of old **[*779]** cases, including the 1846 Massachusetts case, *Anthony v. Slaid, 52 Mass. (11 Met.) 290 (1846)*. In *Slaid*, a party contracting to provide support to paupers made claim against a party who had tortuously caused injury to an indigent. The Massachusetts Supreme Judicial Court denied recovery, finding that the damage was too remote and indirect. [8]

To decide whether the reasoning of *Slaid* should stop the present claims, a review of the principles of remoteness, proximate causation, and standing is beneficial. Scrutiny of the classic decision *Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928)*, aids this review. In *Palsgraf*, the decision by Chief Judge Cardozo and the dissent by Judge Andrews respectively set out arguments suggesting a limitation on tort claims **[**16]** and arguments allowing a broader scope of claims. [9]

In *Palsgraf*, railway employees negligently pushed a passenger onto a departing train. While boarding the train in this way, the passenger dropped a package of fireworks, which exploded upon hitting the ground. The shock of the explosion dislodged scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sued and recovered judgment.

Judge Cardozo's majority opinion reversed a jury verdict in favor of Plaintiff Palsgraf and against the railway. In denying recovery, Cardozo found that the injuries foreseen control the scope of duty. Cardozo found that a plaintiff may recover in negligence only if her injury was one that a defendant exercising reasonable foresight (less than "extravagant prevision") would have foreseen. The court **[**17]** there ruled:

> Negligence, like risk, is thus a term of relation. . . . One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.

Id. at 345 (citations omitted).

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[7] If so limited, the plaintiffs would need to make additional showings. "According to the general rule, an assignee or subrogee of a claim stands in the shoes of the assignor or subrogor, and succeeds to all the rights and remedies of the latter." *Inter Ins. Exch. of the Chicago Motor Club v. Wagstaff, 144 Ohio St. 457, 460, 59 N.E.2d 373 (1945)*. Further, a subrogee may only assert claims the subrogor could assert. *Kurent v. Farmers Ins., Inc., 62 Ohio St. 3d 242, 247, 581 N.E.2d 533 (1991)*. In short, "standing in the shoes" of these participants would require the Funds to offer individual proofs (and overcome affirmative defenses) for each smoker as to whom subrogation is claimed.

[8] See also *Great American Insurance Co. v. United States, 575 F.2d 1031 (2nd Cir. 1978)*.

[9] Cardozo's *Palsgraf* opinion enjoyed a narrow majority. Three judges concurred in the majority opinion of Cardozo while two judges joined the dissent of Andrews.

Cardozo's argument breaks down into two parts: (1) ***HN2***[] a plaintiff has a right of action in negligence only if the defendant's conduct was negligent relative to her; and (2) if the plaintiff's injury was not reasonably foreseeable, then the defendant's act was not negligent relative to her. Central to Cardozo's argument is the suggestion that tort law does not afford a remedy for merely unsocial conduct:

> The argument for the plaintiff is built upon the shifting meanings of such words as 'wrong' and 'wrongful,' and shares their instability. What the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to **[**18]** any one.

248 N.Y. at 343-44.

To decide if a tort plaintiff is within the orbit of those protected against a defendant's wrongful conduct, Cardozo suggested that "the risk reasonably to be perceived defines the duty to be obeyed." Moreover, "this does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. 'It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye.'" *Id. at 344* (quoting *Munsey v. Webb, 231 U.S. 150, 156, 58 L. Ed. 162, 34 S. Ct. 44 (1913))*. Cardozo further ruled that ***HN3***[] if acts are imminently dangerous to anyone who may come within contact, the law will find a duty of prevision not far from that of an insurer. *248 N.Y. at 344*. Willfully dangerous acts or intentional acts support a broader scope of duty. *Id.*

In dissent, Judge Andrews argued for a broader scope of those able to bring tort claims. Andrews argued that the wrongdoer **[*780]** should be liable, without limitation, for all damages shown to have resulted **[**19]** from the wrongful conduct. Andrews explained his reasoning:

> We are told that 'there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be not which is owed to the plaintiff himself and not merely to others.' This I think too narrow a conception. Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. That is immaterial. Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful. If [sic] is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there--a wrong to the public at large.
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> Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.
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> * * *
>
> The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm, might reasonably be expected to result, but he also who is in fact injured, **[**20]** even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain.

Id. at 348-50 (citations omitted).

The *Palsgraf* decision, like *Slaid*, deals with the question of duty. Stated simply, does the defendant stand in such relation to the plaintiff that the law will impose obligations and consequences resulting from the defendant's acts or omissions?

Contrary to the arguments that defendants here make, the determination of duty lacks precision. As Dean Prosser explained:

> In the decision whether or not there is a duty, many factors interplay: the hand of history, our idea of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in **[**21]** keeping with the general understanding of mankind."

Dean Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 15 (1953) (footnotes omitted).

Prosser states the issue:

> Essentially, the choice is between an innocent plaintiff and a defendant who is admittedly at fault. If the loss is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's innocence. If it is unjust to the defendant to make him bear the loss which he could not have foreseen, it is no less unjust to the plaintiff to make him bear a loss which he could not have foreseen and which is not even due to his own negligence but to that of another. In these cases there is no justice to be had. [10]

[22]** To place some limit upon liability for negligent acts, Prosser suggests that there must be some "reasonably close connection between the harm threatened and the harm done." Prosser, *Palsgraf Revisited*, at 27.

HN4[] "Proximate cause" is the limitation that courts place upon an actor's responsibility for the consequences of his conduct. In reality, an act's consequences go on forever. [11] **[*781]** As suggested by Prosser, we can make a strong argument that it is more equitable to visit responsibility for unforeseen consequences upon the wrongdoer rather than upon the victim. Nevertheless, the law limits a wrongdoer's responsibility for his wrongful acts to avoid a flood of litigation and to avoid the uncertainty attending less direct claims. By shifting the expense to the victim rather than the tortfeasor, the law limits claims to those causes that are so closely connected with the result and of such significance that the law is justified in imposing liability.

[23]** The proximate cause requirement, therefore, limits a defendant's liability. While the reasons for a proximate cause requirement are easily articulated, defining when proximate cause exists is uncertain.

Judicial denial of derivative claims is less clear than defendants suggest. For example, a spouse or parent or child can bring an independent claim for loss of the services of an injured wife or husband or child [12] or parent. [13]

[24]** Likewise, an employer may bring an action for negligent injury to his employee. See *Cincinnati Bell Telephone Company v. Straley, 40 Ohio St. 3d 372, 380-81, 533 N.E.2d 764 (1988)* (citing *Ledex, Inc. v. Heatbath Corp., 10 Ohio St. 3d 126, 461 N.E.2d 1299 (1984)* and *Midvale Coal Co. v. Cardox Corp., 152 Ohio St. 437, 89*

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[10] Dean Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 17 (1953). While criticizing Cardozo for failing to give reasoned guidance for deciding the issues of duty and proximate cause, Prosser recognized the need to place some limit upon liability:

> There is still the problem of an end to liability, of a place to stop. It is still unthinkable that any one shall be liable to the end of time for all of the results that follow in endless sequence from his single act.

Dean Prosser, *Palsgraf Revisited* at 24.

[11] Prosser, Law of Torts § 41, at 236 (4th ed. 1971). "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. . . . Thus, it could be argued that the fatal trespass done by Eve was the cause of all woe." *Id.*

[12] *See* *Grindell v. Huber, 28 Ohio St. 2d 71, 275 N.E.2d 614 (1971)* (syllabus at paragraph one) (stating when a minor child suffers an injury, allegedly as a result of the negligence of a defendant, two separate causes of action arise: an action by the child for his or her personal injuries, and a derivative action in favor of the parents for loss of services and medical expenses.).

[13] The Supreme Court of Ohio recognized a minor child's cause of action for loss of parental consortium against one who has negligently harmed the child's parent in *Gallimore v. Children's Hospital Med. Ctr., 67 Ohio St. 3d 244, 617 N.E.2d 1052 (1993)* (syllabus at paragraph two).

N.E.2d 673 (1949)) (employer whose employee suffers injuries and recovers workers' compensation benefits may bring an action for increased workers' compensation premiums against a third party whose conduct caused the employee's injuries.); Ohio Rev. Code § 4123.931 (statutorily recognized right of an employer to bring an action for increased workers compensation expenses against third party tortfeasor.). Further, a party not in privity with an accountant can bring an action for damages resulting from negligence of the accountant. Haddon View Inv. Co. v. Coopers & Lybrand, 70 Ohio St. 2d 154, 436 N.E.2d 212 (1982) (syllabus at paragraph one) ("An accountant may be held liable by a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant's representation they specifically foresee."). As **[**25]** indicated by these examples, the determination of relationship necessary to support a cause of action is less clean than suggested by defendants.

In claiming that they owed plaintiffs no duty in the instant case, defendants say that plaintiffs' claims are too indirect to go forward. Defendants say that the law does not allow recovery by third parties, i.e., parties not themselves directly injured. In making their general claim that plaintiffs' claims are too remote, defendants primarily rely upon cases that deal with proximate cause or directness in the "negligence" context. [14] However, the tests of proximate causation **[*782]** and remoteness are not the same for all types of claims. The tests for remoteness and proximate causation differ for the varied statutory, intentional tort, and equitable contexts in which plaintiffs' claims here arise.

[26]** The decision of whether a defendant should respond to claims from less directly injured claimants require examination of whether there is a reasonable connection between the defendant's acts and its consequences.

To decide whether the defendants' acts and failures to act alleged in the Amended Complaint have a reasonable connection to the greatly increased expenses visited upon the plaintiffs, the Court looks to relevant precedent for guidance. [15]

As later described, plaintiffs make claim against defendants under RICO. In making the general argument that plaintiffs do not have standing, Defendants suggest support in Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992). [16] In *Holmes*, the Supreme Court reviewed whether a

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[14] The Ohio Supreme Court generally defines proximate cause consistent with Cardozo's majority opinion in *Palsgraf*. The Ohio Supreme Court, in Piqua v. Morris, 98 Ohio St. 42, 120 N.E. 300 (1918), defined proximate cause in paragraph one of the syllabus:

> **HN5**[] The 'proximate cause' of a result is that which in a natural and continued sequence contributes to produce the result, without which it would not have happened. The fact that some other cause concurred with the negligence of a defendant in producing an injury does not relieve him from liability, unless it is shown such other cause would have produced the injury independently of defendant's negligence.

In Armour & Co. v. Ott, 117 Ohio St. 252, 257, 158 N.E. 189 (1927), the Ohio Supreme Court approved the following definition for remote cause: " . . . an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence . . . ."

No liability can result to a party, "even if negligence of a party is a cause of injury to another," if the cause is a remote one. Tanzi v. N.Y. Cent. R. Co., 155 Ohio St. 149, 98 N.E.2d 39, "'159 patent (1951).

[15] The parties here identify no clearly controlling precedent of the Sixth Circuit.

[16] In making the claim that plaintiffs' claims are too remote to allow the action to proceed, defendants offensively misrepresent the *Holmes* holding to the Court. Thus, defendants represent to this Court: "[In *Holmes v. Securities Investor Protection Corp.*, [the Supreme Court] held that a RICO plaintiff who "complain[s] of harm flowing merely from the misfortune, visited upon a third person by the defendant's acts . . . stand[s] at too remote a distance to recover." Holmes, 503 U.S. at 268-69.

The complete quote from *Holmes* is: "Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *See, e.g.*, 1 J. Sutherland, Law of Damages 55-56 (1882).

nonprofit corporation had standing, under RICO, to sue employees of a defunct securities brokerage firm. In bringing its action, the nonprofit corporation **[**27]** had sought and obtained approval for the appointment of a trustee to liquidate a securities broker-dealer. The nonprofit corporation and the trustee then brought a RICO action against persons alleged to have conspired in a fraudulent scheme that led to the end of two companies.

[28]** In the circumstances of the *Holmes* case, the Supreme Court found that plaintiffs in a RICO action must show not only a direct injury but also must show that defendant's conduct was a proximate cause of plaintiff's injury:

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient."

Id. at 268.

HN6[] In deciding whether a plaintiff shows proximate injury under the federal RICO law, the Supreme Court found that a party is *generally* required to show a direct injury to have standing. It is generally insufficient under RICO to complain of harm "flowing from the misfortunes visited upon [another] person by the defendant's acts." *Id.* The *Holmes* Court found that the plaintiffs could not make claim for injuries more directly visited upon third parties. The *Holmes* Court emphasized that others were positioned to make the same claims: "Although the customers' claims are senior (in recourse to 'customer property') to those of **[**29]** the broker-dealers' general creditors, the causes of their respective injuries are the same." *Id. at 271*. [17]

Because the proximate cause determination is a policy decision about who will bear the expense of extended damage, courts should consider the original reasons for the proximate cause rule. The decision involves choosing between "an innocent plaintiff and a defendant who is admittedly at fault." To decide this, the *Holmes* Court directed consideration of the difficulty the plaintiff has in showing that its damages flowed from the **[*783]** defendant's conduct, the risk of double recovery, and, importantly, whether the defendant's conduct is sufficiently harmful to warrant deterrence. *Holmes, 503 U.S. at 269*.

In deciding a motion to dismiss, we accept plaintiffs' allegations that defendants' conduct caused damages. Stated another way, the standing issue does not involve whether **[**30]** defendants' conduct caused plaintiffs great financial damage. Instead, ruling on defendants' motion requires the Court to consider whether, considering the conduct and damages alleged, and "on the basis of the mores of the community," [18] **[**31]** a party should avoid damages that party caused. [19]

Defendants' misrepresentation is obvious. First, the quoted language describes general language from a treatise without clearly adopting the treatise. The Supreme Court does not clearly adopt the description in the treatise. Second and more important, the defendants remove the term "generally" in an effort to cause this Court to misunderstand the *Holmes* holding.

[17] In *Holmes*, more directly injured parties had already brought an action complaining of the same conduct. *503 U.S. at 273*.

[18] Prosser, *Palsgraf Revisited*, at 15. The mores of communities evolve. In a letter to Samuel Kercheval on July 12, 1816, Thomas Jefferson spoke to change in the law:

> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat that fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.

Quoted in *Klever v. Canton Sachsenheim, Inc., 1998 Ohio App. LEXIS 3992*, No. 1998-CA-0010 (Ohio Ct. App. 5th Dist. August 10, 1998) (Gwin, W.S.) (unreported).

[19] Defendants deny that their acts or omissions caused any damage. In reviewing defendants' motion for judgment, plaintiffs' allegations that defendants' acts caused damages are taken as true.

At this juncture, the Court finds that plaintiffs allege facts that would allow recovery. First, plaintiffs do not bring a negligence action. Statutes and court interpretations of those statutes define the proximate cause elements of plaintiffs' RICO and antitrust claims. *See, e.g.,* *National Organization for Women v. Scheidler, 510 U.S. 249, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994)* ("NOW") (describing the proximate cause/directness requirement of a RICO claim); *Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)* (same); *Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)* (describing antitrust standing requirements); *Associated Gen. Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (same).

Second, plaintiffs allege that **[**32]** defendants acted intentionally in causing harm to plaintiffs. ***HN7***[] "In cases of willful or malicious injury, and injury from reckless or illegal acts, or from positive fraud, the damages are not so strictly confined to proximate consequences as when these elements do not exist. . . . Where there is fraud or other intentional wrong, there is not the same strictness to exclude remote or uncertain damages, even where punitory damages are not involved." *Burckhardt v. Burckhardt, 42 Ohio St. 474, 487(1885)*. [20] See also *Restatement (Second) of Torts § 435B*.

As suggested by plaintiffs, proximate causation is broader with regard to intentional **[**33]** acts than it is for negligent acts. The *Comments to Restatement (Second) of Torts § 435B* support this contention:

> "Responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent . . . ."

Restatement (Second) of Torts § 435B, ch.16., cmt. a (1965).

HN8[] An act is intentional when "'the actor desires to cause consequences of his act, or . . . he believes that the consequences are substantially certain to result from it.'" *Sicard v. Univ. of Dayton, 104 Ohio App. 3d 27, 30, 660 N.E.2d 1241 (2nd Dist. 1995)* (quoting *Marchetti v. Kalish, 53 Ohio St. 3d 95, 96 n. 2, 559 N.E.2d 699 (1990))*. [21] See also *Monsler v. Cincinnati Cas. Co., 74 Ohio App. 3d 321, 328, **[*784]** 598 N.E.2d 1203 (10th Dist. 1991)* ("An act is intentional in the context of civil liability if (1) it is done willingly, and either (2) the actor desires the results of his conduct, or (3) the actor knows, or ought to know, the result will follow from his conduct.") (citation omitted). As the plaintiffs allege intentional conduct, "the responsibility for harmful consequences should be carried further." **[**34]** *Comments to Restatement (Second) of Torts § 435B*.

The determinations of proximate cause, standing, and remoteness are particularly matters of policy. Plaintiffs bring different causes of actions with different considerations for standing. The Court finds that plaintiffs' standing to bring various actions must be individually judged. Accordingly, the defendants' blanket argument for dismissal on remoteness grounds fails.

IV. Standing to bring RICO actions.

A. General discussion of standing for RICO claims.

HN9[] In determining whether a party has standing to bring a RICO action, the *Holmes* Court said courts should consider: (1) the difficulty the plaintiff has in showing that damages flowed from the defendant's conduct; (2) the risk

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[20] In *Burckhardt*, the Supreme Court of Ohio explained its approach:

> That the person injured shall received [sic] a compensation commensurate with his loss or injury, is the universal and cardinal principle of the law of damages. This principle is paramount, and by it all rules on the subject of compensatory damages are tested and corrected.

42 Ohio St. at 487.

[21] The *Sicard* case quotes from 1 *Restatement (Second) of Torts § 8A*, at 15 (1965).

of double recovery; and (3) whether the defendant's conduct is sufficiently injurious to warrant deterrence. *Holmes, 503 U.S. at 269*.

While disputed, plaintiffs show evidence, that if believed, **[**35]** would show that damages directly resulted to plaintiffs from defendants' conduct. Plaintiffs suggest they will offer epidemiological evidence showing that defendants' conduct greatly increased the expenses of affording coverage to beneficiaries. Some medical research suggests that smoking causes 10 percent of the nationwide medical expenses. [22] Plaintiffs claim that union members' beneficiaries smoke at rates greater than the general population. Plaintiffs suggest that they will show that nearly 10 percent of the hundreds of millions of dollars they have spent on health care has been caused by defendants' unlawful conduct.

[36]** As described, the *Holmes* Court delineated three considerations for determining whether damages caused by violation of RICO should not be allowed on proximate cause grounds. Under the first factor, the Court focused on the difficulty the plaintiff has in showing that damages flowed from the defendant's conduct. *503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. The plaintiff avers major damages to their trusts from being required to absorb medical expenses caused by defendants. The Court finds that this factor weighs in favor of a finding of proximate relationship.

The *Holmes* Court described a second consideration in the policy grounded determination of proximate causation in RICO actions: whether we should stop claim for injury because of the risk of double recovery. *Id.*

Defendants suggest that they would be exposed to double recovery should this Court permit plaintiffs to bring this action. Specifically, defendants say that both Fund beneficiaries and the plaintiffs would seek, and might recover, for the same damages.

[*785] The Court finds little potential for double recovery. First, an injured smoker beneficiary could not recover under antitrust or RICO for the medical costs paid by any of the plaintiffs' **[**37]** trust funds. Both ***antitrust law*** and RICO require a showing of injury to a plaintiffs business or property. Medical expenses paid on the behalf an injured smoking beneficiary could not make up a monetary loss or other injury to a smoker's "business or property." *See* Clayton Act § 4, *15 U.S.C. § 15* (antitrust); *Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)* (antitrust injury to property includes loss of money, excludes personal injuries); *18 U.S.C. § 1964(c)* (RICO); *Steele v. Hospital Corp. of America, 36 F.3d 69, 70 (9th Cir. 1994)* ("If the patients have paid none of the allegedly excessive charges out of their own pockets because those charges were covered by insurance, then they have suffered no financial loss," and plaintiff patients have no injury to their business or property). [23]

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[22] The Amended Complaint alleges that cigarette smoking is the leading cause of premature death in the United States. Plaintiffs allege that cigarette smoking kills more than 400,000 Americans each year, more than the combined deaths caused by automobile accidents, AIDS, alcohol use, use of illegal drugs, homicide, suicide and fires. Plaintiffs say smoking-related illnesses account for one of every five deaths in the United States. Amended Complaint at PP 53-57.

See U.S. Dep't of Health, Educ. & Welfare, *The Health Consequences of Smoking: A Public Health Service Review* 34, 135 -38 (1967); Advisory Comm. to the Surgeon General of the Public Health Service, U.S. Dep't of Health. Educ. & Welfare, *Smoking and Health* 31 (1964). *See also* Richard Scruggs, *Tobacco Litigation: a Problem That Needs a Solution*, *41 N.Y.L. Sch. L. Rev. 487, 487-88 (1997)*; Raymond E. Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, *22 Fordham Urb. L.J. 81, 81-103 (1994)*.

Researchers from the University of California and the Centers for Disease Control estimate smoking-related medical care in 1993 at $ 50 billion. Others suggest that ten to twenty percent of all health care dollars are spent treating tobacco-related illnesses. C. Everett Koop, *A Tax That's Good for You*, Wash. Post, Sept. 21, 1993, at A19 (cited in D. Garner and R. Whitney, *Protecting Children From Joe Camel And His Friends: a New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, *46 Emory L. J. 479 (1997)*); *Medical Care Expenditures Attributable to Cigarette Smoking -- United States*, 1993, 43 Morbidity & Mortality Wkly. Rep. 469, 470 (1994).

[23] The *Holmes* Court cited the pendency of an action by the broker-dealers as suggesting the Court not afford a remedy:

[38]** Moreover, the single satisfaction rule would allow defendants to seek credit for amounts paid plaintiffs in antitrust and RICO litigation in later personal injury litigation by beneficiaries. *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)* (antitrust); [24] **[**39]** *Singer v. Olympia Brewing Co., 878 F.2d 596, 599-601 (2nd Cir. 1989)* (RICO), *cert. denied*, *493 U.S. 1024, 107 L. Ed. 2d 748, 110 S. Ct. 729 (1990)*; *Morley v. Cohen, 888 F.2d 1006, 1012-13 (4th Cir. 1989)* (RICO, citing antitrust and tort cases); [25] *Restatement (Second) of Torts § 885(3)* (torts). [26] The payment by defendants of a judgment or settlement would give defendants a defense of satisfaction in any other suit in which an injured smoker/trust beneficiary might seek to recover any of the costs sought here. Defendants would not have to pay for the same medical cost damages twice.

[40]** Having found that there is no major difficulty showing that defendants' conduct caused damage to the plaintiffs trust funds, and having found that there is little risk of a double recovery, the Court turns to the third factor suggested by the *Holmes* Court: whether the defendant's conduct is sufficiently harmful to warrant deterrence. *Holmes, 503 U.S. at 269*.

The Amended Complaint alleges seriously wrongful conduct on defendants' part. Moreover, the Amended Complaint alleges extremely large damages flowed from defendants' claimed unlawful conduct.

[*786] Plaintiffs allege that for decades, defendants have known that nicotine is addictive and is the reason that people continue to smoke cigarettes and use smokeless tobacco. [27] **[**41]** Plaintiffs claim that defendants have long known that cigarettes and smokeless tobacco create addiction and causing cancer, heart disease, emphysema, cataracts, adverse pregnancy outcomes, and other diseases and death. [28] The plaintiffs say

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> Finally, the law would be shouldering these difficulties despite the fact that those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication. As noted above, the broker-dealers have in fact sued in this case, in the persons of their SIPA trustees appointed on account of their insolvency.

503 U.S. at 273

[24] *See also* *Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 894 (2nd Cir. 1988)* (antitrust); *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1086 (2nd Cir. 1988)* (antitrust), *cert. denied*, ***488 U.S. 848, 102 L. Ed. 2d 101, 109 S. Ct. 128 (1988)***; *Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 391-95 (4th Cir. 1982)* (antitrust), *cert. denied*, ***461 U.S. 914, 77 L. Ed. 2d 283, 103 S. Ct. 1893 (1983)***; *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc., 635 F.2d 118, 130 (2d Cir. 1980)*, *aff'd*, *456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*; *Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 533-34 (3rd Cir. 1976)* (antitrust), *cert. denied*, ***429 U.S. 825, 97 S. Ct. 78, 50 L. Ed. 2d 87 (1976)***; *Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-98 (9th Cir. 1957)* (antitrust), *cert. denied*, ***355 U.S. 835, 2 L. Ed. 2d 46, 78 S. Ct. 54 (1957)***.

[25] *See also* *Pyramid Securities Ltd. v. IB Resolution, Inc., 288 U.S. App. D.C. 157, 924 F.2d 1114, 1117 n. 3 (D.C. Cir. 1991)* (RICO), *cert. denied*, ***502 U.S. 822, 116 L. Ed. 2d 57, 112 S. Ct. 85 (1991)***; *Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1310 (7th Cir. 1987)* (RICO), *cert. denied*, ***492 U.S. 917, 106 L. Ed. 2d 588, 109 S. Ct. 3241 (1989)***.

[26] *See also* *United States Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1236 (10th Cir. 1988)* (securities); *Harris v. Union Elec. Co., 846 F.2d 482, 485 (8th Cir. 1988)* (securities); *Marcus, Stowell & Beye Gov't. Sec., Inc. v. Jefferson Inv. Corp., 797 F.2d 227, 233 (5th Cir. 1986)* (contract); *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1508 (11th Cir. 1985)* (torts); *Watts v. Laurent, 774 F.2d 168, 179 (7th Cir. 1985)* (torts), *cert. denied*, ***475 U.S. 1085, 89 L. Ed. 2d 722, 106 S. Ct. 1466 (1986)***; *Ratner v. Sioux Natural Gas Corp., 719 F.2d 801, 803 (5th Cir. 1983)* (securities); *Howard v. General Cable Corp., 674 F.2d 351, 358 (5th Cir. 1982)* (torts); *Franklin Supply Co. v. Tolman, 454 F.2d 1059, 1072 (9th Cir. 1971)* (torts).

[27] Amended Complaint at PP 2, 165, 172-189. Thus, the Amended Complaint alleges that in 1962, Sir Charles Ellis, a science advisor to the board of the parent of Brown & Williamson stated that "smoking is a habit of addiction" and that nicotine is not only a very fine drug, but the technique of administration by smoking has considerable psychological advantages. . ." Plaintiffs allege he described Brown & Williamson as being "in the nicotine rather than the tobacco industry. Amended Complaint at P 165.

Plaintiffs also allege that the general counsel of Brown & Williamson, wrote in 1963: "Moreover, nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." *Id.*

defendants had the means of manufacturing and marketing safer and less-addictive tobacco products, yet conspired not to do so. [29]

Despite such knowledge and ability to market safer products, plaintiffs say defendants fraudulently promised to conduct objective research and reveal accurate information as to all aspects of smoking and health and then suppressed information that cigarettes were harmful. Plaintiffs further contend the defendants manipulated nicotine content to create and maintain addiction and inhibited the development and marketing of safer, less-addictive cigarettes and smokeless tobacco. [30] **[**42]** Plaintiffs also say the defendants lied to Congress under an oath about their knowledge of the dangers and addictiveness of their products. [31]

In deciding whether this Court should dismiss this action on remoteness or proximate cause grounds, *Holmes* directs this Court to consider whether the defendant's conduct is sufficiently injurious to warrant deterrence. *Holmes, 503 U.S. at 269*. If proven, one can scarcely imagine conduct more harmful. See footnote 21.

Having found that proving the plaintiffs' damages flowed from defendants RICO violation is not unduly difficult, and having found there is little risk of double recovery for defendants purported RICO violations, and having found that, if proven, defendants conduct is sufficiently injurious to warrant deterrence, the factors described in *Holmes* suggest this Court not dismiss plaintiffs RICO counts on standing or proximate cause grounds.

B. Plaintiffs' State Law RICO Claim - Standing

In Counts XIV, XV, and XVI, the plaintiffs make claim under the Ohio equivalent of RICO, the Ohio Pattern of Corrupt Activity Act, *Ohio Rev. Code §§ 2923.31, et seq.* Plaintiffs allege that the tobacco companies have violated *§§ 2923.32(A)(1)*, *(2)* **[**43]** and *(3)* of the Ohio Corrupt Activity Act. [32]

In seeking dismissal of these state law RICO claims, defendants argue that Plaintiffs Funds cannot establish that defendants' violations of RICO proximately caused their injuries. As support for their assertion, defendants say that plaintiffs were not directly injured and cannot bring a direct action. Separately, defendants assert that plaintiffs do not allege facts showing that they suffered injury to their "business or property."

To decide whether plaintiffs allege sufficient facts to avoid dismissal on standing grounds, the Court first examines the Ohio RICO law. In doing so, this Court is mindful that determinations of proximate cause, **[*787]** standing and remoteness are particularly matters of policy. Accordingly, courts should be especially respectful of legislative decisions. Additionally, courts should consider the difficulty of proof, the potential for multiple recoveries, and the need to place some limit upon the number **[**44]** of claims flowing from a wrongful act.

With *Ohio Rev. Code § 2923.34*, the Ohio General Assembly provided for a civil action for violation of *Ohio Rev. Code § 2923.32*. [33] In providing for a civil action, the General Assembly addressed who should have standing to bring such action for triple damages and attorney's fees. In pertinent part, ***HN10***[] *§ 2923.34(F)* provides:

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[28] Amended Complaint at PP 53-62, 109. Thus, plaintiffs allege that a 1958 memorandum at Philip Morris stated "the evidence . . . is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors . . ." Amended complaint P 109.

[29] Amended Complaint at PP 147-162.

[30] Amended Complaint at PP 74, 163-221, 147-162. Thus, plaintiffs allege that internal Philip Morris reports in the 1970s stated:

> "The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarette pack as a storage container for a day's supply of nicotine. . . . Think of the cigarette as a dispenser for a dose unit of nicotine."

Amended Complaint at P 177.

[31] Amended Complaint at PP 63-65, 78.

[32] Amended Complaint at PP 255-291, 398-434.

> (F) In a civil proceeding under division (B) of this section, any person *directly or indirectly* injured by conduct in violation of *section 2923.32* of the Revised Code or a conspiracy to violate that section, . . . shall have a cause of action for triple the actual damages he sustained. . . .

Ohio Rev. Code § 2823.34(F) (emphasis added).

In affording a cause of action to any person directly or *indirectly* injured, the **[**45]** Ohio General Assembly departed from the language used by Congress in affording a federal cause of action under the federal RICO law. Title *18 U.S.C. § 1964* provides in pertinent part:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

Even a cursory review shows that the Ohio General Assembly largely patterned the Ohio Pattern of Corrupt Activity Act after the federal cause of action. [34] Yet while similar, the Ohio General Assembly made obvious and significant departures. Most pertinent to the issues here, the Ohio General Assembly stated that persons injured both directly and indirectly by violations of *§ 2923.32* had standing to bring an action under Ohio's RICO law.

[46]** "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." *Thompson Elec., Inc. v. Bank One, Akron, N.A., 37 Ohio St. 3d 259, 264, 525 N.E.2d 761 (1988)* (quoting paragraph three of the syllabus in *Baker v. Powhatan Mining Co., 146 Ohio St. 600, 67 N.E.2d 714 (1946))*. As the Ohio Supreme Court held in *Iddings v. Bd. of Educ. of Jefferson Cty. Sch. Dist., 155 Ohio St. 287, 98 N.E.2d 827 (1951)*:

> It has been so frequently stated as to become axiomatic that the meaning and intent of a legislative enactment are to be determined primarily from the language itself. The plain provisions of a statute must control. If there is no ambiguity therein there is no occasion to construe or interpret. To construe or interpret what is already plain is not interpretation but legislation, which is not the function of courts. When the meaning is plain from the language employed, an attempt to construe it only tends to make ambiguous that which is simple and clear.

Id. at 290.

Where a legislature **[**47]** makes a difference from patterned legislation, such change **[*788]** suggests the desire to alter previous understandings: "It is axiomatic that it will be assumed that the General Assembly has knowledge of prior legislation when it enacts subsequent legislation." *State v. Frost, 57 Ohio St. 2d 121, 125, 387 N.E.2d 235 (1979)*.

In reviewing an antitrust claim in *Minnesota v. Philip Morris Inc. 551 N.W.2d 490, 495 (1996)*, the Minnesota Supreme Court reviewed similar language. There, a Minnesota ***antitrust law*** provided for a cause of action for "any person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or

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[33] Ohio enacted its version of RICO on June 20, 1985, creating the criminal offense of "engaging in a pattern of corrupt activity." Ohio Rev. Code § 2823.32(B)(1). These statutes took effect on January 1, 1986.

[34] *See* *State v. Thrower, 62 Ohio App. 3d 359, 369, 575 N.E.2d 863 (9th Dist. 1989)* ("The Ohio RICO statute was based on the federal RICO statute and statutes passed by other states."). Congress explicitly directed that the RICO statute be "liberally construed to effectuate its remedial purposes." *Russello v. United States, 464 U.S. 16, 27, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983)*. The Sixth Circuit also recognizes "the broad construction of RICO." *Dana Corp. v. Blue Cross & Blue Shield Mutual of Northern Ohio, 900 F.2d 882, 887 (6th Cir. 1990)*. RICO is written "in terms variously described as 'broad' . . . 'expansive' . . . and 'sweeping'." ***County of Oakland v. City of Detroit, 866 F.2d 839, 847 (6th Cir. 1989)*** (quoting *Associated General, 459 U.S. at 529*, *McCready, 457 U.S. at 472*, and *Southhaven, 715 F.2d 1079 at 1081)*.

indirectly by a violation" of the Minnesota antitrust laws. *Id.* (citing to *Minn. Stat. § 325D.57* (1994)). The Court found "that this expansive grant of standing reaches the [antitrust] injuries suffered by Blue Cross." *Id. at 496*.

In choosing to broaden standing to bring RICO actions under state law, the Ohio General Assembly decided to widen the right to bring an action. Such determination is clearly a policy matter. Making this policy decision is within the prerogative of the legislature. Courts need show extreme **[**48]** deference to the policy determinations of the popularly elected legislature.

Because the Ohio General Assembly has determined that ***HN11***[] persons indirectly injured should have standing to bring an action under the Ohio Pattern of Corrupt Activity Act, the Court finds defendants' standing argument here without merit. Accordingly, the Court denies defendants' motion to dismiss Counts XIV, XV, and XVI of the Amended Complaint. [35]

C. Plaintiffs' Federal Law RICO Claim - Standing

As noted, ***HN12***[] *18 U.S.C. § 1964(c)* gives a cause of action to "any person injured in his business or property by reason of a violation of section 1962." *18 U.S.C. § 1964(c)*. Defendants principally say that plaintiffs lack standing to bring this federal **[**49]** RICO action because they did not suffer any direct injury.

In making their defense on standing, defendants principally rely upon *Holmes*, in which the Supreme Court examined the standing requirement of the federal civil RICO provision. In *Holmes*, the Supreme Court found that Congress had modeled *§ 1964(c)* of the RICO law on the Clayton Act. The Clayton Act had been interpreted as requiring a plaintiff to show that its damages were both the direct result and the proximate result of defendants' conduct.

In *Holmes*, the Supreme Court required a RICO plaintiff to show that the defendant's unlawful conduct violation was both the "but for" and "proximate" cause of the plaintiffs injury. *Holmes, 503 U.S. at 265-269*. *See also Firestone v. Galbreath, 976 F.2d 279, 285 (6th Cir. 1992)*. To decide whether a plaintiff's RICO damages proximately resulted from defendants' conduct, the *Holmes* Court looked to the common law for guidance. In so doing, it focused primarily on one element of proximate cause: the directness of the relationship "between the injury asserted and the injurious conduct alleged." *503 U.S. at 268*. This requirement of a direct relation was held to *generally* **[**50]** preclude recovery by "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Id. at 268-69*. Applying the Clayton Act to RICO, the *Holmes* Court found that the plaintiff's claims were insufficiently direct to show proximate causation. *Id. at 267-68*. [36]

[51]** **[*789]** However, in *National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994)*, the Supreme Court broadly afforded standing to health care clinics to bring a claim that defendants threatened or used actual force, violence, or fear against clinic employees, doctors, and patients. Alleging that defendants conspired to use intimidation against doctors and patients, the plaintiff health organizations made viable claims under RICO.

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[35] Plaintiffs claim that they were directly injured by defendants conduct. Having determined that plaintiffs have standing under the Ohio Corrupt Activity Act even if they were not directly injured, the Court need not reach this issue with regard to Counts XIV, XV, and XVI of the Amended Complaint.

[36] In *Holmes*, the Supreme Court held that the plaintiff, Securities and Investor Protection Corporation ("SIPC"), had not met the proximate cause requirement and thus had no standing to bring suit under RICO. SIPC is a private nonprofit corporation, created pursuant to the Securities Investors Act, which most broker-dealers are required by law to join and which has a statutory duty to advance funds to reimburse the customers of member broker-dealers that are unable to meet their obligations. *503 U.S. at 261*.

SIPC brought a civil RICO action alleging that former members of a brokerage firm conspired in a stock manipulation scheme. SIPC said this scheme caused damages of nearly $ 13 million representing monies that SIPC advanced to cover claims. *See also Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494 (3rd Cir. 1998)*.

In *NOW*, the Court found standing, though the intimidating acts were largely directed against patients and employee physicians. Thus, in *NOW*, the Supreme Court allowed clinics to make claims for damages resulting from acts directed at others.

Lower courts echo the Supreme Court in finding that standing to bring a RICO claim is not always limited to those directly injured. [37] *See Khurana v. Innovative Health Care Sys., Inc., 130 F.3d 143 (5th Cir. 1997)* (to establish standing under RICO subsection that provides for treble damages for injuries to business or property, the plaintiff must show (1) RICO violation, (2) injury to business or property, and (3) injury proximately caused by RICO violation); *Mid* **[**52]** *Atl. Telecom, Inc. v. Long Distance Servs., Inc., 18 F.3d 260, 263 (4th Cir. 1994)* (rejecting adoption of "a rule that only injuries suffered by the immediate victim of a predicate act satisfy the 'by reason of requirement of *§ 1964(c)*'"); *Zervas v. Faulkner, 861 F.2d 823, 833 (5th Cir. 1988)* ("requirement that the nexus between the injury and a predicate act be 'direct' may . . . be overly restrictive").

[53]** In *Mid Atlantic*, plaintiff telephone company accused one of its competitors of violating RICO by defrauding its customers with fictitious charges, enabling it to charge lower rates to entice new subscribers. The plaintiff company alleged that it lost revenues from subscribers whom the competitor defrauded into accepting the fraudulent lower rates of the defendant company. The Fourth Circuit rejected the argument that the plaintiff company lacked standing because the customers were the directly injured parties and its alleged misconduct proximately injured only them. [38]

[54]** ***HN13***[] To decide whether the plaintiff has standing to make claim under RICO, the Court must examine whether others are positioned to make the same claims, whether the plaintiff will have difficulty showing its damages flowed from the defendant's conduct, whether there is a risk of double recovery, and, importantly, whether the defendant's conduct is sufficiently harmful to warrant deterrence. *Holmes, 503 U.S. at 269*.

[*790] As described above, the Court finds sufficient standing for this case to go on. First, under RICO, participant smokers cannot make claim for medical bills. The medical expenses incurred by plaintiffs represent damage to the business and property of the Plaintiffs Funds, not to individual smokers. *See Steele v. Hospital Corp. of America, 36 F.3d 69, 70 (9th Cir. 1994)*. In *Steele*, the Ninth Circuit examined a RICO claim brought by hospital patients

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[37] Defendants suggest support from *Firestone v. Galbreath, 976 F.2d 279 (6th Cir. 1992)*. The case is inapposite. In *Firestone*, beneficiaries of a trust complained that the trust corpus was reduced by theft during another beneficiary's life. The Sixth Circuit found that the decedent's estate had standing to bring an action but the children as beneficiaries did not. Important to this determination, the Sixth Circuit found that under Ohio law the executor, not the heirs, have the right to bring the estate's causes of action. Ohio does not permit heirs to bring these claims for their own, individual, benefit. *976 F.2d at 283*. The Sixth Circuit further found that any property was removed before death. Ohio law grants no enforceable rights to potential takers under a will before the testator's death. The *Firestone* plaintiffs had no vested interests until death. *976 F.2d at 284-285*.

[38] The Fourth Circuit explained its finding:

> LDS and Rice contend that their customers were the only victims of the alleged fraud and only those customers can assert their rights. They further maintain that any injury to Mid Atlantic stemmed from the independent intervening acts of Mid Atlantic customers after LDS's solicitations. It follows, the appellees argue, that the solicitations could not have been the proximate cause of Mid Atlantic's injuries.
>
> We are unable to agree. In *Brandenburg, 859 F.2d 1179 at 1189*, it was recognized that "the legal cause determination is properly one of law for the court, taking into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." *Brandenburg* also explained that proximate causation requires a nexus between the proscribed acts and the injuries. *Id. at 1187*. We did not, however, intend to establish a rule that only injuries suffered by the immediate victim of a predicate act satisfied the "by reason of" requirement of *§ 1964(c)*.

Mid Atlantic, 18 F.3d at 263.

complaining of over billing. Because insurance had paid the charges, the Ninth Circuit found that the insurer had suffered the damages, not the patient:

> The district court explained that it was the insurance companies and not the patients themselves who suffered financial loss from the allegedly fraudulent health **[**55]** care billings. . . . It is not enough that the patients show that their insurance company had to pay out more than it otherwise would have without the alleged RICO violation. This does not constitute financial loss to them.

36 F.3d at 70.

Next, the plaintiffs do not seek personal injury damages, such as pain and suffering or wrongful death damages. Following *Steele*, the Court finds that individual smokers cannot make claim for medical expenses incurred by insurers or trust funds. Because others cannot make claims under RICO for these damages, the Court finds no others are positioned to make the same claims. There is scant reason to fear that defendants will be subjected to double recovery.

While defendants say the plaintiffs will have difficulty showing that their damages flowed from the defendants' conduct, the Court finds this argument insufficient to stop this action at this stage. While disputed, the Court finds that plaintiffs make plausible claims that defendants' conduct damaged them in their business and property.

Finally, plaintiffs allege conduct that, if believed, has had extremely deleterious consequences upon plaintiffs. Having alleged such consequences, **[**56]** the Court finds the Amended Complaint avers conduct sufficiently harmful as to warrant deterrence. *Holmes, 503 U.S. at 269*.

D. Plaintiffs' State and Federal Law RICO Claim - Damage to Property

Beyond arguing for dismissal of the Ohio Pattern of Corrupt Activity Act claims for standing reasons, defendants say plaintiffs cannot bring this action because plaintiffs cannot allege the defendants damaged them in their business or property. Rather, defendants suggest the plaintiffs' action under the Ohio RICO law is to recover for damages resulting from physical injury.

HN14[] Only a person "injured in his business or property" [39] may recover damages under RICO. 18 U.S.C. *§ 1964(c)*. RICO excludes from its ambit damages for personal injury. [40] Claims for personal property injuries are also not cognizable under RICO. *See, e.g., Genty v. Resolution Trust Corp., 937 F.2d 899, 918 (3rd Cir. 1991)*; *Drake v. B.F. Goodrich Co., 782 F.2d 638, 644 (6th Cir. 1986)*. "The plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." **[*791]** *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, **[**57]** 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)*.

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[39] The "injury to business or property" language in *18 U.S.C. § 1964(c)* was taken from Section 4 of the Clayton Act, *15 U.S.C. § 15*. The United States Supreme Court has held that this language has "restrictive significance" in that "it would, for example, 'exclude personal injuries suffered.'" *Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)*. Case law interpreting the Clayton Act has been persuasive and heavily relied upon by courts addressing issues involving RICO. *See Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 267-68, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)*.

[40] The Sixth Circuit has held that economic losses resulting from physical injuries are not damages to "business or property" within the meaning of RICO:

> Whether [the plaintiff] can show a financial loss does not, by definition, establish that she has suffered a business or property injury within the meaning of *§ 1964(c)*. Most personal injuries -- loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering, to name a few -- will entail pecuniary consequences. Perhaps the economic aspects of such injuries could, as a theoretical matter, be viewed as injuries to "business or property" but engaging in such metaphysical speculation is a task best left to philosophers, not the federal judiciary.

Doe v. Roe, 958 F.2d 763, 770 (7th Cir. 1992).

[58]** The requirement that a plaintiff suffer an injury to its "business or property" means that the plaintiff must show a proprietary or economic type of damage. *See, e.g., Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 151, 97 L. Ed. 2d 121, 107 S. Ct. 2759 (1987)* ("Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees.").

In the instant case, the Court finds that plaintiffs have sufficiently alleged injury to their "business or property" to withstand dismissal under *Fed. R. Civ. P. 12(b)(6)*. Plaintiffs allege that the defendants' conduct has required them to incur significant costs and expenses attributable to tobacco-related diseases. While related, the Court finds that plaintiffs' injuries are distinct from the personal injury claims of smokers. Plaintiffs have sufficiently stated RICO's injury element.

V. Plaintiffs' antitrust claims

In Counts IV and X of the Amended Complaint, the plaintiffs make antitrust claims under federal and state law. [41] In their Amended Complaint, plaintiffs allege that defendants have conspired to restrain trade and inhibit competition **[**59]** by suppressing the development and marketing of safer, less addictive tobacco products and by agreeing in furtherance of this conspiracy to conceal information concerning the negative health attributes of their products. Plaintiffs say that the defendants have restrained competition in the market for safer tobacco products. Because of this purported restraint, plaintiffs allege the Plaintiffs Funds incurred substantial costs to treat the tobacco-related illnesses of their participants.

In their motion to dismiss, defendants argue that the plaintiffs have suffered no antitrust injury, that the plaintiffs lack antitrust standing, and that the plaintiffs fail to adequately allege an antitrust violation.

Although the federal and state antitrust statutes are worded slightly differently, the goals are the same. Both condemn combinations **[**60]** having for their purpose restraints on trade or commerce. Ohio courts interpret the Valentine Act in light of federal judicial construction of *Section 1* of the Sherman Act. *C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp., 63 Ohio St. 2d 201, 204, 407 N.E.2d 507 (1980)*. See also *Re/Max Intern., Inc. v. Realty One, Inc., 924 F. Supp. 1474 (N.D. Ohio 1996)*. A review of defendants' arguments regarding the Sherman Act will encompass the Ohio claims as well. *See Richter Concrete Corp. v. Hilltop Basic Resources, 547 F. Supp. 893, 920 (S.D. Ohio 1981)*, *aff'd*, *691 F.2d 818 (6th Cir. 1982)* (plaintiff's failure to prove its claims under Sherman Act was a failure to prove claim under Valentine Act).

A. Antitrust injury

Defendants say that plaintiffs have not suffered an antitrust injury. Congress intended the Sherman Act to protect only against injury to the competitive process, not as a substitute for common law tort claims. Defendants argue that the increased health care costs the Funds claim are not the type of injury to "business or property" for which the antitrust acts permit recovery.

HN15[] To assert a claim for damages under the antitrust statutes, one must be injured in **[**61]** his "business or property." *See 15 U.S.C. § 15(a)*. A plaintiff must allege specific "antitrust injury." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. An injury, "although causally related to an antitrust violation, nevertheless will not qualify as an 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*.

In *Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*, the Supreme Court found that limits must be placed upon those who might make claim under the antitrust laws:

[41] Count IV is based on a violation of the Sherman Act, *15 U.S.C. § 1, et seq.* Count X is based on claimed violations of the Valentine Act, Ohio Rev. Code § 1331, *et seq.*

> **[*792]** An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." . . . It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. . . . **[**62]** Indeed, the unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective. . . . The courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of "proximate cause." In applying that elusive concept to this statutory action, we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

457 U.S. at 476-78 (citations omitted).

In part, the Amended Complaint claims the defendants conspired to stop the development of safer cigarettes. Private standard-setting associations "have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anti-competitive harm. Agreement on a product standard is, after all, implicitly an agreement not **[**63]** to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)* (citations omitted). Because the stifling of competition in product quality is of the type that Congress designed the antitrust laws to address, the Court finds that defendants' arguments on this issue fail.

Defendants also raise the separate argument that this Court should dismiss plaintiffs' antitrust claims in the Amended Complaint because plaintiffs cannot show proximate relationship to defendants' conduct. In *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, the Supreme Court examined whether the plaintiff-unions had sufficiently alleged antitrust injury. To decide whether the plaintiffs there had sufficiently alleged antitrust injury, the *California* Court required the plaintiff to allege both injury in fact and a proximate relationship. The Supreme Court identified factors used for this determination: **[**64]**

> Other relevant factors -- the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy -- weigh heavily against judicial enforcement of the Union's antitrust claim.

459 U.S. at 545.

As previously discussed regarding defendants' motion to dismiss plaintiffs' RICO claim, the Court finds sufficient allegations to support a finding of proximate causation as for the antitrust injuries. The Court finds little potential for duplicative recovery or apportionment of damages. As described, cigarette smoking fund beneficiaries do not have standing to bring claim for personal injuries under the Clayton Act. Under that law, beneficiaries are restricted to bringing claims for injuries to their business or property. There is little risk of double recoveries against defendants.

For similar reasons, there is little difficulty with an apportionment of damages. There are no more direct victims of the alleged conspiracy who have standing to bring **[**65]** claims under the antitrust laws.

Separately, the defendants argue that plaintiffs' claims are for personal injuries and that plaintiffs cannot make antitrust claim for such injuries. *See* *Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)* (while consumers cannot make claim for personal injuries under **[*793]** § 4 of the Clayton Act, they can make claim for having to pay a higher price for goods purchased for personal use because of antitrust violations).

HN16[] Section 4 of the Clayton Act allows civil recovery of treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)*. As in the RICO context, the requirement that a plaintiff suffer an injury to his "business or property" means that the plaintiff must show a proprietary or economic type of damage. Here, plaintiffs allege that defendants' conduct has resulted in a substantial increase in the cost of medical care for the participants and beneficiaries. Plaintiffs say the defendants have required them to bear these increased costs.

To make a claim under § 4 of the Clayton Act, a plaintiff need not prove that the **[**66]** antitrust violation was "the sole or 'but for' cause of his injury. It is enough that the challenged conduct is a material cause of that injury. '[A] plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury. . . .'" *Allied Accessories & Auto Parts Co. v. General Motors Corp., 901 F.2d 1322, 1325 (6th Cir. 1990)* (quoting *Zenith Corp. v. Hazeltine, 395 U.S. 100, 114 n. 9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969))*.

Plaintiffs allege their tobacco-related health care costs were greatly increased by the defendants' anti-competitive restriction of product choice and suppression of product information. [42] The Court finds that plaintiffs sufficiently allege an antitrust conspiracy that resulted in proprietary or economic injury to plaintiffs' "business or property."

B. Standing to Assert Antitrust Claims

Even if plaintiffs can show injury under Section 4 of the Clayton Act, defendants say the plaintiffs do **[**67]** not have standing to make antitrust claims. Antitrust standing is an independent requirement that must be satisfied to obtain legal or equitable relief in an antitrust action. *Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 110 n.5, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*. The Court finds this argument fails, largely for the reasons previously discussed.

In *Blue Shield v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*, the Supreme Court noted that "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." In quoting from Judge Andrews' dissent in *Palsgraf*, the *McCready* court limited the right to make antitrust claims to those proximately injured: "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Id. at 477*.

As previously discussed, ***HN17***[] a court determining antitrust standing must evaluate (1) the nature of the damages sought, (2) whether the injury is of the type that the antitrust laws were intended to remedy, (3) the risk of duplicative recoveries of **[**68]** complex damages apportionment, and (4) the presence of more direct victims of the antitrust violation who can bring claim. *Associated Gen. Contractors, Inc., 459 U.S. at 537-45*.

The Court finds that plaintiffs have standing to make antitrust claims. The Amended Complaint alleges economic injury to the plaintiffs' businesses through expenses increased by collusion to stop the introduction of safer cigarettes. The Court finds this to be the type of injury the antitrust laws were directed to remedy. The Court also finds little risk of duplicative recovery or complex damage apportionment. Any such risk is obviated by defendants' rights to set off amounts otherwise paid in damages and settlement for the same injuries. Finally, the Court finds no more directly injured victims who could bring antitrust claims, first, because the antitrust laws do not allow an action for personal injury, and second, because plaintiffs-funds are better positioned to make such claims.

For these reasons, the Court denies defendants' motion to dismiss Counts IV and X of the Amended Complaint.

[*794] VI. Voluntarily undertaken duty

In Counts VI and VII, plaintiffs make claims for breach of voluntarily undertaken **[**69]** duties. [43] Defendants seek dismissal of these causes of action. In seeking dismissal, defendants contend that the plaintiffs must allege physical harm and that they have not. Defendants also seek dismissal on grounds that the plaintiffs' economic losses are not recoverable in this action. Further, defendants say that their conduct did not increase the risk of harm to the Funds.

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[42] Amended Complaint at P 300.

[43] In Count VI, plaintiffs allege an intentional breach of a voluntarily undertaken duty. In Count VII, plaintiffs allege a negligent breach of a voluntarily undertaken duty.

As to these causes of action, plaintiffs claim that defendants voluntarily agreed to undertake studies regarding the effect of tobacco products and promised to reveal all material facts about tobacco use, health and addiction uncovered by their research. In 1954, defendants published the "Frank Statement." With that statement, defendants promised to take "an interest in people's health as a basic responsibility," and "pledged aid and assistance to the research effort **[**70]** into all phases of tobacco use and health." [44] Beyond the 1954 "Frank Statement," plaintiffs say defendants otherwise represented that they would monitor and report on the health consequences of smoking.

HN18[] Under Ohio law, one who gratuitously undertakes a voluntary act assumes the duty to be careful under the circumstances. *Seley v. G. D. Searle & Co., 67 Ohio St. 2d 192, 202, 423 N.E.2d 831 (1981)*; *Briere v. Lathrop Co., 22 Ohio St. 2d 166, 258 N.E.2d 597 (1970)*; Prosser on Torts § 56, at 343-348.

The *Restatement (Second) of Torts § 323* describes a cause of action for a voluntarily undertaken duty. That section provides:

> Negligent Performance of Undertaking to Render Services
>
> One who undertakes, gratuitously **[**71]** or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323, ch.12 (1965).

Although the Ohio Supreme Court has not expressly adopted *§ 323 of the Restatement,* it has been cited with approval by the Ohio Supreme Court and several courts of appeals of this state. *See, e.g., Seley, 67 Ohio St. 2d at 202*; *Briere, 22 Ohio St. 2d at 172*; *Wissel v. Ohio High Sch. Athletic Ass'n, 78 Ohio App. 3d 529, 605 N.E.2d 458 (1st Dist. 1992)*; *King v. Lindsay, 87 Ohio App. 3d 383, 622 N.E.2d 396 (10th Dist. 1993)*.

HN19[] Under Ohio law, a claim for breach of a voluntarily undertaken duty must allege physical injury. In *Hinton v. United States Postal Service, 68 F.3d 474* (TABLE) (6th Cir. 1995) (unpublished), the court described voluntary duty under Ohio law:

> Under **[**72]** the Good Samaritan doctrine, "one who voluntarily assumes a duty must perform that duty with reasonable care." *Thomas v. Tennessee Valley Authority, 769 F.2d 367, 370 (6th Cir. 1985)*. However, "recovery under the Good Samaritan Doctrine is limited to physical harm." *Shaner v. United States, 976 F.2d 990, 994 (6th Cir. 1992)*, *cert. denied*, *507 U.S. 1051, 113 S. Ct. 1944, 123 L. Ed. 2d 650 (1993)* (citations omitted).

Hinton, 68 F.3d at 474.

Plaintiffs have previously said that "plaintiffs do not seek to recover for tobacco-related personal injuries suffered by Fund participants; rather, plaintiffs' claims are for economic injuries." [Doc. 63, at 4-5]. In the Amended Complaint, plaintiffs have disclaimed **[*795]** seeking damages for personal injuries.

Recognizing that the Amended Complaint does not allege physical harm, plaintiffs suggest that they only seek to recover for intentional breach of a voluntarily assumed duty, not for a negligent breach of an assumed duty. This argument is disingenuous. Count VII clearly states a cause of action for "Negligent Breach of Special Duty."

[44] Defendants publicly disseminated the "Frank Statement," which appeared in 448 newspapers across the nation in 258 cities. According to Defendants, this was done because "people are entitled to know where we stand on this matter and what we intend to do about it." Amended Complaint at P 105.

Moreover, the Court finds that the attempt to characterize the claim as an intentional **[**73]** tort does not change the elements of the cause of action. [45]

Given that plaintiffs do not allege physical harm or personal injury damages, the Court concludes that plaintiffs fail to state a cause of action for breach of voluntarily undertaken duties. Therefore, the Court grants defendants' motion to dismiss Counts VI and VII of the Amended Complaint.

VII. Conspiracy claim

Defendants move to dismiss Count XI of the Amended Complaint. **[**74]** In that count, plaintiffs seek to state a claim for conspiracy. As grounds for its motion to dismiss Count XI, defendants say that conspiracy, of itself, furnishes no cause of civil action.

HN20[] In Ohio, civil conspiracy is "a malicious combination of two of more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co., 72 Ohio St. 3d 415, 419, 650 N.E.2d 863 (1995)* (citing *LeFort v. Century 21-Maitland Realty Co., 32 Ohio St. 3d 121, 126, 512 N.E.2d 640 (1987))*. See also *Gosden v. Louis, 116 Ohio App. 3d 195, 218, 687 N.E.2d 481 (9th Dist. 1996)*.

An actionable conspiracy must be based upon an actionable underlying tort. *Stiles v. Chrysler Motors Corp., 89 Ohio App. 3d 256, 266, 624 N.E.2d 238 (6th Dist. 1993)*; *Miskinis v. Chester Twp. Park Dist., 112 Ohio App. 3d 466, 472, 679 N.E.2d 39 (11th Dist. 1996)* ("A claim of civil conspiracy requires the plaintiff to prove a malicious combination of two or more persons causing injury to person or property and the existence of an unlawful act independent from the actual conspiracy.").

In seeking dismissal of plaintiffs' conspiracy claim, the defendants **[**75]** argue that all of plaintiffs' underlying causes of action should fail. Defendants say that if all plaintiffs' other causes of action fail, then plaintiffs' conspiracy claim must also fail. Although defendants' argument is logically correct, it is inapplicable here. The Court has found that plaintiffs state causes of action under RICO, the Ohio Corrupt Activity Act, and federal and state antitrust laws. Having stated such causes, the Court concludes that plaintiffs' have sufficiently stated a cause of action for civil conspiracy.

Accordingly, the Court denies defendants' motion to dismiss Count XI of the Amended Complaint.

For the foregoing reasons, the Court grants defendants' motions to dismiss plaintiffs' claims for breach of voluntary undertaken duty averred in Counts VI and VII of the Amended Complaint. The Court denies defendants' motions to dismiss plaintiffs' remaining claims under federal RICO (Counts I, II, III), under the Ohio Corrupt Activity Act (Counts XIV, XV, and XVI), for antitrust (Counts IV and X), and for civil conspiracy (Count XI).

IT IS SO ORDERED.

Dated: September 10, 1998

Judge James S. Gwin

United States District Judge

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[45] Plaintiffs also cite to authority from other jurisdictions to support their claim that physical injury is not required. *See, e.g., City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1142-43 (N.D. Cal. 1997)*; *State, by Humphrey v. Philip Morris Inc., 551 N.W.2d 490 (Minn. 1996)*. The Court finds the discussion of voluntarily assumed duty fails to directly speak to whether a showing of physical harm is required. But more importantly, clear Ohio authority teaches that physical harm is an element of a claim for breach of a voluntarily assumed duty.

[VIM, Inc. v. Somerset Hotel Ass'n](#)

United States District Court for the Western District of Pennsylvania

September 10, 1998, Decided

Civil Action No. 96-67J

Reporter

19 F. Supp. 2d 422 *; 1998 U.S. Dist. LEXIS 14415 **; 1999-2 Trade Cas. (CCH) P72,614

VIM, INC, f/k/a VIRGINIA INN MANAGEMENT, INC. et al., Plaintiffs, v. SOMERSET HOTEL ASSOCIATION, et al., Defendants

Disposition: [1]** Defendants' motions for summary judgment, dkt. nos. 40, 43, 44, GRANTED and plaintiffs' complaint DISMISSED WITH PREJUDICE. Summary judgment entered for defendants.

Core Terms

hotel, traffic, antitrust, height, zoning, sham, site plan, defendants', properties, site, planning commission, Turnpike, borough, special exception, summary judgment, baseless, genuine, motions, zoning ordinance, nonmoving party, traffic impact, material fact, adversely affect, probable cause, common pleas, moving party, neighboring, adjoining, nonmovant, ordinance

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Evidence > Burdens of Proof > Allocation

HN1[] **Summary Judgment, Evidentiary Considerations**

Summary judgment is appropriate where admissible evidence fails to demonstrate a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. If the nonmoving party bears the burden of persuasion at trial, the moving party must show that the nonmoving party's evidence is insufficient to carry that burden. The nonmoving party can create a genuine issue of material fact by pointing to evidence in the record sufficient to support a jury verdict in its favor at trial. Alternatively, the burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party's case. Since a complete failure of proof concerning an essential element on which a party bears the burden of proof at trial establishes that the moving party is entitled to a judgment as a matter of law, the nonmoving party must establish the existence of every element essential to its case. Such evidence must be significantly probative and more than merely colorable. The nonmoving party is afforded the benefit of all reasonable inferences drawn from the record.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] **Summary Judgment, Opposing Materials**

Once the moving party has satisfied its burden, the nonmoving party is required by *Fed. R. Civ. P. 56(e)* to establish that there remains a genuine issue of material fact. The nonmovant may not rest upon mere allegation or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. A fact is material if it might affect the outcome of the suit under the governing law, and is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In determining whether a nonmovant has established the existence of a genuine issue of material fact requiring a jury trial, the evidence of the nonmovant must be believed and all justifiable inferences are to be drawn in its favor. Whether an inference is justifiable, however, depends on the evidence adduced. An inference based upon speculation or conjecture does not create a material factual dispute sufficient to defeat summary judgment. Likewise, simply showing that there is some metaphysical doubt as to the material facts does not establish a genuine issue for trial.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Governments > Legislation > Statutory Remedies & Rights

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN3[] **Antitrust & Trade Law, Exemptions & Immunities**

The Noerr-Pennington doctrine was developed by the Supreme Court in recognition of the fact that the right to petition the government for redress of grievances, a right protected by the *First Amendment*, generally trumps the statutory right of competitors to be free from unfairly anticompetitive conduct under ***antitrust law***. Those who petition government for redress are generally immune from antitrust liability, even though the purpose of that petitioning may be to restrain competition.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine does not insulate from antitrust attack conduct that is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN5[] **Sanctions, Baseless Filings**

The Supreme Court outlines a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon. This two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability.

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN6[] **Sanctions, Baseless Filings**

Probable cause requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication. Once probable cause for defendant's legal actions is shown, the antitrust plaintiff fails as a matter of law to satisfy the objective prong of the sham exception.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN7[] **Zoning, Ordinances**

Under Pennsylvania law, as to specific requirements of a zoning ordinance, the applicant has the persuasion burden, as well as the initial evidence presentation burden. This rule means the applicant must bring the proposal within the specific requirements expressed in the ordinance for the use sought as a special exception. Once the applicant has made that showing, the objector has the burden of showing the proposal to be detrimental to public health, safety, and welfare. If the applicant's burden is not met, the special exception cannot be granted.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Intentional Torts > Abuse of Process > Defenses

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN8[] **Conspiracy, Elements**

Claims for civil conspiracy, tortious interference and malicious use of process are subject to Noerr-Pennington immunity.

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Judges: D. Brooks Smith, United States District Judge.

Opinion by: D. Brooks Smith

Opinion

[2] [*423]** ***MEMORANDUM OPINION AND ORDER***

D. Brooks Smith, District Judge.

This is an antitrust case in which plaintiffs, who wished to and ultimately did build and operate a Hampton Inn hotel in Somerset, Pennsylvania, have sued various defendants who operated existing, competing hotels in that city. The gravamen of plaintiffs' claims is that defendants, through the use of a trade group known as the Somerset Hotel Association, conspired to impede the construction of the Hampton Inn by interposing patently meritless legal challenges to plaintiffs' positions before Somerset Borough's zoning and planning commissions, and before the courts. Defendants have responded with motions for summary judgment, asserting that the *Noerr-Pennington* doctrine insulates their conduct from antitrust attack, regardless of its motivation. Because the undisputed facts of record demonstrate that defendants' legal challenges were not objectively baseless as contemplated by *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*, I will grant the motions and enter summary judgment for defendants.

I.

The material facts, viewed **[**3]** in the light most favorable to plaintiffs, are as follows. In January 1995, Virginia Inn Management ("VIM") contracted to purchase a parcel of land adjacent to an existing truck stop located just off the Somerset Turnpike exit; on this property they hoped to construct their Hampton Inn. Dkt. no. 51, Exh. 1. This tract of land then served as extra parking space for the truck facility and was zoned such that a hotel could be build upon it.

[1] The design of VIM's Hampton Inn, however, was such that a special height exception would have to be obtained from the zoning board, in addition to a general site plan approval from the planning commission.

VIM's proposed hotel was to be the first major overnight lodging facility built in Somerset in many years. As such, it was viewed **[*424]** with no small amount of consternation by its competitors, who in response, formed the **[**4]** Somerset Hotel Association to represent their common interests. *Id.*, Exh's 3-4. The association decided to send representatives to the public meetings and hearings concerning the proposed Hampton Inn, expressing opposition to the project. *Id.*, Exh. 7.

The first of these hearings occurred on April 4, 1995 before the Somerset Zoning Hearing Board. *See id.*, Exh. 12. VIM's proposed design height for its five-story Hampton Inn was fifty-five feet, ten feet higher and two more floors than normally permitted under the local zoning ordinance. *Id.* at 5; *see also id.*, Exh. 11, at 6 (table). That ordinance, however, provided for a special height exception to be granted upon a showing by VIM that the extra height would not "substantially affect adversely the uses of adjacent and neighboring property." *Id*, Art. 12, § 4.

At the zoning hearing, VIM's counsel put evidence on the record that was intended to show that the extra ten feet would not adversely affect adjoining properties. This evidence took the form of a plan view of the site, photographs of other Hampton Inns, testimony from two engineers retained by VIM, and the testimony of the owner of the truck stop (who **[**5]** was also the seller of the land). *Id.* Exh. 12, at 3-12, 16-22. VIM, however, did not perform any property-by-property analysis of how its proposed use would affect the views and signage of the adjoining businesses, nor did it provide any front, rear or side elevation drawings of the proposed hotel. *See id.* at 44-53.

For their part, defendants offered no evidence that the extra building height would adversely affect the uses of their properties, or, for that matter, on any other issue. Instead they argued concerning the increase in vehicle traffic that they believed would accompany the new Hampton Inn, and the possibility, feared by local business owners, that the Pennsylvania Turnpike Commission would consider relocating the Somerset interchange should there be an increase in congestion and vehicular accidents. *Id.* at 22-26, 31-32. Defendants then moved to continue the proceedings while they developed their rebuttal evidence. *Id.* at 47-50.

Defendants' objections, although vociferous, went to the issue of whether a hotel should be permitted to be built at the site *vel non*, not whether an extra ten feet in its height would adversely affect their properties. Because **[**6]** VIM had the right, under the zoning ordinance, to build a hotel on the site, defendants' contentions were immaterial to the board's decision, and the borough solicitor so informed the board members at the hearing. Thus, the board voted, 3-1, to grant the special exception, with one member dissenting because she felt that VIM's evidence was insufficient to give her a sense of how the hotel would affect the surrounding properties. *Id. at 53, 65*. No action was taken on the motion for continuance.

On May 2, 1995, defendant Somerset Hotel Association filed a land use appeal in the court of common pleas challenging the zoning board's decision to grant the special height exception. *Id.*, Exh. 33. One basis of this appeal was that VIM had failed to come forward with sufficient evidence that its hotel's additional ten feet in height would not have an adverse effect on the adjoining property owners. *Id.*

On May 25, the Somerset Borough Planning Commission held a public meeting to consider VIM's proposed site plan for its hotel. *Id.*, Exh. 32. Again, defendants argued, without presenting evidence, that the hotel would increase traffic around the Somerset interchange, and that approval **[**7]** be delayed until a traffic study could be conducted, as previously requested by the Turnpike Commission. *Id.* In this proceeding, however, the zoning ordinance required the planning commission to examine the project's effect on internal and external traffic patterns in making its determination whether to approve the site plan. Dkt. no. 46, Exh. B., §§ 4(1)(e), 4(3). Nevertheless, the borough solicitor instructed the commissioners that they could not legally require a traffic impact study or consider any traffic effects beyond the borders of the site itself. Dkt. no. 51, Exh. 32. The commission accordingly approved the site

[1] The land was zoned M-1. Dkt. no. 51, Exh. 15. A hotel may be lawfully be constructed in such a district. *See id.*, Exh. 11, Art. 5, §§ 8.2(7), 5.2(10).

plan, contingent on the appeal of the zoning exception being resolved in **[*425]** VIM's favor. *Id.* Defendants appealed this decision to the court of common pleas as well.

Both appeals were consolidated and on August 22, 1995, defendants filed motions to open the record and present additional evidence, although initially defendants had no offer of proof in support of the motions. *See id.*, Exh. 35, at 3, 39. Eventually, however, defendants' evidence was confined solely to the position of the Turnpike Commission (expressed by one of its officials) that traffic around **[**8]** the Somerset interchange was a real concern. *Id.* at 44-45. This default, combined with the fact that the evidence was available to defendants at the time of the planning commission hearing, led the motions judge to decline to open the record, without prejudice. *Id.*, Exh. 36.

Thus, both appeals proceeded on their merits, the zoning appeal on the theory that VIM had failed to produce sufficient evidence that its hotel's extra height would not adversely affect neighboring properties, and the planning appeal on the contention that the commission improperly failed to comply with the ordinance's requirement that the hotel's effect on external traffic patterns be considered. Defendants renewed their motion to open the record, but their proposed witness, a representative of the Turnpike Commission, would have testified only that the Commission thought that a traffic study *should* be performed, but not that the Turnpike Commission had the power to *require* a study or otherwise delay the project. *Id.*, Exh. 39, at 50. Given this limited testimony, defendants ultimately decided not to even offer it. *See id. at 50*. On October 4, 1995, the court denied both appeals, *Id.*, **[**9]** Exh. 40; defendants did not appeal to the Commonwealth Court.

As a result of defendants' ultimately unfounded opposition to the Hampton Inn project, defendants were unable to begin construction by the time winter set in in 1995, and were forced to wait until the Spring of 1996. *Id.*, Exh. 20. Plaintiffs estimate that they were delayed a total of 228 days because of the actions of the defendants. *Id.*

Plaintiffs filed suit on April 2, 1996, alleging that defendants engaged in an antitrust conspiracy in violation of the Sherman Act, as well as civil conspiracy, wrongful use of civil process, abuse of process and intentional interference with contractual and prospective business relationships under state law. Dkt. no. 1. On March 27, 1997, I denied defendants' motions to dismiss the complaint under *Fed. R. Civ. P. 12(b)(6)*, dkt. no. 27. Answers and summary judgment motions were subsequently filed. Discovery is complete, and those motions are now ripe for adjudication.

II.

HN1[] Summary judgment is appropriate where admissible evidence fails to demonstrate a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. If the **[**10]** nonmoving party bears the burden of persuasion at trial, the moving party must show that the nonmoving party's evidence is insufficient to carry that burden. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The nonmoving party can create a genuine issue of material fact by pointing to evidence in the record sufficient to support a jury verdict in its favor at trial. *Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 330 (3d Cir. 1995)*. Alternatively, "the burden on the moving party may be discharged by showing . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex, 477 U.S. at 325* (internal quotation marks omitted). "Since a complete failure of proof concerning an essential element," *id. at 323-24*, on which a party bears the burden of proof at trial establishes that the moving party is "entitled to a judgment as a matter of law," the nonmoving party must establish the existence of every element essential to its case. *Id.* Such evidence must be significantly probative and more than "merely colorable." *Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)*. The nonmoving party **[**11]** is afforded the benefit of all reasonable inferences drawn from the record. *Id.*

HN2[] Once the moving party has satisfied its burden, the nonmoving party is required by *Fed. R. Civ. P. 56(e)* to establish that there remains a genuine issue of material fact. **[*426]** *Clark v. Clabaugh, 20 F.3d 1290, 1294 (3d Cir. 1994)*. The nonmovant "may not rest upon mere allegation or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. A fact is material if it "might affect the outcome of the suit under the governing law. . ." *id. at 248*, and is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id. at 248, 257*.

In determining whether a nonmovant has established the existence of a genuine issue of material fact requiring a jury trial, the evidence of the nonmovant must "be believed and all justifiable inferences are to be drawn in [its] favor." *Id. at 255*. Whether an inference is justifiable, however, depends on the evidence adduced. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., **[**12]** 475 U.S. 574, 595-96, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. An inference based upon speculation or conjecture does not create a material factual dispute sufficient to defeat summary judgment. *Robertson v. Allied Signal, Inc., 914 F.2d 360, 382 n.12 (3d Cir. 1990)*. Likewise, "simply showing that there is some metaphysical doubt as to the material facts" does not establish a genuine issue for trial. *Matsushita, 475 U.S. at 586*.

III.

Defendants move for summary judgment, arguing that their conduct is completely insulated from antitrust attack under the *Noerr-Pennington* doctrine. [2] "Not so," counter the plaintiffs, who assert forcefully that defendants' obstructionist tactics fall within the "sham exception" to *Noerr-Pennington*. To sort out these contentions, it is first necessary to explore the contours of *Noerr-Pennington*.

[13]** A.

HN3[] The *Noerr-Pennington* doctrine was developed by the Supreme Court in recognition of the fact that the right to petition the government for redress of grievances, a right protected by the *First Amendment*, generally trumps the statutory right of competitors to be free from unfairly anticompetitive conduct under ***antitrust law***. *See Columbia Pictures, 508 U.S. at 56*. Thus, "those who petition government for redress are generally immune from antitrust liability[,]" *id.*, even though the purpose of that petitioning may be to restrain competition. *See Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138-39, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*.

Nevertheless, ***HN4***[] the *Noerr-Pennington* doctrine does not insulate from antitrust attack conduct that "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. . . ." *Noerr, 365 U.S. at 144*. This "sham exception" was refined by the Supreme Court in *Columbia Pictures* and has a very narrow scope. As the Court opined:

> ***HN5***[] We now outline a two-part definition of "sham" litigation. First, the lawsuit must be objectively **[**14]** baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon. This two-tiered process requires the plaintiff **[*427]** to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability.

Columbia Pictures, 508 U.S. at 60-61 (citations and internal quotation marks omitted).

The Supreme Court then further elaborated on the definition of objective baselessness, equating it first to the concept of lack of probable cause as applied in the common-law **[**15]** tort of wrongful civil proceedings. *Id. at 62-63*. On that point, the Court noted that ***HN6***[] probable cause "requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication." *Id.* (citing, *inter alia*, *Restatement (Second) of Torts § 675 comment e* (1977)). Once probable cause for defendant's legal actions is shown, the antitrust plaintiff fails as a matter of law to satisfy the objective prong of the sham exception. *Id. at 63*. A few pages later, in

[2] Defendant K&M Properties of Somerset, Inc., which operates the local Days Inn, has additionally moved for summary judgment on the ground that it successfully withdrew from any unlawful conspiracy and should not be held liable. Dkt. nos. 40, 41. Because I conclude that the *Noerr-Pennington* doctrine provides a complete defense to the allegations of the complaint, I need not reach this issue.

vindicating the defendant's conduct, the Court noted that defendant's lawsuit against the plaintiff met the requirements of nonfrivolity under Fed. R. Civ. P. 11. Id. at 65. [3]

[16]** B.

Here, I assume, without deciding, that defendants' purpose for opposing the Hampton Inn was to restrain competition. The issue that must be determined, then, is whether its tactics in prosecuting that opposition were objectively baseless. I conclude they were not.

In deciding this issue, as on any motion for summary judgment, if "there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law." [4] Columbia Pictures, 508 U.S. at 63. I must also be mindful that, even though "the antitrust defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." Id. at 60 n.5 (citation and internal quotation marks omitted). Thus, I must determine whether, as a matter of state law, it was objectively reasonable for defendants to challenge the decisions of the zoning and planning **[*428]** boards; that is, whether a reasonable litigant in their position would "believe that there is a chance that a claim may be held valid upon adjudication." Id. at 62-63. **[**17]**

[18]** 1.

The Somerset Borough Zoning Ordinance provides that certain "buildings and uses are permitted as special exceptions if the Board finds that, in its opinion, as a matter of fact, such exceptions will not substantially affect adversely the uses of adjacent and neighboring property." Dkt. no. 46, Exh. B, Art. 12 § 4, at 56. A special height exception is specifically provided for land, such as plaintiff's, located in the M-1 and M-2 districts. *Id.* § 4.3, at 58.

HN7[] Under Pennsylvania law, "as to specific requirements of the zoning ordinance, the applicant has the persuasion burden, as well as the initial evidence presentation burden." Bray v. Zoning Bd. of Adj., 48 Pa. Commw.

[3] The state law standard for determining whether a land use appeal is frivolous is similar to the one applied under a *Noerr-Pennington* analysis:

> A frivolous appeal is one in which no justiciable question has been presented and the appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed.

Abbey v. Zoning Hearing Bd., 126 Pa. Commw. 235, 559 A.2d 107, 112 (Pa. Commw. Ct. 1989) (quoting Black's Law Dictionary 601 (5th ed. 1979)).

[4] Defendants rely upon the "expert opinion" of Attorney David W. Craig, retired President Judge of the Commonwealth Court of Pennsylvania, to support their argument that their land use appeals were "not objectively baseless as a matter of law. . . ." Dkt. no. 45, at 19. It detracts not at all from my high regard for former Judge Craig, nor the esteem in which he is held by the legal community, to observe that lack of objective baselessness is not the sort of issue that lends itself to expert testimony under Fed. R. Evid. 702 and 704. While "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact[,]" *id.*, "an expert may not state his or her opinion as to legal standards nor may he or she state legal conclusions drawn by applying the law to the facts." Okland Oil Co. v. Conoco, Inc., 144 F.3d 1308, 1328 (10th Cir. 1998); *accord* Burger v. Mays, 176 F.R.D. 153, 156-57 (E.D. Pa. 1997); Haberern v. Kaupp Vascular Surgeons Ltd., 812 F. Supp. 1376, 1378 (E.D. Pa. 1992); Rich v. Bailey, 1996 U.S. Dist. LEXIS 19437, No. 95-9632, 1996 WL 745298, *5 (E.D. Pa. Dec. 23, 1996) (citing cases), *aff'd mem.*, ***135 F.3d 766 (3d Cir. 1997)***. "Because the jury does not decide . . . questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of Fed. R. Evid. 702. . . . This is because the judge's expert knowledge of the law makes any such assistance at best cumulative, and at worst prejudicial." Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 100 (1st Cir. 1997). Indeed, "each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." Burkhart v. Washington Metro Area Transit Auth., 324 U.S. App. D.C. 241, 112 F.3d 1207, 1213 (D.C. Cir. 1997); *accord* Askanase v. Fatjo, 130 F.3d 657, 673 (5th Cir. 1997). Accordingly, because such testimony would not assist the jury to determine a fact in issue, I cannot consider it as factual evidence on a motion for summary judgment. Nevertheless, I will treat Attorney Craig's report as additional legal argument, which it plainly is, and to which plaintiffs have had ample opportunity to respond.

523, 410 A.2d 909, 912 (Pa. Commw. Ct. 1980). "This rule means the applicant must bring the proposal within the specific requirements expressed in the ordinance for the use . . . sought as a special exception." 410 A.2d at 911; *accord* Abbey v. Zoning Hearing Bd., 126 Pa. Commw. 235, 559 A.2d 107, 109 (Pa. Commw. Ct. 1989); Trenge v. Zoning Bd. of Adj., 95 Pa. Commw. 583, 506 A.2d 490, 490 (Pa. Commw. Ct. 1986). Once the applicant has made that showing, the objector has "the burden of showing the **[**19]** proposal to be detrimental to public health, safety and welfare." *Id.* (citation and internal quotation marks omitted). If the applicant's burden is not met, the special exception cannot be granted. *See* Trenge, 506 A.2d at 494; *Sites v. Zoning Hearing Bd., 5 Pa. Commw. 78, 287 A.2d 909, 910 (Pa. Commw. Ct. 1972)*.

Here, then, plaintiffs bore the burden of showing that its proposed extra height for the Hampton Inn would "not substantially affect adversely the uses of adjacent and neighboring property." To meet this burden, plaintiffs introduced a plan view of the site, photographs of other Hampton Inns, the testimony of its engineers and the testimony of the seller of the land. The site plan, however, did not include an elevation view and failed to show how the proposed overheight hotel would affect the signage or other aspects of adjoining properties. Nor did it include any depictions of the hotel in relation to those properties. Moreover, plaintiff's engineer, Scott Krabill, testified to his opinion that the Hampton Inn would not adversely affect the surrounding properties, but did not explain in any detail the basis for his opinion. *See* Dkt. no. 46, Exh. E, *passim* **[**20]** . A majority of the board found this evidence sufficient to sustain the plaintiff's burden and granted the special height exception. Yet, one of the four board members dissented:

> MRS. RYAN: Well, I have -- I just have some concerns. I have a little trouble with spatial things. It's my own problem; but trying to picture how -- just how high this building is, I find that difficult to do without more information on it.

Id. at 53. On appeal, as stated earlier, the Court of Common Pleas affirmed.

The relevant inquiry here, it bears repeating, is not whether plaintiffs actually met their burden and legitimately obtained their special exception, but whether defendants could have reasonably believed that their court challenge to the special exception might be successful. I conclude that such a reasonable belief could have been formed. Plaintiff's evidence, to put it mildly, was sparse. Other than the self-serving testimony of the seller that the Hampton Inn would not be detrimental to his truck stop, plaintiff offered no other landowner's testimony, no diagrams of the hotel in context with the adjoining properties, and no objectively verifiable evidence of the effect, if **[**21]** any, on the neighboring properties' signage, view or light. Indeed, one member of the board could not determine from the evidence presented whether plaintiffs qualified for the special exception or not, and voted against it. From this, it is impossible to conclude that the appeal to common pleas court on the issue of whether plaintiff met its initial burden to qualify for the exception was objectively baseless, without probable cause, or frivolous. Hence, the zoning appeal was not a sham.

[*429] 2.

The Somerset Borough Zoning Ordinance requires that all "major uses" of land, including hotels, "be subject to review by the Planning Commission[.]" Dkt. no. 46, Exh. B, Art. 14, § 4(1), at 73. It further provides that:

> The Planning Commission shall examine the proposed development with respect to the traffic and circulation patterns, internal and external, relation to major thoroughfares, utilities, drainage, and community facilities. . . .

Id. § 4(3).

Notwithstanding this requirement, and the heated discussion at the commission meeting over the impact the Hampton Inn would allegedly have on traffic in and near the Somerset interchange, the borough solicitor instructed **[**22]** the commissioners as follows:

> OK, now there has been discussion about traffic and traffic impact studies and I believe that term traffic impact study first appeared in an unsolicited letter from the Pa. Turnpike Commission addressed to the mayor with a copy to me. . . . In any event, our ordinance does not present the opportunity for the Planning Commission to impose as a requirement for site plan approval that a traffic impact study be done. When you are looking at a

> site plan, you are looking at the site, not the other areas beyond the site where the traffic may flow, and from what I can gather, the turnpike commission is interested in just that and that is what the traffic impact study is directed to. . . . I can tell you that under Pennsylvania law, even if a traffic impact study came out the worst, it could possibly be you still could not deny approval of this site plan because the development would cause too much traffic. If you did that, it would strongly be against my advice because if you did that you are [sic] condemning [the] property and it's my job to keep you from doing those kinds of things; somebody's going to have to pay for that property and it's not going **[**23]** to be my client. . . .

Dkt. no. 46, Exh. I at 282 (spelling and punctuation of original transcript corrected for clarity). The Board Chairman then stated, "Based on what our solicitor just told me we legally cannot do what you have requested." The matter was then moved, and the site plan approved unanimously.

An appeal from this decision cannot be considered objectively baseless. The plain language of the ordinance states that the commission must examine internal and external traffic and circulation patterns, but the borough solicitor instructed the commission that external traffic patterns were outside the scope of its review and suggested that denying the proposed site plan would amount to a compensable taking. Based on this advice, the chairman told the objectors that the commission was powerless to grant relief. Again, regardless of whether such an appeal might or might not ultimately succeed, it is clear that a nonfrivolous case could be made that the commission disregarded its statutory mandate when it approved the site plan. Accordingly, this appeal was not a sham, either.

3.

Hoping to avoid the *Columbia Pictures* test, plaintiffs rely on dictum in one footnote **[**24]** of that opinion to the effect that the *Noerr-Pennington* doctrine "permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *508 U.S. at 62*; *see* *Whelan v. Abell, 310 U.S. App. D.C. 396, 48 F.3d 1247, 1255 (D.C. Cir. 1995)* ("However broad the *First Amendment* right to petition may be, it cannot be stretched to cover petitions based on known falsehoods."). Notably, however, there is no evidence on this record that defendants made any false submissions to the court of common pleas or otherwise perpetrated a fraud upon the court. In any event, to the extent that plaintiff is arguing that the fraud consisted of the defendants never actually caring about traffic hazards (as opposed to their own economic interests), *see* dkt. no. 50, at 18-24; dkt. no. 59, at 9-12, this argument misses the mark. First, defendants never had to represent to the court or any other body that they *cared* about increased traffic, only that traffic constituted a valid basis for denying the application. Second, this argument attempts an end run around *Columbia Pictures'* core holding that objectively reasonable litigation cannot be a sham, regardless of its **[**25]** subjective motivation. **[*430]** Thus, I reject plaintiff's contention that *Columbia Pictures'* two-part test does not apply, and will dismiss plaintiff's antitrust claims in their entirety as barred by the *Noerr-Pennington* doctrine. [5]

IV.

Plaintiffs have also asserted state law claims for civil conspiracy, wrongful use of civil process, abuse of process and intentional interference with contractual and prospective business relationships. It is well-settled in this circuit, however, that ***HN8***[] claims for civil conspiracy, tortious interference and malicious use of process are subject to *Noerr-Pennington* immunity. [6] **[**26]** *See* *Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 156, 160 (3d Cir. 1988)*. Thus, the same analysis and conclusions set forth above apply to these claims as well. [7]

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[5] Because of this disposition, it is unnecessary for me to consider plaintiffs' argument, dkt. no. 50, at 43-47, that their antitrust claims survive summary judgments on their merits.

[6] This holds especially true for malicious prosecution claims asserted against zoning objectors, where it is important not to chill the *First Amendment* Rights of neighbors to come forward and make their positions known. *See* *Matter of Larsen, 532 Pa. 326, 616 A.2d 529, 592 (Pa. 1992)*.

[7] The *Brownsville* case did not involve a claim for abuse of process (as opposed to wrongful use of civil process); nevertheless, that court did cite with approval a Colorado case applying the *Noerr-Pennington* doctrine to that tort. *839 F.2d at 160* (citing *Protect Our Mountain Envt., Inc. v. District Court, 677 P.2d 1361, 1369 (Colo. 1984))*. Plaintiffs have not argued any principled

An appropriate order follows.

NOW, THEREFORE, this *10th* day of September 1998, upon consideration of defendants' motions for summary judgment, dkt. nos. 40, 43, 44, and the responses thereto, it is hereby ORDERED and DIRECTED that the aforesaid motions are GRANTED and plaintiffs' complaint is DISMISSED WITH PREJUDICE. The Clerk of Court shall mark this case CLOSED.

BY THE COURT,

D. Brooks Smith

United States District Judge

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reason why abuse of process should be treated any differently under a *Noerr-Pennington* analysis than wrongful use of civil process, and I can discern no such difference. Hence, I will dismiss this claim as well.